OVERCOMING THE PRESUMPTION OF ARBITRABILITY OF
ADEA CLAIMS: THE TRIUMPH OF SUBSTANTIVE OVER
PROCEDURAL VALUES IN *NICHOLSON v. CPC*
INTERNATIONAL, INC.

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Arbitration is now widely accepted as a legitimate alternative to judicial dispute resolution. During the last decade, the Supreme Court has expanded the scope of the Federal Arbitration Act (FAA),¹ which compels all courts to enforce private arbitration agreements,² to create a general presumption of arbitrability and has circumscribed the possibilities for rebutting this presumption.³ The Court has applied the presumption to a wide range of disputes, primarily those arising in commercial contexts, and has found them amenable to resolution in arbitral fora.⁴

This Comment questions whether the presumption of arbitrability should extend to disputes involving discrimination claims. The Court has yet to address this question outside of the context of collective bargaining, where it has established that discrimination actions in court are not precluded by arbitration agreements. Using age discrimination in employment as an example, this Comment concludes that discrimination claims should be distinguished from commercial claims and exempted from the presumption of arbitrability.

In *Nicholson v. CPC International, Inc.*,⁵ a case of first impression

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¹ 9 U.S.C. §§ 1-14 (1988).

² See *id.* § 2.

³ See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1921 (1989) (noting that "the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute").

⁴ See *id.* (holding a predispute agreement to arbitrate claims under the Securities Act of 1933 enforceable); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (finding claims under the Securities Exchange Act of 1934 and RICO arbitrable under the FAA); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (finding Sherman Act claims arising out of an international commercial transaction arbitrable under the FAA).

⁵ 877 F.2d 221 (3d Cir. 1989) (Sloviter, J.).

on the federal appellate level,⁶ the United States Court of Appeals for the Third Circuit held that an employee may bring a claim under the Age Discrimination in Employment Act (ADEA)⁷ against his employer in a judicial forum despite their agreement to submit all disputes to arbitration.⁸ Applying the test developed by the Supreme Court for rebutting the presumption of arbitrability, the court concluded that the ADEA preempts the FAA.⁹ The reasoning of the court additionally suggests that the presumption of arbitrability should not be construed to reach the discrimination laws.

In a series of cases interpreting and applying the FAA, the Supreme Court has declared that the FAA creates a national policy in favor of arbitration¹⁰ and a presumption that federal statutory rights are subject to arbitration.¹¹ With regard to the policy preference, the Court has proscribed judicial questioning of the competence of arbitrators to handle even the most complex cases or to vindicate substantive statutory rights.¹² The Court has held that the presumption of arbitrability may be overcome only if a party is able to demonstrate that Congress intended to preclude a waiver of a judicial forum under the substantive statute, or if arbitration is inherently inconsistent with the purposes of the substantive statute.¹³ Applying

⁶ See *id.* at 222.

⁷ 29 U.S.C. §§ 621-634 (1982 & Supp. V 1988).

⁸ See *Nicholson*, 877 F.2d at 222.

⁹ See *id.* The United States Court of Appeals for the Fourth Circuit has recently come to the opposite conclusion. See *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990).

¹⁰ See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) (stating that the enforcement of arbitration clauses is determined by the FAA in state court actions).

¹¹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

¹² See *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232-33 (1987).

¹³ See *id.* at 226-27. The *McMahon* court stated:

The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.

Id.; see also *Mitsubishi*, 473 U.S. at 623 ("[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from [the statute's] text or legislative history."). The *McMahon* Court explained that such intent could be deducible "from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (citations omitted).

these standards, the Court has held that claims arising under the securities laws,¹⁴ the Racketeer Influenced and Corrupt Organizations Act (RICO),¹⁵ and the antitrust laws¹⁶ are arbitrable. The Court has suggested that virtually all federal statutory claims arising in commercial contexts will be subject to the FAA.¹⁷

Before these cases were decided, the Court had ruled in a series of labor cases that the right to bring a judicial action under Title VII of the Civil Rights Act of 1964,¹⁸ the Fair Labor Standards Act (FLSA),¹⁹ or the Civil Rights Act of 1871²⁰ is not subject to displacement by arbitration.²¹ While such cases suggest that the Court believes that discrimination claims should be treated differently from commercial cases in assessing arbitrability, each involved arbitration in the context of collective bargaining. In such circumstances, the rights of individual employees legitimately may be subjugated to collective interests, and the need to preserve an individual's right of access to a judicial forum is more apparent than in other discrimination contexts. Additionally, none of these cases directly involved the FAA.²² Moreover, each rested in part upon mistrust of arbitral com-

¹⁴ See *McMahon*, 482 U.S. at 238.

¹⁵ 18 U.S.C. § 1961 (1982); see *McMahon*, 482 U.S. at 242.

¹⁶ See *Mitsubishi*, 473 U.S. at 636-37.

¹⁷ See Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon*, 26 Am. Bus. L.J. 397, 397 (1988) (noting that the Court's reasoning in *McMahon* "suggests that virtually all existing federal statutory claims that arise in commercial contexts are subject to arbitration").

¹⁸ 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. V 1987).

¹⁹ 29 U.S.C. §§ 201-219 (1982 & Supp. V 1987).

²⁰ 42 U.S.C. § 1983 (1982).

²¹ See *McDonald v. City of W. Branch*, 466 U.S. 284, 292 (1984) (§ 1983); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (FLSA); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974) (Title VII).

²² The collective bargaining arbitration cases came to the attention of the courts pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1982) (LMRA), which, like the FAA, creates jurisdiction for cases involving violations of contract obligations. Professor Shell has pointed out that labor arbitration under the LMRA has different purposes and procedures from commercial arbitration under the FAA. See Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 572 (1990). Rather than assessing the arbitrability of claims arising under federal employment statutes outside of collective bargaining with reference to labor arbitration precedent, Shell has suggested that the courts should determine "whether the commercial arbitral forum is 'an adequate substitute' for the courts." *Id.* at 568 (quoting *McMahon*, 482 U.S. at 229). Applying this analysis, he has concluded that there is an inherent conflict between the purposes of the ADEA and Title VII and commercial arbitration under the FAA. See Shell, *supra*, at 566-72.

petence.²³ As such, they have been discredited, though not overruled, by the more recent cases.

Nevertheless, these labor cases may be read to support the proposition that discrimination cases generally should be treated differently from cases arising in commercial contexts when a court is determining arbitrability. Although the Supreme Court has not yet examined this distinction, the most important among the labor cases, *Alexander v. Gardner-Denver Co.*,²⁴ may be read to satisfy the requirements the Court subsequently has established for rebutting the presumption of arbitrability.²⁵ Following a similar analysis, the *Nicholson* court concluded that age discrimination cases occurring outside of collective bargaining should be treated differently from cases arising in commercial contexts, and judicial fora should be reserved for such claims.²⁶

A diminishing percentage of workers are covered by collective bargaining agreements,²⁷ and the number of people in the forty-five to sixty-five age range is expected to increase to more than sixty mil-

²³ See *McDonald*, 466 U.S. at 290 ("An arbitrator may not . . . have the expertise required to resolve the complex legal questions that arise in § 1983 actions." (footnote omitted)); *Barrentine*, 450 U.S. at 743 ("These statutory questions must be resolved in light of volumes of legislative history and over four decades of legal interpretation and administrative rulings. Although an arbitrator may be competent to resolve many preliminary factual questions . . . he may lack the competence to decide the ultimate legal issue" (footnote omitted)); *Alexander*, 415 U.S. at 57 ("[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . [T]he resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." (citation omitted)).

²⁴ 415 U.S. 36 (1974).

²⁵ The court claimed that:

[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes . . . Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

Id. at 48-49 (footnote omitted).

²⁶ See *Nicholson*, 877 F.2d at 224, 229 (noting the distinction between individual contracts and those "entered into in a commercial context," as well as noting the comparison to be made between the ADEA and both Title VII and the FLSA). The enforcement provisions of the ADEA are modeled upon those of the FLSA, and much of the ADEA's substantive language comes from Title VII. See *infra* notes 110-15 and accompanying text.

²⁷ See Swoboda, *2 Women Rise at AFL-CIO in a Sign of Labor's Times*, Philadelphia Inquirer, Jan. 4, 1990, at 10A, col. 2 (reporting that the percentage of the workforce that belongs to unions has dropped from 23% to 17% in the last decade).

lion by the year 2000.²⁸ Additionally, there has been a dramatic increase in the number of cases submitted to arbitration.²⁹ A decision by the Court to apply the presumption of arbitrability to discrimination claims might significantly promote the proliferation of arbitration agreements, many of which can be induced by the superior bargaining power of employers,³⁰ thereby transferring enforcement of the ADEA and other discrimination statutes from the public to the private sector.

By proscribing any challenges to the competence of arbitrators, the Supreme Court has ensured that its presumption of arbitrability will be viewed primarily as a procedural development of the law, whereby an arbitration clause represents a private decision to transfer jurisdiction of a dispute to a private forum.³¹ This development concurrently serves the public function of easing congestion in the courts. If one views the appropriate scope of arbitration more narrowly, such developments represent the triumph of procedural values over substantive values such as nondiscrimination.³² As one commentator has suggested, "[t]here are some disputes that truly implicate core public concerns or involve parties whose bargaining

²⁸ See *Age Bias Claims Mount as Demographic, Legal, Economic Pressures Increase*, Daily Lab. Rep. (BNA) No. 53, at C-1 (Mar. 19, 1985) ("[T]he number of employees subject to the [ADEA's] protection is destined to increase dramatically. The Census Bureau projects that the number of persons between the ages of 45 and 65—the key ages in terms of ADEA activity today—will increase from 44 million today to more than 60 million by the year 2000.").

²⁹ See Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 n.7 (1985) (noting that since 1972 there has been a 70% increase in the number of labor cases submitted to the American Arbitration Association and a 250% increase in the number of commercial arbitration cases submitted (citing American Arbitration Ass'n, *Caseload Figures* (1985))).

³⁰ See *Nicholson*, 877 F.2d at 229.

³¹ The notion of "private decisions" suggests voluntary and knowing transactions, free from government interference, and accepts disparity of bargaining position as an inevitable and acceptable consequence of the free market system. "[P]ublic pressure on choice is [seen as] coercion, private pressure is freedom." Lesnick, *The Consciousness of Work and the Values of American Labor Law* (Book Review), 32 BUFFALO L. REV. 833, 845 (1983). Dissatisfaction with this unyielding principle of freedom of contract has resulted in the creation of protective legislation in certain areas, such as in employment discrimination. See *id.* at 846. Professor Lesnick, however, suggests that such regulatory legislation is inconsistent with the prevailing free market ideology, and that "[a]lthough those principles draw their legitimacy from dissatisfaction with the results of the prevailing ideology, the ideology itself is not rejected, and continues to shape our response." *Id.*

³² See Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1093 (1989).

position and knowledge are fundamentally unequal. In such cases, arbitration is inappropriate."³³

In order to evaluate these issues, this Comment examines the FAA, the ADEA, and their head-on collision in *Nicholson*. Part I examines the FAA and the Supreme Court's development of the presumption of arbitrability. Part II explores the question of the arbitrability of employment discrimination claims within the context of collective bargaining and individual employment contracts, also examining the history and content of the ADEA. Part III analyzes the *Nicholson* opinion.

This Comment concludes that public policy strongly supports the judiciary distinguishing discrimination claims from commercial claims when considering the arbitrability of a dispute. Displacing the judicial forum in favor of arbitration for discrimination claims may discourage grievants from seeking relief, thus undermining the purposes of the antidiscrimination statutes. Displacement of the judicial forum also prevents the courts from articulating the norms and public policies embodied in these statutes and from developing consistent sources of case law that further these policies. For these reasons, this Comment argues that discrimination statutes should be presumed to override the FAA. This presumption would allow substantive public values, such as nondiscrimination, to prevail over procedural values, such as arbitration.

I. THE FAA AND THE PRESUMPTION OF ARBITRABILITY

In the last decade, the Supreme Court has dramatically expanded the scope of the FAA. It has unequivocally declared that federal statutory claims are arbitrable under the FAA unless an explicit or implicit abrogation can be found in another statute. The Court has also stated that such an abrogation cannot be found on the basis of challenges to the competence of arbitral tribunals.³⁴ By proscribing such challenges, the Court has rendered its presumption of arbitrability practically unassailable.

³³ T. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* 136 (1989). Carbonneau notes further that "it is inappropriate to respond to a situation in which access to justice is a problem by making access completely impossible." *Id.*

³⁴ See *supra* notes 10-13 and accompanying text.

A. *The Purpose and Provisions of the FAA*

In 1925 Congress passed the United States Arbitration Act,³⁵ commonly known as the Federal Arbitration Act. The FAA was intended to reverse centuries of judicial hostility to arbitration agreements and spare parties "the costliness and delays of litigation."³⁶ Its primary purposes, however, were to place arbitration agreements "upon the same footing as other contracts"³⁷ and to "ensure judicial enforcement of privately made agreements to arbitrate."³⁸

For years there was general agreement that "the statute applied only in the federal courts and so governed only the few contract suits that happened to involve diversity or admiralty jurisdiction."³⁹ During the last decade, however, the Supreme Court has radically expanded the scope of the FAA, stating that it "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate."⁴⁰

Section 2 of the FAA makes agreements to arbitrate judicially enforceable when the underlying contract affects interstate commerce, and opens such agreements to collateral attack only on "such

³⁵ United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-15 (1988)). Congress enacted title 9 of the U.S. Code with the Act of July 30, 1947, ch. 392, 61 Stat. 669, entitled "Arbitration," which repealed the name "United States Arbitration Act." *See id.* § 14, at 674.

³⁶ H.R. REP. NO. 96, 68th Cong., 1st Sess. 2 (1924). The judiciary's longstanding refusal to enforce agreements to arbitrate has been traced to the courts of England, which "considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (citing H.R. REP. NO. 96, 68th Cong., 1st Sess. 2 (1924)).

The business community and the legal profession have long been at odds over alternate dispute resolution. *See* J. AUERBACH, *JUSTICE WITHOUT LAW?* 101-14 (1983). Businessmen have tended to favor expeditious, efficient dispute resolution, while the legal profession has trumpeted the legal shortcomings of the arbitration process. *See id.* It has been suggested that once lawyers recognized that their dominant control of dispute resolution was not threatened by the arbitration process, compromise between the two groups became possible, and in the 1920s the result of such compromise was the creation of the American Arbitration Association. *See id.* at 110-11.

³⁷ H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924).

³⁸ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985). The Court in *Byrd* emphasized that expediting dispute resolution was a secondary concern of the FAA, which "requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation . . ." *Id.* at 221.

³⁹ *Hirshman*, *supra* note 29, at 1305.

⁴⁰ *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

grounds as exist at law or in equity for the revocation of any contract."⁴¹ Sections 3 and 4 require courts to stay proceedings that concern issues within the scope of an agreement to arbitrate, and to compel arbitration when a party improperly refuses to arbitrate.⁴² Section 9 provides for federal courts to enter judgments following arbitral awards upon application by one of the parties to the agreement.⁴³ Section 10 limits judicial review of awards to arbitrations involving fraud, corruption, partiality, misconduct, or situations where arbitrators exceed their powers or fail to execute a final decision.⁴⁴ The Supreme Court has interpreted the review provisions of the Act as providing for judicial review only when an award indicates "manifest disregard" of the relevant law.⁴⁵

B. *The Arbitrability of Statutory Claims*

By 1953, the Court established that the scope of the FAA extended to controversies involving federal statutory rights.⁴⁶ Nonetheless, until the "Steelworkers Trilogy" decisions in 1960,⁴⁷ the Court continued to view the competence of arbitration proceedings with suspicion.⁴⁸

By 1983, however, the Court clearly established the presumption of arbitrability, noting that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁴⁹ The Court later

⁴¹ 9 U.S.C. § 2 (1988).

⁴² See *id.* §§ 3-4.

⁴³ See *id.* § 9.

⁴⁴ See *id.* § 10(a)-(e).

⁴⁵ See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989).

⁴⁶ See *Wilko*, 346 U.S. at 431-32.

⁴⁷ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Supreme Court asserted that Congress, in § 173(d) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-188 (1982 & Supp. V 1987), established a policy favoring final adjustment of a labor dispute by the contractually agreed-upon method, i.e. arbitration. See *American Mfg. Co.*, 363 U.S. at 566-67.

⁴⁸ See *Wilko*, 346 U.S. at 436-37 (stating that judicial review of arbitration awards cannot reach errors in the interpretation of laws). Parties agreeing to arbitration must be "willing to accept less certainty of legally correct adjustment." *Id.* at 438.

⁴⁹ *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985) ("[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 as an alternative means of dispute resolution."); cf. *Perry*

declared that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."⁵⁰

With regard to substantive rights, the Court declared unequivocally that: "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."⁵¹ The Court initially recognized that the only exception to the presumption of arbitrability of statutory claims is "a counter-vailing policy manifested in another federal statute."⁵²

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁵³ the Court reversed a lower court decision and held that antitrust claims are arbitrable, at least in the context of international transactions. The Court explained:

We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.⁵⁴

v. Thomas, 482 U.S. 483, 489-91 (1987) (holding that under the supremacy clause, the FAA preempts state statutory provisions limiting the enforcement of arbitration agreements); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 16-17 (1984) (holding that § 2 of the FAA declared a national policy equally applicable in state and federal courts, and ordering arbitration of a cause of action under any state statute requiring judicial resolution of such claims).

⁵⁰ *Mitsubishi*, 473 U.S. at 626. Thus the Court noted that arbitration would most likely be compelled when it determined that the parties agreed to arbitrate a dispute that fell within the purview of the FAA. *See id.* at 626-27.

⁵¹ *Id.* at 628. With respect to the antitrust laws, the Court stated that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637.

⁵² *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Mitsubishi*, 473 U.S. at 627 (stating that "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable" (citations omitted)).

⁵³ 473 U.S. 614 (1985).

⁵⁴ *Id.* at 628 (citation omitted). The *Mitsubishi* Court declared its confidence in the arbitral process to handle complicated statutory claims in accordance with the law; the Court also expressed its satisfaction with the minimal safeguards provided by judicial review. *See id.* at 632-34, 636-38. The *Mitsubishi* Court repudiated the prevailing doctrine, articulated in *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), that when a statute implicates important public policy, a judicial forum is required, and that, therefore, rights conferred by the antitrust laws are inappropriate for enforcement by arbitration. *See id.* at 827-28.

Thus, the Court developed a two-step inquiry with respect to the arbitrability of statutory claims: "first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding that it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims."⁵⁵

Justice Stevens's dissent in *Mitsubishi* stated his belief that standard arbitration clauses referring to claims arising out of or relating to a contract should not be construed to reach statutory claims such as those conferred by discrimination laws, which are only indirectly related to the contract.⁵⁶ Justice Stevens concluded that:

[B]oth a fair respect for the importance of the interests that Congress has identified as worthy of federal statutory protection, and a fair appraisal of the most likely understanding of the parties who sign agreements containing standard arbitration clauses, support a presumption that such clauses do not apply to federal statutory claims.⁵⁷

In reaching this conclusion, Justice Stevens noted the arbitrators' lack of competence to apply "public law concepts" in interpreting federal discrimination statutes.⁵⁸

Justice Stevens's narrow reading of the FAA, coupled with a narrow interpretation of broad arbitration clauses and a more realistic assessment of the limits of arbitral competence, would increase the ability of discrimination claimants to have access to judicial fora. However, in the cases that followed *Mitsubishi*, the Court rejected this position.

C. Shearson/American Express, Inc. v. McMahon⁵⁹

The Supreme Court's most forceful ruling in favor of arbitration came in *McMahon*, which rendered the presumption of arbitrability under the FAA nearly irrebuttable. In *McMahon*, the Court held that

The Court concluded that the public policy embodied in the antitrust laws could be adequately protected and enforced, even if claims under those laws were brought in arbitral rather than judicial fora. See *Mitsubishi*, 473 U.S. at 636-37.

⁵⁵ *Mitsubishi*, 473 U.S. at 628.

⁵⁶ See *id.* at 650 (Stevens, J., dissenting).

⁵⁷ *Id.* (Stevens, J., dissenting).

⁵⁸ See *id.* at 647-48 (Stevens, J., dissenting) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974)).

⁵⁹ 482 U.S. 220 (1987).

claims arising under the antifraud provisions of the Securities Exchange Act of 1934 and under RICO are subject to arbitration.⁶⁰

The Court held that while the FAA's presumption of arbitrability "may be overridden by a contrary congressional command[,] . . . [t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."⁶¹ Citing *Mitsubishi* and *Dean Witter Reynolds, Inc. v. Byrd*,⁶² the Court declared: "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes."⁶³

The *McMahon* Court looked askance at the mistrust of arbitration it had previously expressed in *Wilko v. Swan*,⁶⁴ and stated that "*Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue."⁶⁵ Recalling its holding in *Mitsubishi*, the Court reaffirmed its confidence in the competence of arbitration and its satisfaction that judicial review of arbitral awards, although minimal, was sufficient to ensure that arbitrators would comply with the requirements of the law.⁶⁶ The Court also concluded that "the streamlined procedures

⁶⁰ See *id.* at 238, 242.

⁶¹ *Id.* at 226-27 (citation omitted).

⁶² 470 U.S. 213 (1985).

⁶³ *McMahon*, 482 U.S. at 227 (quoting *Mitsubishi*, 473 U.S. at 628) (citations omitted).

⁶⁴ 346 U.S. 427 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989).

⁶⁵ *McMahon*, 482 U.S. at 229. It is important to note that *McMahon* did not overrule *Wilko*. *Id.* at 234. The *Wilko* Court held that arbitration agreements between securities brokers and customers regarding actions taken under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1982), violated § 14, the "nonwaiver" provision of the Act, *id.* § 77n, which voids any prospective waiver of its substantive protections. See *Wilko*, 346 U.S. at 435. Because of the disparity in bargaining power between brokers and customers, the Court questioned whether these arbitration agreements were executed voluntarily. See *id.* The Court also believed that because arbitrators were untutored in the law, they would either misunderstand or improperly apply the relevant law and further noted that, short of cases of "manifest disregard" of the law, the FAA did not subject arbitrators' decisions to judicial review by federal courts. See *id.* at 435-36.

The *McMahon* Court, however, found that claims under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), which contains a nearly identical nonwaiver provision in § 29(a), *id.* § 78cc(a), were arbitrable, in part because the oversight role of the SEC under § 19, *id.* § 78s(b)(2), (c), ensured that the substantive provisions of the Act were adequately protected. See *McMahon*, 482 U.S. at 233-34.

⁶⁶ See *McMahon*, 482 U.S. at 232 (citing *Mitsubishi*, 473 U.S. at 633-37). The applicable standard of review, as noted in *Wilko*, 346 U.S. at 436, is whether the

of arbitration do not entail any consequential restriction on substantive rights."⁶⁷ Under these standards, the Court went on to find that both securities and RICO arbitration passed muster.⁶⁸

The *McMahon* Court noted the role the SEC plays in overseeing and regulating arbitration procedures related to securities claims, in order to reach its conclusion that these arbitral tribunals were competent fora.⁶⁹ The Court concluded that, "where . . . the prescribed [arbitration] procedures are subject to [the SEC's] authority, an arbitration agreement does not effect a waiver of the protections of the Act."⁷⁰

In a partial concurrence and dissent sharing the *Wilko* Court's

arbitrator has acted in "manifest disregard" of the law. According to *Wilko*, this made "interpretations of law" not subject to judicial review for error. *Id.* at 436-37.

⁶⁷ *McMahon*, 482 U.S. at 232 (citing *Mitsubishi*, 473 U.S. at 628). It has been pointed out that the *McMahon* Court, in rejecting *Wilko*, expressed its acceptance of a situation in which consumer rights are determined through a system of industry-imposed and industry-operated arbitration rather than through judicial intervention. See Shell, *supra* note 17, at 419. This result is remarkable when one considers that the securities laws in question were "products of the New Deal intended to address perceived imbalances between an industry that had failed to protect the public's welfare and the public itself." *Id.*

At least one state, Massachusetts, attempted through its securities regulations to overrule *McMahon* and provide judicial fora to securities customers. See MASS. REGS. CODE tit. 950, § 12.204(a)(2)(G)(1)(a)-(c) (1989). The First Circuit, however, struck down these regulations, holding that they were preempted by the FAA, and the Supreme Court denied certiorari. See *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1124 (1st Cir. 1989), *cert. denied*, No. 89-894 (May 29, 1990) (LEXIS, Genfed library, US file). Thirty other states, also concerned about protecting securities customers from being coerced into entering into arbitration agreements, had supported a Massachusetts petition for Supreme Court review of this decision. See *High Court Asks Input on Stock Disputes*, Philadelphia Inquirer, Jan. 23, 1990, at 10C, col. 3 (noting that the Court has asked for the Justice Department's position on the matter).

Moreover, the House Committee on Energy and Commerce recently asked the General Accounting Office to review how the securities industry conducts arbitration. See Labaton, *Brokerage Case Goes On and On*, N.Y. Times, Feb. 19, 1990, at D2, col. 1 (noting that the *McMahon* case remains unresolved, subject to collateral litigation, seven years after the court of appeals decided the case).

⁶⁸ See *McMahon*, 482 U.S. at 238, 242. With respect to RICO claims under 18 U.S.C. § 1964(c), the Court followed *Mitsubishi's* analysis of antitrust claims to find that there was no inherent conflict between arbitration and RICO's underlying purposes, and that "nothing in RICO's text or legislative history otherwise demonstrates congressional intent to make an exception to the Arbitration Act for RICO claims." *Id.* at 239-42. The Court reaffirmed that arbitrators are competent to hear such complex issues. See *id.* at 239. The Court also found that RICO, like the antitrust laws, is primarily a remedial and compensatory statute, and does not require judicial enforcement for public interest or deterrent purposes. See *id.* at 240-41.

⁶⁹ See *id.* at 233.

⁷⁰ *Id.* at 234.

concerns about the protection of securities consumers and the competence of arbitrators, Justice Blackmun accused the majority of abandoning investors to the "predatory behavior" of securities industry insiders and of placing unwarranted confidence in SEC oversight of arbitration procedure.⁷¹

In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,⁷² the Supreme Court followed the logic of *McMahon* and explicitly overruled *Wilko*. The Court thus eliminated any ambiguity remaining in the law due to the *McMahon* Court's failure to overrule *Wilko*. After *Rodriguez de Quijas*, the presumption of arbitrability is assailable only by clear evidence of congressional intent manifest in another statute to preclude waiver of a judicial forum, or if the "waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute."⁷³ As noted by one court, "determining statutory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible."⁷⁴

Professor Shell has suggested that "the Court has transformed the FAA from a procedural statute that applied only in certain federal cases into a national charter for alternative dispute resolution."⁷⁵ Shell also contends that the Court's reasoning in *McMahon* "suggests that virtually all existing federal statutory claims that arise in commercial contexts are subject to arbitration," and that, as a result, there will be "increas[ing] pressure[] on arbitrators to decide cases with reference to public law as well as private interest."⁷⁶ Noting the "fundamental tension, perhaps even a contradiction, in placing public law claims in the hands of a private system of dispute resolution," Shell predicts that arbitration procedure will become increasingly formalized, that existing doctrines of judicial review will be elaborated, and that statutes will be passed which place a "greater emphasis on the role of law in arbitral decisionmaking."⁷⁷ Addition-

⁷¹ See *id.* at 243, 257 (Blackmun, J., concurring in part and dissenting in part).

⁷² 109 S. Ct. 1917, 1922 (1989).

⁷³ *Id.* at 1921 (citations omitted). Professor Shell has noted that, in overruling *Wilko*, "the *Rodriguez* Court dropped any pretense of interpreting congressional will on the subject and relied explicitly on its own new-found confidence in securities arbitration procedures as an adequate substitute for judicial proceedings." Shell, *supra* note 22, at 556 n.358.

⁷⁴ *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197, 1202 (3d Cir. 1986) *vacated*, 482 U.S. 923 (1987).

⁷⁵ Shell, *supra* note 17, at 397.

⁷⁶ *Id.* at 398.

⁷⁷ *Id.* at 399. In fact, in the context of certain self-regulatory organizations, the SEC has approved rules that require brokers to inform securities customers of their

ally, he suggests that "Congress will have to be much more explicit in the future if it wishes to exempt statutory claims from the reach of the FAA."⁷⁸

Culminating with *McMahon* and *Rodriguez de Quijas*, the Supreme Court has definitively interpreted the FAA to prohibit courts from questioning the competence of arbitral tribunals to handle complex statutory commercial disputes.⁷⁹ These include disputes between industry professionals, as well as between industry professionals and outsiders such as consumers, arising from the securities laws, anti-trust laws, and RICO. Essentially the Court has read the FAA to place congressional imprimatur upon the arbitration system, which is a system of private dispute resolution⁸⁰ now deemed competent to resolve disputes based upon federal statutory rights.⁸¹ Moreover, by proscribing any challenges to the competence of arbitration, the Court has made it impossible to find an implicit override of the FAA in another statute based upon an assertion that arbitration would compromise the substantive rights conferred by that statute.

II. THE ARBITRABILITY OF EMPLOYMENT DISCRIMINATION CLAIMS

This section examines whether the logic of *Shearson/American Express, Inc. v. McMahon*⁸² and the presumption of arbitrability extend to the resolution of statutory claims of employment discrimination, particularly to claims of age discrimination. Prior to *McMahon*, the Court held that arbitration pursuant to collective bargaining agreements was inadequate to resolve and protect the statutory rights of individuals with respect to claims of employment discrimi-

rights under mandatory arbitration agreements. See 54 Fed. Reg. 21,144, 21,153-54 (1989).

⁷⁸ *Id.* at 415 (noting that Congress "may not signal that a particular statute is unsuitable for arbitration by merely including general nonwaiver language").

⁷⁹ See *Rodriguez de Quijas*, 109 S. Ct. at 1921; *McMahon*, 482 U.S. at 239.

⁸⁰ It has been noted that "[a]midst the current enthusiasm for arbitration, it is easy to forget that arbitration is, at bottom, a consensual and not a public institution." Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 674 (1988).

⁸¹ It is interesting to note in this regard that both the Court and Congress seem to have arrived at the conclusion of arbitral competence without factfinding on the question. See, e.g., Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 426 n.2 (1988) ("Extensive lobbying efforts secured the passage of [the FAA].; *id.* at 432 ("[E]fforts to determine how effectively arbitration works . . . have been hampered by the relative lack of meaningful empirical data. There are few pertinent studies . . . regarding the degree to which arbitration fulfills its declared goals." (citations omitted)).

⁸² 482 U.S. 220 (1987).

nation. In *Alexander v. Gardner-Denver Co.*,⁸³ the seminal case in this area, the Court suggested that employment discrimination claims generally were inappropriate for arbitral resolution. The Court's decision in *Alexander*, to the extent that it remains vital in the wake of *McMahon* (which did not even cite to *Alexander*), should lend strong support to the Third Circuit's ruling in *Nicholson v. CPC International Inc.*⁸⁴

A. Collective Bargaining Agreements Versus Individual Employment Contracts

1. Collective Bargaining: *Alexander v. Gardner-Denver Co.*

In *Alexander*, the Court held that an employee's statutory right to a trial *de novo* under Title VII is not foreclosed by prior submission of her claim to arbitration in the context of a collective bargaining agreement.⁸⁵ The Court noted the importance of the private right of action in the enforcement of Title VII, stating that "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."⁸⁶ Although recognizing the central function of the Equal Employment Opportunity Commission (EEOC) in enforcing the statute through informal procedures, the Court concluded that "final responsibility for enforcement of Title VII is vested with federal

⁸³ 415 U.S. 36 (1974).

⁸⁴ 877 F.2d 221 (3d Cir. 1989). In this case, the Court held that bringing an ADEA claim in a judicial forum is not precluded by an arbitration clause, even in the case of an arbitration agreement executed outside of the realm of collective bargaining. *See id.* at 222.

⁸⁵ *See Alexander*, 415 U.S. at 59-60. For articulations of this conclusion in the context of other statutes, see *McDonald v. City of W. Branch*, 466 U.S. 284, 292 (1984) ("[I]n a § 1983 action, a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement."); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (holding that petitioners' Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1982), suit was not barred by prior submission of their grievance to collective bargaining dispute procedures), *cert. denied*, 471 U.S. 1054 (1985); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 850 (3d Cir.) (holding that Congress did not intend that plaintiff raising discrimination claim under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (1982), had to exhaust arbitral remedies before bringing suit), *cert. denied*, 484 U.S. 979 (1987).

⁸⁶ *Alexander*, 415 U.S. at 45 (citations omitted). Professor Shell has noted that "[t]he adjudication of a Title VII claim is both an opportunity to reverse an instance of discrimination and an occasion for examining the institutions that made discrimination possible." Shell, *supra* note 22, at 568.

courts.”⁸⁷ The Court examined the legislative history of Title VII and held that Congress intended that the private right of action would remain vested in the individual irrespective of a collective agreement to arbitrate disputes.⁸⁸

In *Alexander*, the Court acknowledged that an individual may waive a Title VII cause of action “as part of a voluntary settlement,”⁸⁹ but made clear that “there can be no prospective waiver of an employee’s rights under Title VII.”⁹⁰ The Court distinguished contractual rights from statutory rights,⁹¹ and pointed out that the arbitrator may only consider the former.⁹² The Court ruled that arbitration was *per se* inadequate to vindicate Title VII rights for two reasons. First, an arbitrator must effectuate the parties’ intent rather than the purposes of the statute.⁹³ Second, “the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.”⁹⁴ The Court reasoned

⁸⁷ *Alexander*, 415 U.S. at 44; see also *id.* at 60 n.21 (“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.”).

⁸⁸ See *id.* at 48-49.

⁸⁹ *Id.* at 52. For a discussion of the issue of waivers of ADEA claims, see *infra* note 120.

⁹⁰ *Alexander*, 415 U.S. at 51.

⁹¹ See *id.* at 52.

⁹² See *id.* at 53-54. The “Steelworkers Trilogy” Court, establishing a precedent of deference to arbitral decisions, stated that an arbitrator may “look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.” *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

⁹³ See *Alexander*, 415 U.S. at 56-57; see also *McDonald v. City of W. Branch*, 466 U.S. 284, 290 (1984) (“[A]lthough arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard.”); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981) (“Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.”), *cert. denied*, 471 U.S. 1054 (1985).

⁹⁴ *Alexander*, 415 U.S. at 57. See also *McDonald*, 466 U.S. at 289 (stating that Congress intended that Title VII, the FLSA, and § 1983 “be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes” (citations omitted)). The *McDonald* Court also noted that an arbitrator may not have either the authority or the expertise required to enforce and resolve complicated § 1983 questions. See *id.* at 290. In *Barrentine*, the Court stated: “These [FLSA] statutory questions must be resolved in light of volumes of legislative history and over four decades of legal interpretation

that the distinguishing informality of arbitration renders it an inferior forum for the resolution of Title VII claims.⁹⁵

It is noteworthy that the *Alexander* Court reached its conclusions without relying upon the fact that the arbitration in question was pursuant to a collective bargaining agreement. In fact, Justice Powell, who wrote the opinion for a unanimous Court, relegated to a footnote the concern that arbitration in the collective bargaining context may not protect the rights of individual employees, whose interests in the process "may be subordinated to the collective interests of all employees in the bargaining unit."⁹⁶

Once the collective bargaining variable is removed from the equation, *Alexander* forcefully suggests that the displacement of the judicial forum by arbitration for discrimination claims is inappropriate. Although the Third Circuit seemed persuaded by this analysis in *Nicholson*, the Supreme Court did not even mention *Alexander* in *McMahon*. It therefore remains an open question whether the Court will follow *Alexander* and distinguish discrimination claims from commercial claims in assessing the former's arbitrability.

In *Alexander*, the Court largely based its decision on an analysis of congressional intent and on the incompatibility between arbitration and the underlying purposes of Title VII, thereby satisfying the criteria later set out in *McMahon* for finding an implicit congressional override of the FAA. However, the *Alexander* decision also contains language questioning the competence of arbitration to resolve Title VII discrimination claims adequately. *McMahon* proscribed reliance

and administrative rulings. Although an arbitrator may be competent to resolve many preliminary factual questions . . . he may lack the competence to decide the ultimate legal issue" *Barrentine*, 450 U.S. at 743. Both the *Barrentine* and *Alexander* courts noted that many arbitrators are not even lawyers. See *id.* at 743 n.21; *Alexander*, 415 U.S. at 57 n.18.

⁹⁵ See *Alexander*, 415 U.S. at 58.

⁹⁶ *Id.* at 58 n.19 (citations omitted). In contrast, the Court in *Barrentine* placed greater emphasis than it did in *Alexander* upon the limitations inherent in a union's vindication of an individual employee's statutory rights through arbitration in the context of collective bargaining. See *Barrentine*, 450 U.S. at 742 (discussing the point in the main text of the opinion).

It has been noted that unionized employees tend to bring age discrimination claims to the grievance and arbitration process often out of economic necessity, concern about the length of litigation procedures, and out of a lack of knowledge about how to prepare their case. See Wrong, *Arbitrators' Awards in Cases Involving Age Discrimination*, 1988 LAB. L.J. 411, 417. However, it is frequently "an unsatisfactory process for the grievant." *Id.* at 416. Unions prefer to "frame . . . grievance[s] in narrow contractual terms rather than venture into the broad area of age discrimination." *Id.* As a result, employees often do not feel as though their grievances are fully represented. See *id.*

upon such judicial analysis, unless, of course, it could be imputed to Congress.

The public law concepts the Court identified in *Alexander* to support its holding that a judicial forum for Title VII claims is not subject to displacement logically apply to all discrimination statutes. These considerations provide a rationale for distinguishing discrimination cases from commercial cases, and they are not dependent upon judicial mistrust of arbitral competence. *Alexander* therefore suggests that the presumption of arbitrability should not be applied to the discrimination statutes.

2. Individual Employment Contracts with Arbitration Clauses

The Supreme Court has not yet addressed the question whether discrimination statutes, such as the ADEA, should be interpreted to preclude compelled arbitration of the claims of employees covered by individual employment contracts that contain broad arbitration clauses.⁹⁷

Congress may have intended to preclude prospective waivers of age discrimination claims through arbitration clauses out of a "paternalistic" concern that parties making such agreements lack either sufficient bargaining power or information to be held to their bargains.⁹⁸ Alternatively, Congress may have concluded that "the private arbitration system is not equipped to take into account the public or social interests inherent in certain kinds of statutory dis-

⁹⁷ Judge Harry T. Edwards, Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, has suggested that alternate dispute resolution procedures, such as arbitration, are appropriate fora when clearly defined rules of law are to be applied, as opposed to situations in which public law is to be articulated. See Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 680 (1986). Thus, Edwards has suggested that some "highly fact-bound" employment discrimination cases, which "can be resolved by applying established principles of law," might be appropriate for alternate dispute resolution. See *id.* In non-collective bargaining situations, he noted that "the experience and standards developed through decades of labor arbitration and mediation could prove particularly useful in settling disputes between nonunionized employees and their employers in cases of 'unjust dismissal.'" *Id.* at 681 (citations omitted).

⁹⁸ See Shell, *supra* note 80, at 671 & n.218; Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 486-87 (1981) (suggesting that agreements to arbitrate should not be enforced when they are "the product of unequal bargaining power, or of unequal transaction costs that make it likely that one party will draft an agreement that the other will sign without first questioning or reviewing the agreement's arbitration clause"). Sterk notes that "[n]o one should be deprived of access to the courts unless that party has satisfactorily demonstrated a willingness to give up such access." *Id.* at 518.

putes [such as age discrimination claims] and might therefore require judicial resolution of claims for reasons of public policy.”⁹⁹

It is equally plausible to conclude that, as with the RICO statute, Congress did not intend to prevent enforcement of agreements to arbitrate ADEA claims; that there is no conflict between arbitration and the purposes underlying the ADEA; and that nothing in the text or legislative history of the ADEA demonstrates congressional intent to make an exception to the FAA for ADEA claims.¹⁰⁰

⁹⁹ Shell, *supra* note 80, at 671. Sterk suggests: “Public policy should be invoked to prevent arbitration when at issue is a legislative expression or a basic case law principle designed for some purpose other than to foster justice between the parties to the dispute.” Sterk, *supra* note 98, at 483 (footnote omitted). In contrast, Sterk would order arbitration “when the legal principles involved in a particular dispute are designed primarily to promote justice between the parties.” *Id.*

Professor Owen M. Fiss has argued that adjudication serves various purposes that settlements generally cannot fulfill. See Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). He has stated that the purpose of adjudication “is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.” *Id.*

These propositions are often premised upon the notion that arbitrators are “unbound generally by legal or equitable principles save their own sense of justice and fairness.” Stipanowich, *supra* note 81, at 434; see also Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 54 (1987) (“The ADR process may give short shrift to substantive law. . . . The ‘procedural’ emphasis of ADR tends to undervalue the role of substantive law.”). It has been argued that, “by deemphasizing law, ADR dilutes special protection legislatively enacted to benefit disadvantaged groups vis a vis a particular industry or economic class.” Shell, *supra* note 17, at 422 (footnote omitted).

Judge Edwards has articulated similar concerns most forcefully:

I have always felt that equal employment opportunity is a fundamental right, and that the enforcement of this right should be achieved in full view of the public, in a public forum such as a court of law. The *adjudicated* results in employment discrimination cases must be complete and consistent. That is not to say that we should not encourage settlement of employment discrimination claims; rather, it is merely to say that the results in litigated cases should be based on the law and not on an arbitrator’s notion of what is fair.

Edwards, *Arbitration as an Alternative in Equal Employment Disputes*, ARB. J., December 1978, at 22, 24. More recently, Edwards has stated that ADR might “become[] a tool for diminishing the judicial development of legal rights for the disadvantaged.” Edwards, *supra* note 97, at 679. Additionally, he has suggested that “decisionmakers may not understand the values at stake,” and that “by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law.” *Id.* Characterizing ADR as permeated with “nonlegal values,” Edwards has concluded that ADR is inappropriate for the resolution of constitutional or public law issues. See *id.* at 682-83.

¹⁰⁰ For expression of this idea in the RICO context, see *McMahon*, 482 U.S. at 242.

B. *The ADEA*

There is no explicit override of the FAA in the ADEA. This section examines the purposes underlying the ADEA, its text and legislative history, in order to assess whether the statute provides an implicit override of the FAA.

1. The Purpose and Effects of the ADEA

The ADEA arose out of a study, mandated by the Civil Rights Act of 1964, and conducted by the Secretary of Labor, which found widespread age discrimination based upon employers' erroneous assumptions about the productivity and abilities of older workers.¹⁰¹ Thus, the ADEA was passed in 1967 "to promote employment of older persons¹⁰² based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of

¹⁰¹ See McKenry, *Enforcement of Age Discrimination in Employment Legislation*, 32 HASTINGS L.J. 1157, 1158 (1981); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 383 (1976) [hereinafter *Age Discrimination*]. This finding has been used by a number of courts and commentators to draw a distinction between age discrimination and other forms of discrimination, such as discrimination based upon race or sex, that occur in the context of employment. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (finding, *inter alia*, that age did not constitute a suspect class requiring strict scrutiny for equal protection purposes); *Age Discrimination*, *supra*, at 383-84 (drawing the distinction that "age [as opposed to race or creed] is at some point inherently related to ability, a fact which is implicitly recognized by both the legislative history and the provisions of the ADEA" (emphasis in original)). Additionally, it may be significant that Congress chose, after debate, to exclude age discrimination from the Civil Rights Act of 1964. See *Lorillard v. Pons*, 434 U.S. 575, 578 (1978); McKenry, *supra*, at 1158.

Both the ADEA and its legislative history indicate that there was strong support in Congress for the proposition that age discrimination might be eliminated if misconceptions about the abilities of older workers were dispelled. See 29 U.S.C. § 622(a) (1985) (mandating research and education programs to inform employers, unions, and the general public about "the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy"); 113 CONG. REC. 31,253 (1967) (remarks of Sen. Yarborough) (noting the utmost importance of educating employers that "older workers are at least as productive as younger workers"). However, it has been noted that "changing attitudes about aging may be particularly difficult to accomplish, since age discrimination is often viewed as a benign accommodation of a natural process, without the invidious intent commonly acknowledged as characteristic of race and sex discrimination." Schuster and Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REL. REV. 64, 65-66 (1984) (footnote omitted).

¹⁰² "Older persons" are defined as "individuals who are at least 40 years of age." 29 U.S.C. § 631(a) (1988). As originally enacted, the ADEA covered only to age sixty-five. In 1978, the Act was amended to reach age seventy, and in 1986 this limitation of age seventy was eliminated. See *id.* § 631(a) (1982 & Supp. 1987).

age on employment.”¹⁰³ The Act forbids age discrimination in hiring, promotion, terms of employment, and discharge.¹⁰⁴

Increasingly large numbers of age discrimination suits have been instituted pursuant to the ADEA,¹⁰⁵ relating primarily to discharge and involuntary retirement.¹⁰⁶ This litigation serves both educational and enforcement functions.¹⁰⁷ Although upper echelon employees are perhaps the most visible victims of age discrimination, a recent congressional report asserted that “[a]ge discrimination victims typically earn more than the minimum wage, but their average annual income is only \$15,000.”¹⁰⁸ The number of workers covered by the ADEA is increasing as the baby boom generation reaches middle age, and once older workers are out of work, they are significantly handicapped in their ability to find new employment.¹⁰⁹

¹⁰³ 29 U.S.C. § 621(b) (1982). A more complete statement of congressional findings behind the creation of the ADEA is as follows:

The Congress hereby finds and declares that (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

Id. § 621(a).

¹⁰⁴ See *id.* §§ 623(a)-(c) (forbidding age discrimination practices by employers, employment agencies, and labor organizations). The provisions of the ADEA specify five exemptions from the Act's prohibitions. Practices that would ordinarily be prohibited are permissible where (a) age is a bona fide occupational qualification; (b) the differentiation is based on reasonable factors besides age; (c) the employee is working in a foreign country and compliance would violate the laws of this foreign country; (d) the employer is observing the terms of a bona fide seniority system or benefit plan which is not a subterfuge to evade the ADEA; or (e) the employer is discharging or disciplining an employee for good cause. See *id.* § 623(f).

¹⁰⁵ See *Age Bias Claims Mount as Demographic, Legal, Economic Pressures Increase*, [Analysis] Daily Lab. Rep. (BNA) No. 53, at C-1 (March 19, 1985); Schuster and Miller, *supra* note 101, at 65 & n.14 (citing Note, *EEOC Reports Increase in Age Discrimination Complaints*, 4 AGING & WORK 281-82 (1981)).

¹⁰⁶ See Schuster and Miller, *supra* note 101, at 74.

¹⁰⁷ See *id.* at 66.

¹⁰⁸ H.R. REP. NO. 221, 101st Cong., 1st Sess. 9-10 (1989).

¹⁰⁹ See *id.* at 10 (noting that “once out of work, these older Americans have less than a 50/50 chance of ever finding new employment. They often have little or no savings, and may not yet be eligible for Social Security benefits”).

2. The ADEA's Relationship to Title VII, the FLSA, and the EEOC

The ADEA borrows much of its substantive language forbidding employment discrimination from Title VII.¹¹⁰ Its enforcement provisions are largely derived from the FLSA.¹¹¹ Congress initially vested enforcement of the Act in the Secretary of Labor, who, along with private individuals, was granted the right to bring actions in court for legal and equitable relief.¹¹² In 1978, Congress transferred responsibility for enforcement from the Secretary of Labor to the EEOC,¹¹³ the agency charged with enforcing the provisions of Title VII of the Civil Rights Act of 1964 with respect to employment discrimination based upon race, color, religion, sex, or national origin.¹¹⁴

Commentators and courts have disagreed strongly over whether

¹¹⁰ Compare 29 U.S.C. § 623(a)(1)-(2) (1982) (describing the employer practices that are unlawful if undertaken because of an individual's age) with 42 U.S.C. § 2000e-2(a)(1)-(2) (1982) (describing the employer practices that are unlawful if undertaken because of an individual's "race, color, religion, sex, or national origin").

¹¹¹ Compare 29 U.S.C. § 626(a)-(e) (1982) (enforcement provisions of the ADEA) with *id.* §§ 201-219 (1982 & Supp. V 1987) (enforcement provisions of the FLSA). Both statutes allow suits to be brought either by the Secretary of Labor or a private individual. Section 626(b) provides that specified rights created by the ADEA are to be "enforced in accordance with the powers, remedies, and procedures provided in" particular sections of the FLSA. *See id.* § 626(b)-(c) (1982); *id.* § 216 (1982 & Supp. V 1987).

Departing from the FLSA, however, the ADEA requires an individual to allow the Secretary to attempt to eliminate the unlawful practice through informal methods before the individual may bring suit. Compare *id.* § 626(d) (1982) with *id.* § 216(b) (1982 & Supp. V 1987). Moreover, if the Secretary brings suit on behalf of an aggrieved individual, her right to sue terminates. Compare *id.* § 626(c) (1982) with *id.* § 216(b) (providing that right to sue terminates only in limited circumstances).

¹¹² *See id.* § 626(b)-(c) (1976).

¹¹³ *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321, § 2 (1978), *reprinted in* 5 U.S.C. app. at 1366 (1988), and in 92 Stat. 3781 (1978).

¹¹⁴ The EEOC was created by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 to -5 (1982), in order to assure "equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, at 44 (1974).

In 1979, the EEOC took the position that the ADEA was to be interpreted "in a manner which is consistent with Title VII" 44 Fed. Reg. 68,858 (1979). However, as noted *supra* note 101, age discrimination and the discrimination prohibited under Title VII differ significantly, and although the EEOC's position clearly influences enforcement practices under the ADEA, courts and commentators have not consistently accepted this position. *See, e.g.,* McKenry, *supra* note 101, at 1168, 1183 ("[Because] [f]undamental differences exist between the groups harmed by age discrimination and the groups protected under Title VII . . . an effort towards uniformity in interpretation [of the ADEA] consistent with principles developed

FLSA or Title VII precedent should govern interpretation of the ADEA, particularly with respect to waivers of rights under the Act.¹¹⁵ A discussion of this issue is beyond the scope of this Comment, which will argue that all of the discrimination statutes should be interpreted consistently, in order to preserve access to judicial fora for their beneficiaries.

3. The Remedial and Enforcement Provisions of the Act

To provide remedies for age discrimination claims, the ADEA provides that:

In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.¹¹⁶

under Title VII may not result in the most effective, equitable, or purposeful enforcement of the ADEA.”). Similarly:

While the language of the ADEA may be identical to that of Title VII in most respects, the problems of age, race and sex discrimination are not. As a result, in resolving these questions under the ADEA, courts would do well to avoid automatic application of Title VII precedents and to look instead more carefully to the distinctive aspects of age discrimination.

Age Discrimination, *supra* note 101, at 411. Some courts have more readily accepted bona fide occupational qualification (BFOQ) defenses in ADEA cases than in Title VII cases, where BFOQ defenses tend to be more strictly and narrowly construed. See McKenry, *supra* note 101, at 1174-75.

¹¹⁵ See Note, *Waiver of Rights Under the Age Discrimination in Employment Act of 1967*, 86 COLUM. L. REV. 1067, 1067 (1986) (arguing that waivers are a desirable “legal device for disposing of age discrimination disputes”); see also *infra* note 120. Before Congress explicitly provided for a right to jury trials in ADEA cases in 1978, the Supreme Court held that jury trials were available as a matter of right in ADEA cases, basing this conclusion primarily upon the inclusion of FLSA provisions in the ADEA. See *Lorillard v. Pons*, 434 U.S. 575, 580-85 (1978).

¹¹⁶ 29 U.S.C. § 626(b) (1982). This section also provides for liquidated damages in cases of willful violations of the law. The Act further provides for criminal penalties for interference with EEOC activities with respect to claims arising under the Act. See *id.* § 629. Although it is beyond the scope of this Comment, there is a division of authority as to whether compensatory damages for pain and suffering are available under the ADEA. See Drucker and Parker, *A Review of the Procedural Requirements of the Age Discrimination in Employment Act*, in *AGE DISCRIMINATION IN EMPLOYMENT ACT: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS* 68, 87-88 (1983).

An award of attorneys’ fees is available to a prevailing plaintiff under the ADEA. See 29 U.S.C. § 626(b) (1982) (incorporating 29 U.S.C. § 216(b) (1982) (FLSA) and providing for “a reasonable attorney’s fee”). Congress, by providing such awards,

Before an ADEA action is instituted in court, however, the Act requires that the EEOC "shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."¹¹⁷

Although the ADEA grants any person the right to bring a civil action, that right is extinguished upon the commencement of a civil action on that person's behalf by the EEOC.¹¹⁸ An individual wishing to institute a civil action under the ADEA must first file a "charge" with the EEOC and allow EEOC administrative procedures to run for sixty days, during which time the EEOC is required to attempt to address the problem through informal methods.¹¹⁹ In

encourages private litigants to bring ADEA actions since it becomes easier to obtain legal representation. *See, e.g., Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983) (stating that "[i]n providing incentives for meritorious civil rights litigation, section 1988 [the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1982)] strikes a delicate balance, encouraging civil rights litigation where success can be achieved through a reasonable expenditure of legal services").

Arbitration rules, such as those promulgated by the American Arbitration Association, do not generally provide for attorneys' fees. *See* AM. ARB. ASS'N COMM. ARB. R. Barring a stipulation in an arbitration agreement providing for the provision of attorneys' fees, it would be within the discretion of an arbitrator deciding an age discrimination claim, just as it is within the discretion of a court in an ADEA case, to award such fees to a prevailing party. The chances of receiving such an award would seem greater in a judicial forum; an arbitrator is not bound by the statute, and she generally operates with a wider range of discretion and is subject to less stringent standards of review than courts. Moreover, arbitration generates a greater likelihood of compromise resolutions. Of course, it would be within the discretion of an arbitrator to decide that the parties did not contemplate in their agreement the award of attorney's fees.

Preclusion of access to a judicial forum may conflict with the purpose of the ADEA to the extent that the award of attorney's fees provides an incentive for employees to bring age discrimination claims in courts, thereby furthering the enforcement of the statute and contributing to the elimination of age discrimination.

It should also be noted that many ADEA claims are brought by parties with private contingent fee arrangements, and such arrangements have been recognized by the courts in granting "reasonable" fee awards, as mandated by the ADEA. *See Cooper*, 719 F.2d at 1503. The compensability of contingency fee arrangements also encourages bringing ADEA claims.

¹¹⁷ 29 U.S.C. § 626(b) (1982).

¹¹⁸ *See id.* § 626(c)(1).

¹¹⁹ *See id.* § 626(d). As an administrative factfinder, the EEOC acts in a public, "judicial capacity," and serves essentially as a surrogate for the court. *Cf. University of Tenn. v. Elliott*, 478 U.S. 788, 797 (1986) (stating "it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity"). The *Alexander* Court, however, stated that Congress created the EEOC as a means to promote employers' voluntary compliance with Title VII, but that ultimate authority to enforce Title VII rights is vested in the federal courts. *See Alexander v. Gardner-Denver Co.*, 415 U.S. at 44. In reviewing state age

1978, the ADEA was amended to provide, *inter alia*, that an individual claimant "shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."¹²⁰

Thus, the ADEA attempts to prevent and eliminate age discrimination in employment and to compensate its victims. The Act was born out of a finding by Congress that age discrimination represents a significant problem in our society, and there is every indication that the scope of the problem will increase as the century draws to a close. To effectuate congressional intent, the courts must remain sensitive to the problem and resist efforts to undermine the protective legislation enacted to address it. As suggested in the discussion of the *Nicholson* case that follows, enforcing private agreements to arbitrate ADEA claims, particularly those arising out of broad arbi-

discrimination law prior to the passage of the ADEA, Congress found that "[w]hile promotion, education, and persuasion are most effective, enforcement procedures are necessary to get the required attention of employers and others." H.R. REP. NO. 805, 90th Cong., 1st Sess. 3 (1967), *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2215.

¹²⁰ 29 U.S.C. § 626(c)(2) (1982). The issue of the retroactive waiver of rights under the ADEA as part of settlements has caused a great deal of debate and litigation. A bill to amend the ADEA by limiting the circumstances under which such waivers would be permitted, entitled the Age Discrimination in Employment Waiver Protection Act of 1989, is currently before Congress. *See* S. 54, 101st Cong., 1st Sess. (1989); H.R. 1432, 101st Cong., 1st Sess. (1989). The purpose of this amendment to the ADEA is "to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the Act." H.R. REP. NO. 221, 101st Cong., 1st Sess. 3 (1989). Thus, "[t]he bill allows waivers *only* if an individual has made a bona fide claim of age discrimination against an employer, by filing a charge with the Equal Employment Opportunity Commission (EEOC), initiating a court action, or making a specific written allegation directly to the employer." *Id.* (emphasis in original). Additionally, any waiver must meet various criteria:

- (1) the waiver is knowing and voluntary; (2) the waiver is part of a written agreement that makes specific reference to rights and claims under the ADEA; (3) the agreement does not apply to rights or claims that may arise after the date of the agreement itself; (4) the waiver is exchanged for valuable consideration in addition to what the individual already is entitled to receive; (5) the individual is given a reasonable period of not less than 14 days in which to review and consider the settlement agreement; (6) the individual is advised orally and in writing to consult with an attorney before executing a waiver; (7) the individual is informed orally and in writing that he or she may be accompanied by another individual of his or her choice during the negotiation process to settle the ADEA claim; and (8) a notice of the settlement is filed with the EEOC.

Id.; *see also* S. REP. NO. 79, 101st Cong., 1st Sess. (1989) (substantively identical to the House Report).

tration clauses in employment contracts, represents a threat to fulfilling the purposes of the ADEA.

III. *NICHOLSON V. CPC INTERNATIONAL, INC.*

In June, 1989, the Third Circuit held in *Nicholson v. CPC International, Inc.*¹²¹ that an employee with an individual employment contract containing a broad arbitration clause is not precluded by such a clause from bringing an ADEA claim in a judicial forum.¹²² The court concluded that arbitration is inherently inconsistent with the purposes of the ADEA. The reasoning of this decision supports the proposition that statutes designed to address discrimination in employment should be presumed implicitly to override the FAA.

A. *Background*

Nicholson, a corporate executive, attorney, and longstanding employee of CPC International (CPC), signed an employment contract with CPC that included an arbitration clause under which all disputes were to be settled through arbitration.¹²³ After being discharged, Nicholson filed an ADEA charge with the EEOC, which was subsequently "administratively terminated at his request so that he could file suit."¹²⁴

Nicholson originally brought suit against CPC in state court in New Jersey,¹²⁵ whereupon CPC removed the action to the United

¹²¹ 877 F.2d 221 (3d Cir. 1989). This case was settled before the Supreme Court acted upon CPC's petition for certiorari.

¹²² See *id.* at 230.

¹²³ See *id.* at 222-23. The arbitration clause provided that:

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.

Id. at 223.

¹²⁴ *Id.*

¹²⁵ Superior Court of New Jersey, Law Division, Union County, Docket No. L-97370-87. The Third Circuit briefs of the parties reveal that in the ensuing litigation, culminating in the Third Circuit, Nicholson and CPC disputed various issues including: the degree of voluntariness with which Nicholson entered the agreement; whether he received valuable consideration in exchange for the agreement; whether his position was eliminated or whether he was replaced by a younger person; and whether Nicholson had agreed to arbitrate an ADEA claim. See Brief for Defendants-Appellants at 6-12 and Brief for Plaintiff-Appellee at 1-6, *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) (No. 88-5588).

States District Court of New Jersey¹²⁶ and moved to compel arbitration pursuant to the FAA. The district court refused to order arbitration as to the ADEA claim, but granted CPC's motion for interlocutory appeal to the Third Circuit.¹²⁷

B. *The Issues*

1. The Presumption of Arbitrability v. the Presumption of Nonarbitrability

The Third Circuit majority in *Nicholson* began its analysis of the arbitrability question by distinguishing Supreme Court precedent that, on the one hand, established a presumption of arbitrability under the FAA in the context of the Sherman Act, the securities laws, and civil RICO, and, on the other hand, established a presumption of nonarbitrability in the context of ERISA, the FLSA, Title VII, and § 1983.¹²⁸ The court noted that the presumption of arbitrability "will be defeated when it is 'overridden by a contrary congressional command' in another statute."¹²⁹ The court concluded that the recent Supreme Court opinion in *Rodriguez de Quijas v. Shearson/Amer-*

¹²⁶ See *Nicholson v. CPC Int'l, Inc.*, 46 Fair Empl. Prac. Cas. (BNA) 1019 (D.N.J. 1988), *aff'd*, 877 F.2d 221 (3d Cir. 1989). Removal was pursuant to 28 U.S.C. § 1441 as the case involved an ADEA claim.

¹²⁷ See *id.* at 1023. Denying CPC's motion to compel arbitration, the district court relied upon its prior decision in a similar case, *Steck v. Smith Barney, Harris Upham & Co., Inc.*, 661 F. Supp. 543 (D.N.J. 1987). In *Steck*, the court concluded that Congress intended to preclude waiver of judicial remedies under the ADEA. See *id.* at 547. Among the court's concerns was that under the ADEA courts were granted broad equitable and legal relief powers which would not be within an arbitrator's authority. See *id.* at 546-47. The *Nicholson* court also held that "arbitration is insufficient for the vindication of the ADEA's goals . . ." *Nicholson*, 46 Fair Empl. Prac. Cas. (BNA) at 1022.

The court further noted, in distinguishing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), that the EEOC's influence and control "pales in comparison to the SEC's," and that with respect to the ADEA, in contrast to RICO, its enforcement and deterrent functions are as central as its remedial function. See *Nicholson*, 46 Fair Empl. Prac. Cas. (BNA) at 1022-23.

Another district court disagreed with the decision in *Steck*, and found a similar ADEA claim arbitrable. See *Pihl v. Thomson McKinnon Securities*, 48 Fair Empl. Prac. Cas. (BNA) 922 (E.D. Pa. 1988). In this case, which was settled prior to the Third Circuit's decision in *Nicholson*, the court "found nothing . . . that evinces a congressional intent to exclude ADEA claims from the dictates of the Arbitration Act." *Id.* at 924.

¹²⁸ See *Nicholson*, 877 F.2d at 224.

¹²⁹ *Id.* (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

*ican Express, Inc.*¹³⁰ "is consistent with the line of cases enforcing arbitration agreements in the setting of business transactions."¹³¹

Thus, for purposes of determining arbitrability, the *Nicholson* court drew a distinction between cases involving business transactions and cases involving discrimination. Noting that the labor discrimination cases, particularly *Barrentine* and *Alexander*, rested upon an analysis of the statutes involved, the court declined to discount their precedential value because they arose in the context of collective bargaining agreements and expressed, in part, a mistrust of arbitration.¹³²

In fact, the *Nicholson* court suggested that the disparity of bargaining power between employers and employees generally, and between employers and older employees particularly, discredited the argument that arbitration provisions in individual employment contracts were comparable to those found in arm's-length commercial contracts.¹³³ Thus, the court stated:

The disparity in bargaining power between an employer and an individual employee is well known. 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 employers. New employees who need the job may be in a similar position. 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.¹³⁴

¹³⁰ 109 S. Ct. 1917 (1989).

¹³¹ *Nicholson*, 877 F.2d at 224. The dissent took issue with this proposition, arguing that there is nothing in the FAA or in the cases interpreting it which "evince[] an interpretation of the FAA that would limit its application to commercial settings" *Id.* at 233 n.3 (Becker, J., dissenting). Additionally, the dissent contended that an arbitration agreement between a business executive and her employer takes place in no less of a business setting than does such an agreement between a securities investor and a securities broker. *See id.* In response, the majority opinion pointed out the danger of ruling on a matter of law based upon particular characteristics of a party before the court. *See id.* at 229 & n.9. Yet persuasive authority exists for the proposition that most ADEA claimants are not business executives. *See, e.g.*, H.R. REP. NO. 221, 101st Cong., 1st Sess. 9-10 (1989) (noting that the average annual income of age discrimination victims is only \$15,000).

¹³² *See Nicholson*, 877 F.2d at 229. The dissent disagreed on the relevance of these labor discrimination cases because it concluded they turned upon the existence of collective bargaining agreements, rather than upon a finding of implied congressional preemption of arbitrability. *See id.* at 235 (Becker, J., dissenting).

¹³³ *See id.* at 229.

¹³⁴ *Id.* On the other hand, the dissent stated: "Because [the ADEA's] goals can be effectively achieved through a variety of forums and through individual bargaining

2. The Inherent Conflict Between Arbitration and the ADEA

The *Nicholson* court assessed the text and legislative history of the ADEA according to the test mandated by the Supreme Court in *Mitsubishi* and *McMahon* in order to ascertain whether Congress intended "to preclude a waiver of judicial remedies" for ADEA claims, or whether there was "an inherent conflict between arbitration and the statute's underlying purposes."¹³⁵

Emphasizing the importation of provisions from the FLSA into the Act, the court distinguished the ADEA from Title VII, noting that "[t]he ADEA vests primary enforcement responsibility with the [EEOC], to which the individual's right of action under the Act is secondary."¹³⁶ Relying upon the FLSA enforcement provisions¹³⁷

as to the proper forum, I cannot conclude that the ADEA prohibits normal market forces to operate where parties bargain over this type of forum-selection clause." *Id.* at 243 (Becker, J., dissenting) (contrasting the ADEA to civil rights statutes in which Congress intended to foreclose forum-selection clauses in order to provide a federal instead of a state judicial forum).

The dissent also noted that the Supreme Court had compelled arbitration of securities disputes in *McMahon* with the recognition that the bargaining power between customers and brokers was unequal, although insufficient to void the agreement based upon standard contract principles. *See id.* at 243-44 (Becker, J., dissenting). The dissent cites *Rodriguez de Quijas*, 109 S. Ct. at 1920, for the notion that the right to select a forum is waivable despite the "rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers." *Id.* (Becker, J. dissenting). The dissent suggested that the majority's discomfort with extant disparity in bargaining power in ADEA cases was an irrelevant factor.

The majority rejected CPC's argument that *Nicholson* and most ADEA claimants are upper-level employees who need no protection from the consequences of the agreements they voluntarily and knowingly enter. *See Nicholson*, 877 F.2d at 229. Instead, the court found that "many ADEA plaintiffs are not highly paid executives," *id.* at 230. In fact, the court acknowledged that Congress and the Secretary of Labor had found that age discrimination against older, higher paid employees was a serious problem because of incentives for employers to replace them with younger workers and the difficulties such workers have in finding comparable alternate employment. *See id.*

¹³⁵ *Nicholson*, 877 F.2d at 224 (quoting *McMahon*, 482 U.S. at 227 and citing *Mitsubishi*, 473 U.S. at 628).

¹³⁶ *Nicholson*, 877 F.2d at 224 (citations omitted). The court distinguished the ADEA from Title VII in this regard, noting that under § 626(c)(1) of the ADEA an individual's right to sue is extinguished if the EEOC brings suit in her behalf. *See id.* at 225. Thus, "unlike under Title VII, the individual's right to seek redress against an employer for age discrimination is subordinate under the ADEA to the enforcement action of the public agency charged with the ADEA's administration." *Id.* (citations omitted).

¹³⁷ *See* 29 U.S.C. § 216(b) (1982). The *Nicholson* court stated that:

These provisions, including civil liability for employer violations of the applicable laws, a right by aggrieved employees to bring an action in any court of competent jurisdiction, and the termination of this right upon the

reflected in the ADEA, the court cited the Supreme Court's decision in *Barrentine v. Arkansas-Best Freight System, Inc.*¹³⁸ for the proposition that these FLSA rights could not be waived through an agreement to arbitrate.¹³⁹ The court therefore determined that Congress' incorporation of FLSA enforcement provisions into the ADEA reflected "a deliberate policy choice in favor of enforcement of ADEA claims in court proceedings."¹⁴⁰

The *Nicholson* court also examined the 1978 amendment to the ADEA,¹⁴¹ which tolled the statute of limitations for up to a year pending the completion of EEOC conciliation efforts. The court concluded that the amendment was intended to ensure access to the courts for individuals in the case of the termination of EEOC proceedings. The court also concluded that the amendment was intended to prevent employers from using delaying tactics during such proceedings to postpone settlement and possibly avoid liability.¹⁴² Thus, the court stated: "This suggests that Congress intended that extrajudicial methods of seeking resolution of age discrimination claims should not impede ultimate resolution of those claims in a judicial forum when extrajudicial methods proved inadequate."¹⁴³

filing of a complaint for 'injunction proceedings' by the agency in charge of enforcement of the statute, are as fully applicable to ADEA actions as to FLSA actions."

Nicholson, 877 F.2d at 225 (citation omitted).

¹³⁸ 450 U.S. 728 (1981).

¹³⁹ See *Nicholson*, 877 F.2d at 225. The dissent criticized the majority's reliance upon *Barrentine*, pointing out that in *Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 n.8 (3d Cir. 1988), the court had previously held that FLSA standards were not always to be read into the ADEA. See *Nicholson*, 877 F.2d at 233 (Becker, J., dissenting). In *Coventry*, the court wrote, with respect to retroactive waivers of ADEA rights, that "although we conclude that the interpretation given to the FLSA should inform the decision regarding the proper manner to interpret the ADEA, we cannot conclude that an absolute bar against private settlement of claims that arise under the ADEA best effectuates the purposes of that statute." *Coventry*, 856 F.2d at 521-22 n.8.

¹⁴⁰ *Nicholson*, 877 F.2d at 226.

¹⁴¹ 29 U.S.C. § 626(e)(2) (1985).

¹⁴² See *Nicholson*, 877 F.2d at 226 (citing S. REP. NO. 493, 95th Cong., 1st Sess. 13 (1977)).

¹⁴³ *Id.* The dissent argued that Congress merely wanted to make sure that ADEA claims reached an "adjudicatory forum," finding nothing in the ADEA or its legislative history to indicate that Congress intended to preclude extrajudicial methods, such as arbitration, as "inherently inferior to judicial resolution." *Id.* at 236 (Becker, J., dissenting).

The court also noted that *Nicholson* and the EEOC as *amicus curiae* for *Nicholson* had argued that the 1978 ADEA amendment providing for an explicit right to trial by jury manifested congressional intent that the right to a judicial forum for ADEA

The *Nicholson* court found, nonetheless, that the text and legislative history of the ADEA spoke inconclusively to the issue of arbitration. In an attempt to resolve the issue, the court continued to follow the analysis prescribed by the Supreme Court in *Mitsubishi* and *McMahon* and “examine[d] [the question] whether the objectives of the ADEA are inherently incompatible with the displacement by arbitration of a judicial forum for claimants alleging age discrimination.”¹⁴⁴ For the following reasons, the court found such incompatibility.

a. *The Primacy of the Role of the EEOC*

The *Nicholson* court addressed the primacy of the role Congress allocated to the EEOC in the ADEA¹⁴⁵ and concluded that mandatory arbitration would undermine that role and thereby contravene congressional intent. The court speculated that charges that would ordinarily be reported to the EEOC would probably not be made if an employee were precluded from access to a judicial forum.¹⁴⁶ Viewing the EEOC and ultimately the courts as guardians of the public interest, the court stated:

Any procedure that detracts from the EEOC charge requirement would undermine Congress' design, since the charge not only informs the EEOC of the particular discrimination but also may identify other unlawful practices. . . . Any process which contrib-

claims be nonwaivable. *See id.* at 226 n.5. *Nicholson* noted that the amendment was prompted in part by the notion that juries, as opposed to judges, might be more “open” to claims of age discrimination. Brief for Appellee at 13-14, *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) (No. 88-5588) (quoting 123 CONG. REC. 34318 (daily ed. Oct. 19, 1977) (remarks of Sen. Kennedy) (“juries are more likely to be open to the issues which have been raised by the plaintiffs”)). The *Nicholson* court did not rely on this proposition because the right to a jury trial is also available under the Sherman Act, yet claims under this Act were found arbitrable in *Mitsubishi*. *See Nicholson*, 877 F.2d at 226 n.5.

¹⁴⁴ *Nicholson*, 877 F.2d at 227 (citations omitted).

¹⁴⁵ *See id.* (noting “Congress’ clear intent that compliance with the ADEA be overseen by a public agency”).

¹⁴⁶ *See id.* (outlining the importance of the charge under Title VII and finding an equally important role under the ADEA). The dissent believed that EEOC involvement with an alleged violation is unaffected by an arbitration agreement, which only would affect an individual’s choice of forum. *See id.* at 238-39 (Becker, J., dissenting). The dissent remarked that an aggrieved party cannot be precluded from filing a charge with the EEOC, which preserves the avenue to the EEOC even with a signed arbitration agreement. Additionally, the dissent disputed the majority’s contention that employees compelled to arbitrate their ADEA claims and barred from judicial fora, will be unlikely to file charges with the EEOC. Judge Becker reasoned that such disgruntled employees, wary of arbitration, actually would have an incentive to file EEOC charges. *See id.* at 238 (Becker, J., dissenting).

utes to employers' avoidance of the scrutiny to which an EEOC charge investigation would subject them is necessarily incompatible with the congressional scheme for the ADEA.¹⁴⁷

b. *The Lack of EEOC Oversight of Arbitration*

The court noted that the *McMahon* decision relied upon the SEC's power to ensure the adequacy of arbitration procedures in securities cases to express confidence that arbitration was competent to vindicate the statutory rights at issue in those cases.¹⁴⁸ By contrast, the *Nicholson* opinion pointed out that "no statutory provision gives the EEOC the power to affect the arbitration procedure" in ADEA cases.¹⁴⁹

¹⁴⁷ *Id.* at 227-28. The *Nicholson* court rejected the argument that a statute that prescribes "informal methods of conciliation, conference, and persuasion," must countenance arbitration, which is such an informal method of resolving disputes. *Id.* at 228. The court stated:

Congress' intent, as explicitly stated in the text of the statute, is not only that disputes concerning claims of age discrimination be resolved through informal means, but that the EEOC 'eliminate the discriminatory practice or practices alleged' by encouraging voluntary compliance if possible. It is only through the conciliation process that the EEOC has its opportunity to secure voluntary compliance."

Id. (quoting 29 U.S.C. § 626(b) (1985)). The EEOC, which intervened as amicus curiae in support of *Nicholson*, argued that arbitration threatened to diminish the "policing function" of the EEOC in the enforcement of the ADEA. Brief for the EEOC as Amicus Curiae in Support of the Plaintiff-Appellee at 7, *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) (No. 88-5588) (emphasis in original). CPC argued, however, that "[w]aiver of the judicial forum is not a waiver of a substantive right and Congressional concern to preserve the latter cannot be equated with a determination to preserve the former." Brief of Defendants-Appellants at 23-24, *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) (No. 88-5588). CPC noted that "there is also a significant public interest in securities regulation, antitrust enforcement and the elimination of racketeering, and there is no basis for drawing 'public purpose' distinctions between these statutes and ADEA." *Id.* at 23.

The dissent in *Nicholson* argued that the statutory scheme "does not compel the conclusion that Congress intended that the EEOC must be involved in every instance of age discrimination in this country." *Nicholson*, 877 F.2d at 237 (Becker, J., dissenting). The dissent seemed persuaded by language in the legislative history of the ADEA that reflected a desire for expedited, informal resolutions of ADEA claims. See *id.* (citing, *inter alia*, *Age Discrimination in Employment: Hearings on S.830 and S.786 Before the Subcomm. on Labor of the Senate Comm. on Public Welfare*, 90th Cong., 1st Sess. 24-25 (1967) (remarks of Sen. Javits) (noting EEOC backlogs and the hardship of such delays upon older citizens)).

¹⁴⁸ See *supra* notes 69-71 and accompanying text.

¹⁴⁹ *Nicholson*, 877 F.2d at 228; see also *id.* at 228 n.6. The dissent stressed that the oversight role of an administrative agency cannot be dispositive of whether the FAA will be enforced, noting that in antitrust and RICO cases, arbitration was found acceptable in the absence of any administrative agency involvement. See *id.* at 239

c. *The Inability of Arbitrators to Award Equitable Remedies*

The Third Circuit considered the limited remedies available in arbitration as indicative of its inability to enforce the ADEA effectively and eliminate age discrimination.¹⁵⁰ This view was based upon the court's conclusion that arbitrators are limited in their ability to award to a plaintiff or a class of plaintiffs the broad equitable relief available under the ADEA.¹⁵¹ The court cited the rules of the American Arbitration Association limiting arbitral remedies to "the scope of the agreement of the parties" to support the proposition that an arbitrator, as opposed to a court, is prevented from issuing injunctive relief that would bar future acts of employer discrimination, as well as discrimination against other employees not before the arbitrator.¹⁵²

(Becker, J., dissenting) (referring to *Mitsubishi* and *McMahon*). The dissent concluded that the *McMahon* decision had merely taken notice of the expanded power of the SEC to govern self-regulating organizations. On the other hand, the majority asserted that the *McMahon* Court's explicit reliance on SEC oversight authority was used to support its conclusion that arbitration would not effect a waiver of the substantive rights protected by the statute in question. *See id.* at 228 n.6. Although the language in *McMahon* regarding this issue is ambiguous, the Supreme Court in *McMahon* did "conclude that where, as in this case, the prescribed procedures are subject to the Commission's § 19 authority, an arbitration agreement does not effect a waiver of the protections of the Act." *McMahon*, 482 U.S. at 234.

The *Nicholson* dissent also noted that since there was no explicit preclusion of arbitration in the ADEA, the EEOC, which was granted rulemaking power, might "infer" that Congress had delegated to it the power to regulate arbitration in ADEA cases, and that potentially the EEOC might have equal or even greater power than the SEC to control arbitration within its sphere. *See Nicholson*, 877 F.2d at 240. The majority, however, was persuaded that the securities cases were distinguishable because the nexus between the rulemaking authority of the administrative agency and the statute, recognized and relied upon by the Court in *McMahon* to justify its confidence in the arbitral process, is more direct and well-established in the securities laws than with respect to the ADEA. *See id.* at 228 n.6.

¹⁵⁰ *See Nicholson*, 877 F.2d at 228-29.

¹⁵¹ *See id.* (citing 29 U.S.C. § 626(b) (1985); *id.* § 216(b) (1982)).

¹⁵² *See id.* at 228 & n.7 (quoting AM. ARB. ASS'N COMM. ARB. R. 17). The dissent, in contrast, believed that arbitrators are empowered to grant as broad a range of equitable relief as courts, particularly with regard to broad arbitration agreements or so-called "unrestricted submissions," and that arbitration is therefore capable of achieving the objective of the ADEA, namely to eliminate age discrimination in employment. *See id.* at 240 (Becker, J., dissenting). The dissent noted that the rules of the American Arbitration Association state that: "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties . . ." *Id.* (quoting AM. ARB. ASS'N COMM. ARB. R. 43, Scope of Award (emphasis supplied by the dissent)).

Furthermore, the dissent pointed out that:

In 1978, partly in response to the concerns expressed in *Alexander*, with respect to the adequacy of the arbitral forum for determination of

3. Support Among the Sister Circuits

The Third Circuit cited cases from other federal courts of appeal in support of its position that an arbitration clause should not preclude an ADEA claimant from access to a judicial forum. In *Criswell v. Western Airlines, Inc.*,¹⁵³ pilots covered by a collective bargaining agreement brought an ADEA action against an airline challenging the airline's policy that prevented pilots nearing mandatory retirement age from "downbidding" to positions that would allow them to continue working past the mandatory retirement age for pilots.¹⁵⁴ An arbitration board had heard the grievance and ruled in the airline's favor, but the Ninth Circuit ruled that the pilots were not barred from pursuing the ADEA claim in a judicial forum, and that the district court was not required to give deference to the arbitrator's decision.¹⁵⁵ The court stated that "[t]he right of the plaintiffs to go before the [arbitration board] is contractual, arising out of their collective bargaining agreement. Their right to come before this court is statutory, arising out of the ADEA."¹⁵⁶

In *Cooper v. Asplundh Tree Expert Co.*,¹⁵⁷ the Tenth Circuit held that a discharged employee's ADEA claim was not foreclosed by an

discrimination claims, the AAA [American Arbitration Association] issued Employment Dispute Arbitration Rules, arbitration rules designed particularly for the purpose of guiding arbitration of individual discrimination claims. Use of these Rules, which provide for the same scope of discovery and remedies as would be available in court, would obviate at least some of the Court's earlier concerns expressed in *Alexander*, *Barrentine*, and *McDonald* about the adequacy of arbitration.

Id. at 234 n.4 (Becker, J., dissenting) (citation omitted).

¹⁵³ 709 F.2d 544 (9th Cir. 1983), *aff'd*, 472 U.S. 400 (1985).

¹⁵⁴ *See id.* at 546-47.

¹⁵⁵ *See id.* at 547-49. In addition to money damages awarded by the jury, the district court granted equitable relief in the form of a system-wide injunction against such discriminatory practices. *See id.* at 547.

¹⁵⁶ *Id.* at 548. The court followed the same analysis the Supreme Court used in *Alexander* and *Barrentine*. In affirming the district court decision, the Ninth Circuit pointed out the "miniscule" nature of the evidence before the arbitration board when compared to that before the district court. *See id.* The plaintiff in *Nicholson* cited *Criswell* to illustrate the inadequacy of arbitration to vindicate statutory rights under the ADEA:

Had the plaintiffs in *Criswell* been required to submit their ADEA claims for final determination before the arbitration board, the procedural limitations of the arbitration process would have resulted in the denial of valid ADEA claims and deprived similarly situated pilots of the benefit of the 'system-wide' relief which was granted by the district court.

Brief for Plaintiff-Appellee at 17, *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221 (3d Cir. 1989) (No. 88-5588).

¹⁵⁷ 836 F.2d 1544 (10th Cir. 1988).

arbitrator's award.¹⁵⁸ Citing *Alexander*, *Barrentine*, and *McDonald*, the court ruled that "[b]ecause Congress closely modeled the ADEA upon Title VII, we similarly deny preclusive effect to arbitral fact-finding in ADEA claims."¹⁵⁹

Additionally, the Third Circuit cited *Swenson v. Management Recruiters Int'l*,¹⁶⁰ an analogous Title VII case, for support. In *Swenson*, an employee sued her former employer alleging sex discrimination.¹⁶¹ The Eighth Circuit relied upon *Alexander* to reject the employer's motion to compel arbitration pursuant to the FAA, noting:

Although *Alexander* involves a collective bargaining agreement, and not a commercial arbitration agreement under the FAA, this fact should not change the Court's analysis. The *Alexander* Court was well aware that federal policy favors arbitration. That decision turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII. *Alexander* noted that "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'"¹⁶²

Thus, the court found that "[t]he analysis of *Alexander* lends strong support that Congress did not intend federal judicial proceedings in discrimination cases to be preempted by employment arbitration agreements enforceable under the FAA."¹⁶³

The *Swenson* court cited *Barrentine* to support the proposition that "certain statutes which provide minimum substantive guarantees . . . are to be treated differently for arbitration purposes."¹⁶⁴ Moreover, the court noted: "Discrimination and civil rights legislation have traditionally been viewed differently than purely private economic disputes."¹⁶⁵ The court also declared that the line of cases

¹⁵⁸ See *id.* at 1553.

¹⁵⁹ *Id.*

¹⁶⁰ 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989).

¹⁶¹ See *id.*

¹⁶² *Id.* at 1306 (quoting *Alexander*, 415 U.S. at 47). The dissent in *Nicholson* rejected this analysis as based upon a mistrust of arbitration, which has been proscribed by the *Mitsubishi*, *McMahon*, and *Rodriguez de Quijas* line of cases. See *Nicholson*, 877 F.2d at 235 n.6 (Becker, J., dissenting).

¹⁶³ *Swenson*, 858 F.2d at 1306.

¹⁶⁴ *Id.* With reference to *Barrentine* and the FLSA, it has been noted that "Congress recognized the significant inequalities in bargaining power that exist between employers and employees, and accordingly made the FLSA's provisions mandatory." S. REP. NO. 79, 101st Cong., 1st Sess. 4 (1989).

¹⁶⁵ *Swenson*, 858 F.2d at 1306 (citing R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 15.4 & 15.7 (1986)). The court also rejected the argument that *Mitsubishi* limited the effect of *Barrentine* and *Alexander*. See *id.* at 1306 n.4.

creating a presumption in favor of arbitrability under the FAA, including *McMahon* and *Mitsubishi*, were distinguishable in that none of them involved employment discrimination claims.¹⁶⁶ Acknowledging the mandate of *Mitsubishi*, and without basing its holding upon the mistrust of arbitration expressed in *Alexander*, *Barrentine*, and *McDonald*, the court stated:

[I]n the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII. Title VII mandates the promotion of the public interest by assisting victims of discrimination. The arbitration process may hinder efforts to carry out this mandate.¹⁶⁷

The *Swenson* court thus concluded that "*Alexander* makes clear that Congress intended the right in employment discrimination cases to have access to judicial remedies to outbalance the federal policy favoring arbitration."¹⁶⁸

4. The Third Circuit's Conclusion

After examining the text, legislative history, and objectives of the ADEA, in accordance with the guidelines established by the Supreme Court in *Mitsubishi* and *McMahon* for determining when the FAA is preempted by another federal statute, the Third Circuit found that "the right to a judicial forum under the ADEA is not subject to displacement by a prospective agreement to arbitrate disputes contained in individual employment contracts."¹⁶⁹ Furthermore, the

¹⁶⁶ See *id.* at 1306 & n.5.

¹⁶⁷ *Id.* at 1307.

¹⁶⁸ *Id.* at 1308-09.

¹⁶⁹ *Nicholson*, 877 F.2d at 230. Professor Shell reached the same conclusion by taking a slightly different path. Rather than relying upon precedent from the labor cases, such as *Alexander*, he contrasted labor arbitration with commercial arbitration and found that commercial arbitration "is not . . . an adequate substitute for the courts for the resolution of . . . ADEA claims." Shell, *supra* note 22, at 517. Thus, he stated that:

The antidiscrimination purpose of the ADEA, the congressional desire to track Title VII's substantive provisions, and the statute's focus on providing both individual remedies and mechanisms for institutional reform suggest that private arbitration of ADEA claims under the FAA would conflict with the legislative goals of the statute. As with Title VII claims, commercial arbitration is focused too narrowly on specific transactions to give effect to the institutional goals of the ADEA. . . . Finally, cases brought under the ADEA are not purely economic in nature. Rather, they involve questions of personal dignity and worth that are precisely the kinds of "core value" questions that should be reserved for a

court speculated that a contrary holding would induce employers to follow suit and devise similar employment contracts, "thereby shifting enforcement of the ADEA away from the courts to arbitration. If this is a result desired by Congress, we should wait for Congress to explicitly so state."¹⁷⁰

IV. ANALYSIS AND CONCLUSION

The Supreme Court's test for rebutting the presumption of arbitrability is extremely difficult to satisfy in a world where realistic challenges to arbitral competence are proscribed. Apparently preoccupied by docket-clearing concerns and satisfied that arbitral fora can vindicate the most fundamental statutory rights, the Court has dramatically expanded the scope of the FAA, ignoring the possibility that certain types of cases should be excluded from its reach. Rather than attempting to coordinate the FAA with other important federal statutes, or reserving a position for the courts involving oversight or more substantive review of arbitration proceedings, the Court, under the slogan of freedom of contract, has dictated the triumph of the FAA, abrogating to arbitrators the responsibility for protection of a wide range of statutory rights.

Arguments that ADEA cases should be beyond the scope of the FAA because they require sophisticated statistical expert testimony and extensive discovery thus have been short-circuited. The Court is also likely to reject the argument that the right to a jury trial, explicitly conferred upon ADEA plaintiffs in the statute, indicates congressional intent to preclude waivers of judicial fora for the resolution of such claims. Such a position, of course, disregards the fact that jury trials provide an incentive for employees to bring ADEA claims. The result of the Court's celebration of arbitral competence, which has been arrived at without factfinding on the issue, thereby threatens to compromise the substantive rights of claimants, the enforcement of the statute, and the fulfillment of the statute's purpose—to eliminate age discrimination.

Discrimination statutes should be interpreted consistently with each other, and whenever possible, they should be interpreted for the benefit of the groups protected by them.¹⁷¹ The Court in *Alexan-*

court. It is thus not stretching too far to assume that Congress meant to forbid private arbitration of age discrimination claims under the FAA.

Id. at 572.

¹⁷⁰ *Nicholson*, 877 F.2d at 231.

¹⁷¹ The "in pari materia rule" of statutory interpretation suggests that,

*der v. Gardner-Denver Co.*¹⁷² made such a determination with respect to Title VII, and suggested that its analysis should apply to other statutory discrimination claims. Cases that follow in the wake of *Nicholson v. CPC Int'l, Inc.*¹⁷³ will present an opportunity for the Supreme Court to limit the presumption of arbitrability to commercial cases and to affirm *Alexander's* reservation of judicial fora for discrimination cases. Such affirmation would allow the courts to interpret these statutes in order to articulate the norms and public values they incorporate, and to develop consistent sources of law pursuant to them.¹⁷⁴

Deference or delegation to private forum dispute resolution may be seen from one perspective as an example of freedom from government interference and judicial activism. Viewed from the public value perspective, and especially considering the relative powerlessness of victims of employment discrimination, this delegation represents an abandonment of the statutory commitment to eradicate discrimination in our society.¹⁷⁵

[w]here a federal law is similar to (in pari materia with) another federal law, the Court will presumptively interpret the former law consistently with the other and will rely on prior interpretations of one to interpret the other. The Supreme Court typically explains this rule by reference to the traditional legal process idea of imputed legislative intent: "[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."

Eskridge, *supra* note 32, at 1039 (quoting *Lorillard v. Pons*, 434 U.S. 575, 581 (1978)). In Eskridge's opinion, "this rule is an occasion for the Court to harmonize statutory policy and to articulate public values." *Id.* Eskridge also notes the unstated rule of statutory interpretation that "[s]tatutes affecting certain discrete and insular minorities—'Caroline groups'—shall be interpreted, where possible, for the benefit of those minorities." *Id.* at 1032.

¹⁷² 415 U.S. 36 (1974).

¹⁷³ 877 F.2d 221 (3d Cir. 1989).

¹⁷⁴ Professor Shell has stated that "[t]he institutions of commercial arbitration have demonstrated neither the historical ability nor the desire to resolve disputes so close to the core of our Nation's values." Shell, *supra* note 22, at 570. He has concluded that "commercial arbitration procedures and institutions appear to be suited to processing claims of economic damage arising from standard commercial and employment relations, but poorly adapted to resolving disputes touching on rights to personal dignity and equal protection." *Id.* at 573.

¹⁷⁵ These opposing perspectives are clearly illustrated by comparing the majority opinion in *McMahon* with Justice Blackmun's concurrence and dissent. The majority was perfectly comfortable with assigning disputes related to fraudulent transactions between securities customers and securities professionals to arbitration controlled and supervised by securities professionals. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 220-42 (1987). In fact, the opinion may even be read to suggest a celebratory attitude toward such arbitration and its ability

The Third Circuit suggested in *Nicholson* that, in the area of employment discrimination, the courts must not ignore the realities of the marketplace in reaching conclusions about prospective waivers of judicial fora. In an era in which fewer workers are protected by unions and in which there will be increasingly large numbers of older workers, the courts should monitor employer-employee relations with, if anything, greater scrutiny than in the past. Moreover, it seems fair to suggest that Congress, in passing various protective statutes such as the ADEA, intended the courts to play such a role when necessary.

A decision by the Supreme Court finding no override of the FAA in the discrimination laws would indicate that the Court was perfectly willing to leave enforcement of the discrimination laws to private sector forces such as arbitration. The Third Circuit suggested that this willingness was an unsatisfactory resolution of the conflict between the competing public values of nondiscrimination, on the one hand, and arbitration on the other. The court therefore sensibly held that Congress, not the judiciary, should decide whether public enforcement of the discrimination laws should be subjugated to the policy endorsing arbitration.

to render justice in such cases. *See id.* Justice Blackmun, by contrast, was much more skeptical and wary of this forum, obviously concerned that the substantive rights conferred by the federal securities laws might not be vindicated there. *See id.* at 242-68 (Blackmun, J., concurring in part and dissenting in part).