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# Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR As Interest-Convergence

MICHAEL Z. GREEN\*

## INTRODUCTION

I am a self-avowed litigation romanticist, albeit an extremely frustrated one.<sup>1</sup> Accordingly, I “exhibit[ ] a characteristically American

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1. I have recently fessed up to this characterization without being as open about it as I am herein because I only admitted it in a footnote. See Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 69 n.46 (2004) [hereinafter Green, *Finding Lawyers*]. Also, others have captured me admitting that I am a litigation romanticist. See James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation, and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 286 (2004) (quoting me saying: “I’m a frustrated litigation romanticist, but I’m also a skeptical proponent of informal dispute resolution”). One criticism of litigation romanticists is that they tend to see the world with litigation-colored glasses while ignoring the problems of the litigation approach. See Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 385-86 (describing the litigation-romanticism phenomenon and counseling against mediation romanticism). Carrie Menkel-Meadow has been at the forefront in raising concerns about the narrow approaches of litigation romanticists. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense*

attitude, namely that law and legal institutions can fix any problem, no matter how complex, immediately and simply.”<sup>2</sup> This approach is based upon my beliefs about the value of Title VII of the Civil Rights Act of 1964,<sup>3</sup> which created landmark protections by banning employment discrimination on the basis of race, color, national origin, religion, and sex.<sup>4</sup> One commentator, Michael Yelnosky, however, has explained the concerns about litigation romanticists who strongly espouse vindication of employment discrimination claims through the courts and under the law of Title VII rather than through alternatives to the court system:

[A] focus on litigation creates “the impression that the elimination of legal barriers is sufficient to achieve racial equality. Litigation thus becomes the focal point of activism at the cost of possibly more dynamic attacks on the root causes of racial and sexual subordination . . . .” Enforcement of employee rights through litigation takes disputes out of the hands of those directly involved and puts lawyers and state actors at center stage. A plaintiff must rely on a lawyer and that lawyer’s doctrinal expertise to reframe her dispute for resolution in litigation. That relationship can be subordinating rather than empowering for the client. For example, in a Title VII case the plaintiff’s lawyer may use superior knowledge of the increasingly arcane Title VII doctrine to reframe the client’s story and suppress the client’s voice, dictate the remedies available, and otherwise control the litigation. . . . Justice, in the mind of the “litigation romantic,” is something people can get only from the government. It is not something they can get from one another.<sup>5</sup>

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of Settlement, 83 GEO. L.J. 2663, 2669 (1995) (criticizing “litigation romanticism” as involving “empirically unverified assumptions about what courts can or will do” and “a focus almost exclusively on structural and institutional values” while “giv[ing] short shrift to those who are actually involved in the litigation”). She has also acknowledged, however, that there may be some situations where informal dispute resolution will not work and formal adjudication must occur. See Carrie Menkel-Meadow, *What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1623 (1997) (“I am not in favor of ending adjudication. Adjudication is necessary to generate rules and norms, and to exist as a final resort when the parties cannot resolve things themselves and require a particular kind of decisionmaker—whether judge or jury—each with its own logic, rationales, and functions within our judicial system.”) [hereinafter Menkel-Meadow, *When Adjudication Ends*].

2. See Leroy D. Clark, *A Critique of Professor Derrick A. Bell’s Thesis of the Permanence of Racism and His Strategy of Confrontation*, 73 DENV. U. L. REV. 23, 40 (1995) (citing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 3-22 (1994)).

3. Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to 2000e-17 (2004)).

4. 42 U.S.C. §§ 2000e-2(a) (1)-(2).

5. Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 596-97 (footnotes omitted). Others have also questioned the ability of the law to deliver on

## The Promise of ADR as Interest-Convergence

Given these thoughtful comments about subordination, we litigation romanticists may provide a better service to our followers by becoming more creative and focusing on the underlying causes rather than continuing to rely on more legislation and legal enforcement to transcend the issues of race discrimination in employment.<sup>6</sup> The thesis of this Essay is that litigation and legal enforcement strategies, including any new legislation that would force employers to address discrimination in the workplace, should no longer be the focus of civil rights activists.<sup>7</sup> Instead, those seeking to root out race discrimination

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eradicating discrimination. See Derrick A. Bell, Jr., *Racism is Here to Stay: Now What?*, 35 *How. L.J.* 79, 84 (1991); John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 *OR. L. REV.* 201, 223 (1982); Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 *GEO. L.J.* 1879, 1881-82 (1992); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 *ALA. L. REV.* 375, 479-80 (1995).

6. While acknowledging that I have romantic notions about justice and what the litigation system can offer, I am not averse to the promise that alternatives to the courts, especially mediation, may offer. See Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 *BERKELEY J. EMP. & LAB. L.* (forthcoming Fall 2005). Nor do I take the Pollyannish approach of neglecting the fact that litigation in the courts presents its own set of problems for many of those who seek justice therein, especially for Black employees who are the focus of this Essay. See Green, *Finding Lawyers*, *supra* note 1, at 64 n.23 (generally lamenting the lack of lawyers available to Black employment discrimination claimants in the courts as "the reality remains for most employees pursuing employment discrimination claims that they face little hope of finding an attorney" and citing sources). But I also do not advance ADR solely for seeking peaceful resolution at the cost of obtaining racial justice, but rather as a complement to our justice system. See James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Ruminaton on Mediator Values Beyond Self-Determination and Neutrality*, 5 *CARDOZO J. CONFLICT RESOL.* 65, 71-72 & n.32 (2004) (identifying critics of ADR when its focus is to "simply secure the peace" and also identifying critiques of ADR because of racial and cultural prejudice concerns) (quoting Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 *MINN. L. REV.* 1391, 1400, 1402 (1997) (criticizing the "basic premise of the ADR movement, the idea that conflict is pathology" and asserting that it is healthy because "conflict is not pathology but the ordinary and natural state of affairs in a radical free market-society like ours"); Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1078 (1984)); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 *OHIO ST. J. ON DISP. RESOL.* 1, 6-7 (1993) (describing the growth of ADR as a focus on "peace not war" and criticizing this overall harmony rather than justice focus). But see Carrie Menkel-Meadow, *Practicing in the Interests of Justice in the Twenty-First Century: Pursuing Peace as Justice*, 70 *FORDHAM L. REV.* 1761, 1763 (2002) (arguing that seeking peace is synonymous with seeking justice). Rather, I still think there is a need for trials and adjudication in our system of justice. See Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 *J. EMPIRICAL LEGAL STUD.* 627, 629-30, 634-35 (2004) (describing benefits of trials); Menkel-Meadow, *When Adjudication Ends*, *supra* note 1, at 1623 (ascribing to a need for adjudication); Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 *J. LEGAL STUD.* 807, 817 (1994) (asserting the importance of the law in changing society and how it is used by those groups with significant interests in the law in effectuating change and using mass tort claims as a key example).

7. On February 11, 2004, legislation was introduced into Congress titled, Fairness: The Civil Rights Act of 2004, H.R. 3809 and S. 2088, which is intended to reverse several Supreme Court decisions and provide fair remedies to civil rights litigants through the court system. See Ritu Kelotra, *Fairness: The Civil Rights Act of 2004*, 13 *POVERTY & RACE: POVERTY & RACE*

in the workplace must focus on including non-legal options such as alternative dispute resolution (ADR) activities. Any new strategies must address the concerns of workplace discrimination and the use of ADR<sup>8</sup> in a way that merges those issues with the interests and incentives of employers. Derrick Bell has referred to the merger that forms when the interests of the majority match those of the minority as involving an interest-convergence principle.<sup>9</sup> This Essay will explore measures where ADR can be used as a mechanism to focus on racial justice in the workplace while also acting as a tool to accomplish employer incentives as interest-convergence.

Furthermore, it is now clear that any notions of litigation romanticism must give way to current realities under Title VII, primarily because as we advance into the twenty-first century, the prospects seem dismal for Blacks<sup>10</sup> who seek to litigate employment discrimination

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RESEARCH ACTION COUNCIL 5 (Mar./Apr. 2004), available at <http://www.civilrights.org/issues/enforcement/details.cfm?id=22723> (last visited 9/24/2004). The actual proposed legislation can be found at <http://thomas.loc.gov/>.

8. Several commentators have concerns about the use of informal dispute resolution systems and the effect that they may have on the weaker party seeking justice within that system especially in terms of race, gender, and cultural components. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388-89; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548 (1991); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 61-62, 80-81 (1995).

9. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites.”); Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371 (2002) (noting “an impressive insight by Derrick Bell that gains for [B]lacks coincide with [W]hite self-interest and materialize at times when elite groups need a breakthrough for African Americans, usually for the sake of world appearances or the imperatives of international competition”); Paul Frymer & John D. Skretny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 678 (2004) (asserting that a recent Supreme Court decision adopting a diversity rationale in enforcing affirmative action and its “more instrumental and forward-looking approach to defending affirmative action” is “perhaps just another example of what Derrick Bell has called ‘interest convergence’—that civil rights progress occurs only in moments when it benefits elite [W]hites, whether for economic profit or national security”).

10. The focus herein on Black employees recognizes the significance of the Black-White binary in the establishment of rights in the United States. See Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 215 n.16 (2002) (“[S]ome believe that the racial identity of all groups has been politically and legally defined by the line between Blackness and [W]hiteness.”). This focus on Black employees, however, is not intended to constitute surrender to the Black-White binary paradigm as the ultimate methodology for analyzing race relations. See Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 475-77, 492-96 (2004) (highlighting the significant problems with race in our society and the uniqueness of the struggle for Black rights from slavery to Jim Crow to “separate but equal” accommodation while describing problems that the Black-White binary paradigm causes by not acknowledging the needs for Latinos and other groups as a whole); Juan F. Perea, *The Black/*

claims. Forty years after the enactment of Title VII, employment discrimination claimants tend to lose their cases handily in the federal courts.<sup>11</sup> For those few cases that even get to trial, winning plaintiffs then face the even more exasperating possibility of having their jury verdicts overturned on appeal.<sup>12</sup> Then by adding insult to injury, employers—the ones who win most of their cases in the lower courts—face little chance of having their victories overturned on appeal.<sup>13</sup>

With this sad state of affairs regarding current court litigation and enforcement opportunities under Title VII, some have suggested legislative changes which have essentially been unsuccessful for more than a decade.<sup>14</sup> On the other hand, other commentators have suggested that various forms of ADR may provide for some semblance of fairness to claimants under Title VII, given the flawed and potentially

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*White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 LA RAZA L.J. 127, 145-46 (1998) (criticizing the Black/White binary paradigm in discussing race because it does not address the outsider perspective of a Latino, neither White nor Black).

11. See Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 547 (2003); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947; Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 451-52 (2004) (describing "a troublesome anti-plaintiff effect in federal appellate courts" for employment discrimination claimants along with a bias against plaintiffs at the trial level where few cases even get to a jury); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 560-61 (2001) (asserting that employers prevail in 98% of federal court employment discrimination cases resolved and discussing how these cases tend to be resolved at the pre-trial stage); see also Susan Mandel, *Equal Treatment? Study Shows a Wide Gap Between Worker, Employer Wins in Job Bias Appeals*, 87 A.B.A. J. 24, 24 (Nov. 2001) (acknowledging how lawyers representing plaintiffs "admit it's tough to beat employers in discrimination cases" and describing "a study that shows plaintiffs fare worse in federal appellate job bias cases than in any other kind of civil case"). *Contra* Kevin M. Clermont & Theodore Eisenberg, *Judge Harry Edwards: A Case in Point*, 80 WASH. U. L.Q. 1275 (2002) (criticizing the Edwards and Elliott article and its assertions); *but see* Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002) (asserting that differences in appeals for plaintiffs versus defendants does not mean that the appellate courts have bias towards plaintiffs).

12. Clermont & Schwab, *supra* note 11, at 451-52.

13. *Id.*

14. The last successful attempt to amend Title VII occurred in 1991. See Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 308 (2004) (noting the last major change in Title VII occurred with the Civil Rights Act of 1991). Several attempts by Democratic, U.S. Senator Russell Feingold to offer legislation in Congress that would address the use of arbitration in statutory disputes including Title VII have also failed over the last ten years. See Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 284, 298 (2002); see also R. Larson Frisby, *Congress Considers Curbs on Mandatory Arbitration of Consumer and Employment Disputes*, DISP. RESOL. MAG., Fall 2002, at 31 (describing Senate consideration of legislation introduced by Senator Feingold to prevent enforcement of mandatory arbitration agreements).

non-existent opportunities available in the courts.<sup>15</sup> These proponents of the use of ADR in Title VII disputes have initially focused on the value of arbitration.<sup>16</sup> Despite their colossal advantage in the court system,<sup>17</sup> employers advanced the growth of arbitration for discrimination claims after Congress amended Title VII with the Civil Rights Act of 1991, which gave claimants the right to seek a jury trial along with compensatory and punitive damages for acts involving intentional discrimination.<sup>18</sup> Not surprisingly, the unremitting and emotion-based fear of juries likely led employers to use arbitration despite their utter annihilation of plaintiffs' employment discrimination claims in courts.<sup>19</sup>

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15. See Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1069 (1996); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 106-07 (2003); Lewis L. Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution To Improve Civil Rights*, 12 N.Y. L. SCH. J. HUM. RTS. 1, 1-3 (1994); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 57 (1998); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bathwater and Constructing a New Sink*, 2 U. PA. J. LAB. & EMP. L. 73, 99-100 (1999); Theodore J. St. Antoine, *Gilmer in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 499 (2001); Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 1-9 (1998). But see Coben, *supra* note 6, at 72 & nn.39-40 (asserting that those proponents of ADR who argue "that the litigation alternative is so unattractive, and equally flawed" without addressing the racial and cultural justice concerns in ADR must accept that their "rhetoric and the accompanying stinging critique of litigation is no match for empirical evidence, the lack of which is palpable").

16. See Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 99 n.95 (2003) [hereinafter Green, *Opposing Excessive Use*] (describing arguments raised by proponents for the use of employment arbitration and citing articles).

17. One could likely question why employers would stoop to use arbitration when the courts provide such overwhelming results for employers, and I have raised this very question. See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2001) [hereinafter Green, *Debunking the Myth*] (questioning the value for employers in pursuing arbitration for employment discrimination claims given the outstanding results for employers in these cases when they reach the courts).

18. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101-102, 105 Stat. 1071-74 (1991) (codified in pertinent part at 42 U.S.C. § 1981a (2004)) (describing the right to compensatory and punitive damage remedies and the right to a jury trial available to claimants filing claims of intentional discrimination under Title VII, but placing caps on recovery of \$50,000 for employers with less than 101 employees and then allowing for graduated increases in monetary limits corresponding to the increasing number of employees in the workforce up to a maximum of \$500,000 for employers with more than 500 employees).

19. See *ADR Vision Roundtable: Challenges for the 21st Century*, 56 DISP. RESOL. J. 8, 10 (2001) (identifying comments of Samuel Estreicher that ADR is being increasingly used in employment disputes since 1991 and that a key reason for this growth was "in part a response to the initiation of jury trials [in] the discrimination area" at that time and "the desire [of employers] to be free of the unpredictability of jury awards"); Green, *Opposing Excessive Use*, *supra* note 16,

Part I of this Essay addresses the enforcement of Title VII from its promise-filled origins up to its currently grim results in the courts. It also highlights recent approaches that embrace ADR as a viable option in response to the 1991 amendments to Title VII, which allowed a right to a jury trial along with compensatory and punitive damages in certain cases. Part II explores the opportunity for interest-convergence as a means of dealing with the significant problems of race in our society that infect the workplace; the opportunity for interest-convergence arises out of strong interests in diversity, espoused by a number of leading Fortune 1000 companies. Part III proposes certain areas of focus to merge the interests of employees seeking racial justice in the workplace under Title VII and through the use of ADR with incentives that many corporate employers have shown that they are ready to accept by embracing diversity. Finally, this Essay concludes that future enforcement under Title VII must focus on a balance of allowing various procedures (courts and ADR) to resolve discrimination claims as part of an overall creative approach in designing workplace conflict resolution systems. These systems can function according to the underlying principle of interest-convergence through dispute resolution processes that allow for the betterment of Black workers and society as a whole while matching these goals with incentives for employers to pursue these matters as well.

#### I. RESOLVING EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII AT FORTY AND AFTER A DECADE OR MORE OF INCREASING USE OF ADR

The Civil Rights Movement of the 1950s and 1960s fostered a great beginning to the eradication of race discrimination in the workplace. This movement culminated on July 2, 1964 with the signing, by President Lyndon B. Johnson, of the Civil Rights Act of 1964 and its

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at 96 n.86 (explaining the prospect of jury trials and their unusual but sometimes highly-publicized results along with their uncertainty as being the concern that led employers to increasingly use arbitration for employment discrimination claims) (citing Theodore O. Rogers, *The Procedural Differences Between Litigation in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 640 (2001)); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1423 & n.97 (2004) (finding that "employers see the litigation system as a negative lottery" based on employers' fears of juries); see also Francis A. Spina, *Jury Selection in Employment Discrimination Cases*, FOR THE DEFENSE, Mar. 1994, at 25, 26 (assuming that most jurors are biased against employers because they "have had unhappy experiences with superiors on the job" and finding that "[o]ne need only consider the glee with which plaintiffs' attorneys welcomed the jury trial right granted by the Civil Rights Act of 1991 to recognize that the employer" starts off with "two strikes" against it when facing a jury trial under Title VII).



ban on discrimination in employment under Title VII.<sup>20</sup> Passage of Title VII was not easy; it involved the longest debate in congressional history, and President John F. Kennedy had been skeptical about getting enough votes to pass the law.<sup>21</sup> The assassination of President Kennedy, however, galvanized the passage of Title VII.<sup>22</sup>

The Equal Employment Opportunity Commission (EEOC), the agency tasked with enforcing Title VII, recently co-sponsored three programs to commemorate the fortieth anniversary of Title VII and held them at Georgetown Law School.<sup>23</sup> Each program traced certain periods from the origins of Title VII to the present.<sup>24</sup> The first panel, titled "First Principles—Enacting the Civil Rights Act and Using the Courts to Challenge and Remedy Workplace Discrimination," was held on Tuesday, June 22, 2004.<sup>25</sup> The second panel, titled "Expanding the Reach—Making Title VII Work for Women and National Origin Minorities: Pregnancy, Harassment, and Language Discrimina-

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20. Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 316 (2001) [hereinafter Green, *Proposing a New Paradigm*] (describing the signing of the Civil Rights Act of 1964 into law on July 2, 1964 and its inclusion of Title VII).

21. *Id.* at 317-23 (describing the difficult tasks and background problems involved with passing the legislation that became the Civil Rights Act of 1964); see also Linda Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 RUTGERS L. REV. 707, 708 (1985) (finding that Title VII did not result as a "clear victory, drafted by the victors and signed by the vanquished" and instead, it represented "the result of a battle of words and votes in the Congress and the White House" along with "[a] very fierce fight, accompanied by unprecedented filibuster efforts and rare cloture votes," that "occurred before the legislation . . . became law.").

22. See Judith Kilpatrick, *Wiley Austin Branton and the Voting Rights Struggle*, 26 U. ARK. LITTLE ROCK L. REV. 641, 673 (2004) (describing how President Johnson was determined to make passage of the legislation a "memorial" to President Kennedy); James M. McGoldrick, *The Civil Rights Cases: The Relevancy of Reversing a Hundred Year Plus Error*, 42 ST. LOUIS U. L.J. 451, 464-65 (1998) (describing difficulties with race and the law from the Reconstruction Era until the Civil Rights Act of 1964, which passed after President Kennedy's death, and acknowledging the actions of President Johnson, who leveraged the death of Kennedy to maneuver Congress into passing civil rights legislation); see also David Barton Smith, *Healthcare's Hidden Civil Rights Legacy*, 48 ST. LOUIS U. L.J. 37, 49 (2003) ("President Lyndon B. Johnson turned the passage of Kennedy's proposed civil rights bill into the only appropriate way to honor the death of our nation's fallen leader."); Amelia K. Duroska, Note, *Comparable Work, Comparable Pay: Rethinking the Decision of the Ninth Circuit Court of Appeals in American Federation of State County, and Municipal Employees vs. Washington*, 36 AM. U. L. REV. 245, 254 n.54 (1986) (stating that passage of Title VII was "partially due to the tragic death of President Kennedy" because it became an "explosive force enabling passage of a civil rights agenda").

23. See Celebrating the 40th Anniversary of Title VII, available at <http://www.eeoc.gov/abouteeoc/40th/panel> (last visited Sept. 24, 2004).

24. *Id.*

25. See Celebrating the 40th Anniversary of Title VII: First Principles—Enacting the Civil Rights Act and Using the Courts to Challenge and Remedy Workplace Discrimination, available at <http://www.eeoc.gov/abouteeoc/40th/panel/firstprinciples.html> (last visited Sept. 24, 2004) [hereinafter First Principles]. A transcript of these proceedings may be found at <http://www.eeoc.gov/abouteeoc/40th/panel/40thpanels/panel1/transcript.html> (last visited Sept. 24, 2004) [hereinafter Panel 1 Transcript First Principles].

tion,” was held on Wednesday, June 23, 2004.<sup>26</sup> The third and final panel, titled “Closing the Gaps—Making Title VII More Effective for All: Damages, Jury Trials, and the Civil Rights Act of 1991,” was held on Wednesday, June 30, 2004.<sup>27</sup> Following that framework and highlighting the impact of ADR, I also believe there were three significant periods involved with the enforcement of Title VII: from the great expectations at the time of its passage; to the hopeful possibilities as the law initially developed but followed by major disappointment as the Supreme Court increasingly stymied the law and reached a crescendo with several disappointing decisions in 1989; and then most recently, over the last decade or so, when ADR has started to flourish at the same time as the ramifications of the 1991 Civil Rights Act amendments, including the right to a jury trial and expanded remedies, have become apparent.

A. Enforcement Under Title VII: Grandiose Expectations with a Focus on Private Suits and Charge Processing, 1964-1972

“When Title VII was passed, many of us had extremely high hopes. We expected that this statute was literally going to transform America, and usher in a complete world of equal employment opportunity.”<sup>28</sup> This comment by William Robinson, the moderator for the first panel at the EEOC’s fortieth anniversary program, exemplifies the hype and the euphoria which resulted from the passage of Title VII. Unfortunately, one of the initial problems with Title VII involved a compromise that led to the formation of the EEOC as an enforcement agency with no cease and desist powers. Essentially, the

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26. See Celebrating the 40th Anniversary of Title VII: Expanding the Reach—Making Title VII Work for Women and National Origin Minorities: Pregnancy, Harassment, and Language Discrimination, available at <http://www.eeoc.gov/abouteeoc/40th/panel/expanding.html> (last visited Sept. 24, 2004) [hereinafter Expanding]. A transcript of these proceedings may be found at <http://www.eeoc.gov/abouteeoc/40th/panel/40thpanels/panel2/transcript.html> (last visited Sept. 24, 2004) [hereinafter Panel 2 Transcript Expanding].

27. See Celebrating the 40th Anniversary of Title VII: Closing the Gaps—Making Title VII More Effective for All: Damages, Jury Trials, and the Civil Rights Act of 1991, available at <http://www.eeoc.gov/abouteeoc/40th/panel/closinggaps.html> (last visited Sept. 24, 2004) [hereinafter Closing Gaps]. A transcript of these proceedings may be found at <http://www.eeoc.gov/abouteeoc/40th/panel/40thpanels/panel3/transcript.html> (last visited Sept. 24, 2004) [hereinafter Panel 3 Transcript Closing Gaps].

28. See Panel 1 Transcript First Principles, *supra* note 25 (comments of moderator William L. Robinson, law professor at the University of the District of Columbia); see *id.* (describing comments of panelist, Julius Chambers, who remembered the “enthusiasm” in the “private community” about the passage of Title VII and how this statute along with the “announcement of *Brown v. Board of Education*” was “going to really open up opportunities for minorities and women”).

EEOC was doomed to start off as an agency focused on handling and processing charges rather than being a key player in the enforcement of the statute.<sup>29</sup> Instead, private lawsuits in federal court formed the major enforcement mechanism under Title VII.<sup>30</sup> This meant that a heavy emphasis on the development of rights under Title VII has been placed in the hands of federal judges.<sup>31</sup>

During the early years, many of the key lawsuits that were successful in establishing major rights for claimants arose.<sup>32</sup> Several of those lawsuits ended up in front of the Supreme Court including *Griggs v. Duke Power*,<sup>33</sup> *McDonnell Douglas Corp. v. Green*,<sup>34</sup> and *Albermarle Paper Company v. Moody*.<sup>35</sup> These were all “cases with expansive dicta and trail blazing impact.”<sup>36</sup>

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29. See Green, *Proposing a New Paradigm*, *supra* note 20, at 322-23 (describing the initial creation of the EEOC as a toothless tiger of an agency based upon the compromise that prevented the EEOC from having any cease and desist powers).

30. See Panel 1 Transcript First Principles, *supra* note 25 (describing comments of Julius Chambers about filing the first 850 charges after Title VII became effective in 1965 and discussing the bringing of key precedents in support of the law between 1965 and 1989 including key Supreme Court cases, *Albermarle Paper* and *Griggs v. Duke Power*); see also Robert E. Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225 (1976); Janice Madden & Jennifer Wissink, *Achieving Title VII Objective at Minimum Social Costs: Optimal Remedies and Awards*, 37 RUTGERS L. REV. 997, 999-1013 (1985) (describing the importance of private lawsuits in employment discrimination and how attorneys' fees for prevailing plaintiffs played a major role in early cases and how they create a disincentive for employers to discriminate).

31. See Lee Modjeska, *The Supreme Court and the Ideal of Equal Employment Opportunity*, 36 MERCER L. REV. 795, 797, 803, 810 (1985) (noting that rather than giving the EEOC full adjudicatory authority, Title VII, even after its 1972 amendments, is to be “enforced by means of private party, EEOC, or attorney general de novo civil actions in federal court,” discussing the “private attorney general concept” in granting attorneys' fees to prevailing plaintiffs' counsel, and stating that “current Title VII process relies heavily on the private civil action enforcement mechanism, with the aggrieved individual required to secure private counsel for prosecution of the employment discrimination claim”).

32. See Robert E. Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 961 (1978) (highlighting the significance of many early private enforcement cases in moving protections under Title VII forward); James E. Jones, Jr., *Some Reflections on Title VII of the Civil Rights Act of 1964 at Twenty*, 36 MERCER L. REV. 813, 820 (1985) (finding that “many good court decisions emerged in the early years” of Title VII).

33. 401 U.S. 424 (1971) (establishing the disparate impact theory for bringing claims of discrimination under Title VII when an employer's policies such as a test or a high school diploma were neutral requirements on their face but still involved actionable discrimination due to the disproportionate effect on members of a protected class).

34. 411 U.S. 792 (1973) (establishing framework for proving intentional discrimination by circumstantial evidence under Title VII).

35. 422 U.S. 405 (1975) (extending the disparate impact theory from *Griggs* to professionally developed tests).

36. Jones, Jr., *supra* note 32, at 842.

B. Enforcement Under Title VII: EEOC Enforcement Possibilities and Increasing Legal Limitations, 1972-1991

Meanwhile, during most of the first decade of enforcement under Title VII, the EEOC became engrossed with its primary role of handling and processing charges because it could not even seek to enforce any of its findings from those charges.<sup>37</sup> The 1972 amendments to Title VII did extend power to the EEOC to enforce its own findings by filing separate lawsuits.<sup>38</sup> These amendments also expanded coverage to state and local governments and enlarged the EEOC's jurisdiction by reducing the number of employees needed by an employer to be covered by the statute from twenty-five to fifteen employees.<sup>39</sup> Nevertheless, the underlying assumption in the 1972 amendments remained that private lawsuits would be the primary mechanism for employees to seek relief. At first blush, the amendments to Title VII in 1972 finally gave the EEOC some enforcement rights and suggested a ray of hope for the EEOC to start to play a major role in the legal enforcement of Title VII.

Unfortunately, the possibilities presented by the 1972 amendments to Title VII failed to translate into any significant enforcement impact by the EEOC as its charge backlog hindered it from focusing on making a significant impact.<sup>40</sup> With the increasing jurisdiction of charges to be handled by the EEOC after 1972, its backlog of charges became a major priority for the organization. In 1979, EEOC Chair Eleanor Holmes Norton implemented a rapid charge processing program that involved fact finding conferences. This apparently led to a large number of charges being dismissed by settlement and it fostered a significant reduction in the EEOC's backlog.<sup>41</sup>

At the time Clarence Thomas became the EEOC Chair in 1982, employers were upset about allegedly being coerced to settle unsub-

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37. Green, *Proposing a New Paradigm*, *supra* note 20, at 323-34 (describing the problems developed for the EEOC in handling and processing its backlog of charges).

38. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 5 U.S.C. and 42 U.S.C.).

39. *Id.*

40. Green, *Proposing a New Paradigm*, *supra* note 20, at 325 (asserting that "poor leadership, lack of funding, expanded responsibilities and coverage and a growing concentration on the backlog of charges became the focus of the EEOC in the 1970s"); Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 *YALE L. & POL'Y REV.* 219, 219 (1995) ("[R]ace discrimination in employment remains pervasive despite three decades of government effort" and asserting that the EEOC has "been constrained to focus on processing individual charges of discrimination" rather than being able to "concentrate on combating broader unlawful practices.").

41. Green, *Proposing a New Paradigm*, *supra* note 20, at 329.

stantiated claims under the rapid charge processing program.<sup>42</sup> Thomas addressed their concerns by switching to a full investigation focus that ended up expanding the backlog of charges that had been shrinking under the rapid charge processing program. Then, in 1990, when Evan Kemp became the chair, the EEOC's jurisdiction and its backlog increased even further with the additional coverage of disability claims.<sup>43</sup>

During this same period, most of the earlier cases expanded upon some key concepts regarding proof in systemic claims under Title VII including *Dothard v. Rawlinson*,<sup>44</sup> *International Brotherhood of Teamsters v. United States*,<sup>45</sup> and *Hazelwood School District v. United States*.<sup>46</sup> After that, a number of cases decided during this period focused on procedural technicalities.<sup>47</sup> Finally, during its 1988-1989 term, the Supreme Court decided several controversial cases regarding employment discrimination matters including: *Patterson v. McLean Credit Union*,<sup>48</sup> *Lorance v. AT&T Technologies*,<sup>49</sup> *Martin v. Wilks*,<sup>50</sup> *Price Waterhouse v. Hopkins*,<sup>51</sup> and *Wards Cove Packing Co. v. Atonio*.<sup>52</sup> These decisions, among others decided by the Court that term, caused many civil rights advocates to believe that the Supreme Court's scaled-down approach to Title VII had become a significant concern.

In response, Congress formed a major effort to amend Title VII through legislation that eventually became the Civil Rights Act of 1991.<sup>53</sup> The first effort to pass the legislation, the Civil Rights Act of

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42. *Id.*

43. *Id.*

44. 433 U.S. 321 (1977) (describing the burden of proof in establishing disparate impact regarding females selected for prison guard positions).

45. 431 U.S. 324 (1977) (describing the proof structure in using statistics to establish a systemic disparate treatment claim).

46. 433 U.S. 299 (1977) (describing the relevant labor market to consider in assessing the pool of candidates to consider for establishing a systemic disparate treatment claim).

47. See Jerome McCristal Culp, Jr., *A New Employment Policy for the 1980s: Learning from the Victories and Defeats of Twenty Years of Title VII*, 37 RUTGERS L. REV. 895, 905-06 (1985) (finding that an "inordinate preoccupation with the procedural aspects of Title VII" became the unnecessary focus of Title VII jurisprudence between 1979 and 1985, including a large number of cases relating to issues on the statutes of limitations).

48. 491 U.S. 164 (1989).

49. 490 U.S. 900 (1989).

50. 490 U.S. 755 (1989).

51. 490 U.S. 228 (1989).

52. 490 U.S. 642 (1989).

53. See Robert E. Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993); Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994); Reginald C. Govan, *Honorable Compromises*

1990, failed because President George H.W. Bush indicated that he would refuse to sign a “quota bill” and big business became concerned about proposed terms that went beyond the problems created by the 1989 decisions by granting a right to a jury trial and the availability of compensatory and punitive damages.<sup>54</sup> Accordingly, when the Civil Rights Act of 1990 was presented to President George H.W. Bush, he vetoed it.<sup>55</sup> However, the specter created by the Clarence Thomas-Anita Hill debate on sexual harassment engulfed the nation during the Thomas Supreme Court confirmation hearings and inspired President George H.W. Bush to finally sign the Civil Rights Act of 1991 on November 7, 1991.<sup>56</sup>

### C. Enforcement Under Title VII: Backlog Reduction, Growth of ADR and Fleshing Out the Effects of the Civil Rights Act of 1991, 1991-2004

The passage of the Civil Rights Act of 1991 led to another time period of great expectations under Title VII law.<sup>57</sup> Meanwhile, in

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*and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1 (1993); Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304 (1992); Jerome McCristal Culp, Jr., *Neutrality, The Race Question, and the 1991 Civil Rights Act: The “Impossibility” of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993).

54. See Govan, *supra* note 53, at 69, 148-49; see also Panel 3 Transcript Closing Gaps, *supra* note 27 (describing comments of Charles Shanor regarding the 1989 cases that led to the Civil Rights Act of 1991); see *id.* (describing comments of Jeffrey Blattner about those cases that led to the Civil Rights Act of 1991 and the opposition of the Bush administration to primarily two provisions, first, the reversal of *Wards Cove* and a requirement of business necessity, and second, the right to jury trial with compensatory and punitive damages for intentional discrimination).

55. Govan, *supra* note 53, at 151.

56. See STUART H. BOMPEY & JOHN D. GIANSELLO, *THE CIVIL RIGHTS ACT OF 1991, AN ANALYSIS 1* (1991) (finding that “[a]nother significant impetus for the enactment was rising concern over harassment in the workplace, dramatized on the eve of the compromise agreement by the sexual harassment allegations against now Justice Clarence Thomas, and the national attention given to the hearings on those allegations.”); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1448 n.19 (1996); Peter Schuck, *Affirmative Action: Past, Present & Future*, 20 YALE L. & POL’Y REV. 1, 52 (2002) (describing how the fear of political defeat and a Congressional override encouraged President George H.W. Bush to sign the Civil Rights Act of 1991 after the Thomas-Hill debacle); David R. Wade & Curtiss K. Behrens, *Opening Pandora’s Box: Circuit City v. Adams and the Enforceability of Compulsory, Prospective Arbitration Agreements*, 86 MARQ. L. REV. 1, 26 n.146 (2002) (noting that the Civil Rights Act of 1991 was passed right after the allegations of sexual harassment made by Anita Hill clouded the Supreme Court nomination of Clarence Thomas).

57. See Panel 3 Transcript Closing Gaps, *supra* note 27 (comments of Jeffrey Blattner that after an exhausting fight, sponsors of the Civil Rights Act of 1991 believed they had achieved four goals: (1) “placed Congress decisively on record against the kind of narrow interpretation of the civil rights law manifested in the decisions of the October 1988 Supreme Court term”; (2) “afforded victims for racial or sexual harassment and other forms of on-the-job discrimination a more effective, though by no means perfect, remedy” given the “caps on the damages available”;

1994, EEOC Chair Gilbert Cassellas adopted a priority charge handling procedure that has significantly assisted in reducing the EEOC charge backlog.<sup>58</sup> His successor, Ida Castro, continued to make significant gains in reducing the charge backlog by applying the priority charge procedure. And her successor and current EEOC Chair Cara Dominguez continues to see significant reductions in the backlog. In 2003, the EEOC reported that its “backlog declined 10[%] to the lowest level in 31 years.”<sup>59</sup>

A major factor in this reduction was the EEOC’s development of a mediation program. The EEOC’s mediation program started as a pilot program conducted in four field offices in 1991.<sup>60</sup> With the success of that program, the EEOC established a taskforce to review further use of the program.<sup>61</sup> In 1994, that taskforce found that mediation was an appropriate tool in resolving employment discrimination claims, and it recommended the development of an expanded ADR program.<sup>62</sup> The EEOC finally launched its voluntary mediation program in February 1999, and it became functional at every district office nationwide in April 1999.<sup>63</sup>

Ironically, at the same time that Congress passed the Civil Rights Act of 1991 and allowed jury trials and compensatory/punitive damages up to \$300,000 for intentional discrimination claims, the Supreme

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(3) “our response to the *Wards Cove* decision, we thought, would make employers think twice before adopting unnecessary employment practices that had a disparate impact on racial minorities or women”; and (4) “we thought we had taken several concrete steps to make it a little less difficult for victims of discrimination, like Ann Hopkins, to secure redress in the courts”).

58. See Gilbert F. Cassellas, *The Equal Employment Opportunity Commission: Challenges for the Twenty-First Century*, 1 U. PA. J. LAB. & EMP. L. 1 (1998).

59. See *Job Bias Complaints at 7-Year High*, CHI. TRIB., Feb. 7, 2003, at Bus. Sect. (noting that federal discrimination complaints filed by workers against private employers jumped more than four percent in 2002 to the highest level in seven years with allegations of race and gender constituting the majority of the complaints at a time when its “backlog declined [ten] percent, to the lowest level in [thirty-one] years”).

60. History of the EEOC Mediation Program, <http://www.eeoc.gov/mediate/history.html> (last visited Sept. 24, 2004).

61. *Id.*

62. *Id.* The EEOC based its decision on the recommendations of the taskforce and the outstanding leadership from Commissioners who led the taskforce. See Commission Votes to Incorporate Alternative Dispute Resolution into Its Charge Processing System; Defers Decisions on State and Local Agencies, <http://www.eeoc.gov/press/4-28-95a.html> (last visited Sept. 24, 2004). At that time, then EEOC Commissioner Paul Miller stated his belief that ADR would assist in charge processing because it would “facilitate early resolution where agreement was possible” and “it frees up resources for use in identifying, investigating, and litigating more complex cases of employment discrimination.” *Id.* Likewise, former Commissioner R. Gaul Silberman stated that she believed by making ADR a part of the EEOC’s “charge processing system,” it would “help better serve . . . constituents” and the EEOC’s “law enforcement . . . mission.” *Id.*

63. See Nancy Montwieler, *EEOC’s New Nationwide Mediation Plan Offers Options of Informal Settlements*, DAILY LAB. REP. (BNA) No. 29, Feb. 12, 1999, at C-1.

*The Promise of ADR as Interest-Convergence*

Court issued its *Gilmer v. Interstate/Johnson Lane*<sup>64</sup> decision. The *Gilmer* decision opened the door to using arbitration for Title VII claims. Although there was still some question about whether a direct agreement between an employer and an employee would be enforceable after *Gilmer*, most of the lower courts used the *Gilmer* decision as a basis to expand the enforcement of arbitration agreements to matters involving statutory employment discrimination claims.<sup>65</sup>

After a decade of uncertainty about whether *Gilmer* actually applied to employment agreements, the Supreme Court, in *Circuit City Stores, Inc. v. Adams*,<sup>66</sup> answered the question left open in *Gilmer* and made it very clear that agreements to arbitrate future employment disputes can be enforceable when entered into directly between an employer and an employee.<sup>67</sup> After *Gilmer* inspired the modern day growth of using arbitration to resolve statutory discrimination disputes, a confluence of events arose to spread the use of ADR for Title VII claims during this period.

Since the *Gilmer* decision in 1991, the Supreme Court has generally supported and endorsed the arbitration of all forms of agreements. In *Wright v. Universal Maritime Service Corp.*,<sup>68</sup> the Court addressed the issue of whether an agreement for mandatory arbitration would be enforceable in a union setting that involved a collective bargaining agreement.<sup>69</sup> The Court decided that for a union to waive an individual employee's right to pursue a discrimination claim in a judicial forum, a clear and unmistakable relinquishment of the right to pursue the statutory claim in question must exist.<sup>70</sup>

In *EEOC v. Waffle House, Inc.*,<sup>71</sup> the Court found that the EEOC could bring an enforcement action for all equitable and legal remedies available under law, including back-pay, reinstatement, and compensatory and punitive damages, even though the individual employee who filed the charge had agreed with the employer to arbitrate any employment disputes.<sup>72</sup> This decision raised the importance of collective public rights that the EEOC must vindicate through its enforce-

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64. 500 U.S. 20 (1991).

65. See Green, *Debunking the Myth*, *supra* note 17, at 411 & n.39, 412 & n.42 (citing cases).

66. 532 U.S. 105 (2001).

67. See *id.* at 119.

68. 525 U.S. 70 (1998).

69. *Id.* at 72.

70. *Id.* at 79-80.

71. 534 U.S. 279 (2002).

72. *Id.* at 297-98.



ment policies.<sup>73</sup> Because the EEOC is not a party to the arbitration agreement, it can still seek all the same relief in court that the individual employee may not seek because of the arbitration agreement.<sup>74</sup> If the employee has already recovered remedies in arbitration, any amount received by the employee may limit the final award issued to the EEOC.<sup>75</sup> After *Waffle House*, an employer may still have to defend its actions in court and face a large jury verdict based upon claims of an employee who had agreed to arbitrate those claims. Because the EEOC only takes a small percentage of cases,<sup>76</sup> an employer may find that its arbitration agreement may survive given the limited enforcement activities of the EEOC. If an individual employee files a charge raising a systemic, class-based issue for a large collective of employees, however, the EEOC may be more likely to take the case.<sup>77</sup>

Although there have been criticisms of the use of arbitration, and despite the failure of Congress to pass any successful legislation addressing Title VII since the Civil Rights Act of 1991, a number of commentators, including me, have written articles proposing legislative changes that would address dispute resolution issues for employment discrimination claimants.<sup>78</sup> Regardless of the suggestions of academ-

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73. See *id.* at 290.

74. *Id.* at 292.

75. *Id.* at 296.

76. See Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 175 n.5 (2003). But see Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 LAB. LAW. 33, 35 (2003) (describing an increase in class action filings by the EEOC from 1997 to 2001 up to an overall increase by 2001 to "210 class cases," which represented "[forty] percent of the total docket" and asserting that the increase in filings was due to an increase in the staffing of attorneys at the EEOC during this time period). Professor Ann C. Hodges has also asserted that a problem with relying on the EEOC to right the wrongs that may occur through mandatory arbitration is that the EEOC normally starts its enforcement efforts based upon an employee-filed charge, and if employees have entered into agreements to arbitrate, they may not realize they can file EEOC charges. Hodges, *supra*, at 231-32.

77. See Hawkins, *supra* note 76, at 36 (noting an increase in the filing of class actions by the EEOC). In the EEOC's 1997 enforcement plan, it noted that it would focus on systemic and class-based cases. See Equal Employment Opportunity Commission, U.S. Equal Employment Opportunity Commission National Enforcement Plan, § II(c), at <http://www.eeoc.gov/plan/nep.html> (last visited Sept. 24, 2004) (describing "systemic investigations and litigation" as part of the EEOC's enforcement focus).

78. See, e.g., Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1226-39 (2004) (proposing legislation to amend federal arbitration laws and address discriminatory arbitrator selection); Green, *Proposing a New Paradigm*, *supra* note 20, at 336 (proposing legislation to require the mediation of employment discrimination claims as an agency enforcement requirement under Title VII); Lamont E. Stallworth et al., *Discrimination in the Workplace: How Mediation Can Help*, 56 DISP. RESOL. J. 35 (2001) (proposing the adoption of legislation first introduced in Congress in 2000 called the National Employment Dispute Resolution Act which would require employers who are federal contractors to offer mediation).

ics, there are absolutely no chances that any members of Congress can mount successful civil rights legislation any time soon to amend or correct any current enforcement issues or concerns under Title VII as compared to 1989 when the efforts that led to the Civil Rights Act of 1991 began.<sup>79</sup> At the time of the last major legislative change to Title VII, there was significant support for that change in the then-Democratic controlled Congress.<sup>80</sup> Unfortunately, this kind of support for civil rights legislation does not exist today as even the most recently proposed civil rights legislation, sponsored by four Democrats in a Republican-controlled Congress, has failed to garner bipartisan support.<sup>81</sup> Since 1991, and despite the introduction of a number of bills to address the use of ADR in statutory employment discrimination disputes, no legislation has even reached the President's desk.<sup>82</sup> Recent commentators have exclaimed that employment discrimination cases are difficult to win and tried to explain the reasons for those difficulties.<sup>83</sup> Some of the reasons that have been espoused to describe why employees, and especially Black employees, face daunting obstacles in seeking justice under Title VII include: limited enforcement mechanisms available and few budgeted funds provided to the primary enforcement agency, the EEOC;<sup>84</sup> the difficult burdens of proof under the statute which lead to early court judgments primarily through the summary judgment process;<sup>85</sup> the focus on intent of the perpetrator

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79. See Sondra Hemeryck et al., Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 508 n.228 (1990) (finding in 1989 that "[o]ver the past decade, [seventy] percent majorities in both houses of Congress have supported major civil rights bills").

80. *Id.*

81. See Kelotra, *supra* note 6.

82. Almost every year, some legislation has been introduced in Congress to try to address the concerns about adhesion agreements being used to require employees to agree to arbitrate statutory discrimination claims, and none of that legislation has passed. See Feingold, *supra* note 14.

83. See Selmi, *supra* note 11, at 560-61; Sternlight, *supra* note 19, at 1467-82 (describing ten reasons why employment discrimination claims are difficult to pursue and resolve).

84. See Munroe, *supra* note 40, at 219; Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 49 n.81 (1996); Ronald Turner, *A Look At Title VII's Regulatory Regime*, 16 W. NEW ENG. L. REV. 219 (1994). For an earlier critique of the EEOC's ability to enforce Title VII shortly after it was passed, see Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 4-5 (1977).

85. See Robert E. Belton, *Burdens of Pleading and Proof In Discrimination Cases: Toward A Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1280-85 (1981) (criticizing the burdens that are placed on plaintiffs to prove discrimination and the limited burden on the employer to disprove it); Deborah Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1008-09 (1994) (assessing the difficulties in meeting the burden of proof requirements established by the Supreme Court in proving race discrimination under Title VII); Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 573

rather than the effect on the victim as the primary enforcement paradigm;<sup>86</sup> the inability of plaintiffs to obtain legal counsel despite the designed focus of using private individual lawsuits as the primary enforcement tool;<sup>87</sup> the overall judicial hostility towards antidiscrimination law enforcement;<sup>88</sup> the general societal hostility to using the courts for resolution of disputes as a whole;<sup>89</sup> and a growing sentiment that discrimination claims may have less merit in society today than they did in the 1960s when Title VII was passed.<sup>90</sup>

Beyond these problems, there is no evidence suggesting the current members of Congress will be able to coalesce regarding any substantive changes in employment discrimination law or its relationship with ADR. Even some panelists from the EEOC's fortieth Anniversary commemoration of Title VII readily acknowledged their beliefs that our current Congress would not likely even enact the original Title VII statute today.<sup>91</sup> Instead, recent political events suggest seeking

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(2003) (criticizing the Supreme Court's finding that proof of pretext by the employee or any showing that the reason offered by the employer for its actions is not true does not prevent a fact finder from still concluding that an employee has failed to meet the required burden of plaintiffs to prove that discrimination has occurred); Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 387-88 (1994) (deriding the political nature of the Supreme Court which allegedly led it to change the structure of circumstantial proof of intent in Title VII cases after twenty years of clarity); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2230-32 (1995) (attacking the Supreme Court's shifting burden of production and overall proof requirements for Title VII claims); Leland B. Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 73 (2000) (attacking the growing court use of summary judgment for failure to establish intent of the employer as the alleged perpetrator); Michael J. Zimmer, *Slicing & Dicing Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 585 (2001) (reviewing the analysis of some courts in Title VII summary judgment analysis as involving the slicing and dicing away of all of the plaintiff's evidence as part of the process of allowing the employer to prevail).

86. See Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1978) (questioning the Supreme Court's analysis that focuses on the mindset and acts of the alleged perpetrator rather than the consequences and conditions for the victim).

87. See Green, *Finding Lawyers*, *supra* note 1, at 64 n.23.

88. Clermont & Schwab, *supra* note 11; John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785 (2003) (asserting that a lack of judicial activism based upon a fear of social reform has played a consistent and major role in limiting civil rights law).

89. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 515-18 (2004).

90. See Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 583-92 (2003).

91. See Panel 2 Transcript Expanding, *supra* note 26. Christopher Ho stated in his closing remarks:

[O]ne thing that gives me pause, is that I'm not sure Title VII could be enacted if it were up before the Congress today, let alone would we be able to get such great deci-

new legislation or relying on creative legal strategies to regulate employer actions should no longer remain the focus of those intending to make the workplace fairer for Blacks, especially with respect to the use of ADR.<sup>92</sup> Although such legislative options and legal strategies should not be forgotten or completely dismissed, they simply do not provide any pragmatic examples for change or improvement at this time. Instead, Black employees and their advocates must focus on finding approaches that advance their dispute resolution concerns in a way that matches with issues of concern for the majority.

Recent analysis under Title VII may offer a modicum of hope for future claimants. Under the decision of the Supreme Court in *Desert Palace, Inc. v. Acosta*,<sup>93</sup> there may be a chance for employees to get around the difficult proof structures developed in earlier cases. Because of the Civil Rights Act of 1991 and the finding in *Acosta* that circumstantial evidence may support a mixed motive claim, many have raised questions as to whether the burdensome *McDonnell Douglas* circumstantial structure of proof is dead.<sup>94</sup> I fail to see many

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sions such as [*Griggs v. Duke Power* and *Albermarle Paper*]. That is totally not clear to me, so if that is one measure of progress, I'm not sure if we have made any.

*Id.* The closing comments of Jocelyn Frye espouse the same sentiment:

I agree with Chris. I think it's instructive that, you know, we can't say confidently that it was before this Congress today, that we would pass it, and I think that speaks to a number of issues, and one of the things it speaks to is perhaps our tendency to sort of be - to have a short attention span, you know, to sort of think we passed a law, we fixed a problem, let's move on.

*Id.*

92. Shortly after the 2004 election, President George W. Bush announced that he had gained "political capital" from his victory over Senator John Kerry and would start promoting his agenda which included items involving tort reform, etc. See *Spent Political Capital Will Determine Success*, *MACON TELEGRAPH*, Nov. 8, 2004, at A6 (describing focus of President Bush's domestic agenda of Social Security changes, IRS and tort reform, and education improvements, but no civil rights agenda). But see Jeffrey Stempel, *Not So Peaceful Co-Existence: Inherent Tensions in Addressing Tort Reform*, 4 *NEV. L.J.* 337, 339 (2004) (describing how tort reform is "so divisive" because the "social forces at war over the tort system are also sufficiently balanced, such that neither side is likely to gain a clear upper hand capable of imposing its will on the rest of society"). With a Republican-controlled Congress and the issue of employment discrimination or ADR reform missing from President Bush's agenda, it is very unlikely that any legislative change will occur. With respect to President Bush's tort reform agenda, Professor Jeffrey Stempel recently highlighted how divided our country is politically, based upon the Presidential election of 2000 with its divisive approach to red states and blues states and two figures whose views were clearly contrary resulting in an election outcome dependent on a single state. *Id.* at 362-63 ("Where the explicit partisan politics are so divided, it is no surprise that views on the legal system are sharply divided."). Although the results in 2000 that Professor Stempel refers to do in fact differ somewhat from those in 2004, the clear division between blue states and red states reoccurred in that Kerry would have won the election if he had won the state of Ohio as opposed to how one state, Florida, played the determinative role in the 2000 election.

93. 539 U.S. 90 (2003).

94. See Jeffrey A. Van Detta, "*Le Roi Est Mort; Vive Le Roi*": An Essay on the Quiet Demise of *McDonnell Douglas* and the Transformation of Every Title VII Case After *Desert Palace*,

situations where it would not be to a plaintiff's advantage to try and get a mixed motive jury instruction and shift the burden of persuasion to the employer.<sup>95</sup> In predicting the problem (that *Acosta* highlights) regarding distinguishing mixed motive versus single motive cases, Professor George Rutherglen asserted more than 10 years ago the only "comprehensible" way to address this issue is "by refusing to submit one of two issues—either pretext or mixed motivation—to the jury."<sup>96</sup> In that instance, the best approach for an employee would be to give up the *McDonnell Douglas* methodology and obtain a mixed motive instruction; if the employee is going to lose, it is better to lose by having shifted some of the burden of persuasion to the employer.<sup>97</sup>

## II. CORPORATE DIVERSITY RATIONALES AND RACIAL JUSTICE IN THE WORKPLACE THROUGH ADR: POTENTIAL CONVERGING INTERESTS

Derrick Bell has already acknowledged that a couple of recent Supreme Court decisions offer an excellent example of how his interest-convergence theory works.<sup>98</sup> In two 2003 cases involving the University of Michigan and the enforcement of its race-based affirmative action programs for its respective law school and undergraduate pro-

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Inc. v. *Costa into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71 (2003) (asserting the end of *McDonnell Douglas* after *Acosta*); Panel 3 Closing the Gap, *supra* note 27 (describing comments of federal judge Mark W. Bennett criticizing those who claim that *McDonnell Douglas* is dead due to *Acosta* but asserting that the difficulties from *Acosta* are more prevalent at trial; and speculating that the ruling may be more harmful to plaintiffs than employers as it may cut off awards for employees while giving their attorneys fees, which leaves employees with little money, a very well-compensated counsel, and a big tax bill because of the large attorneys' fees despite little actual recovery).

95. See George Rutherglen, *Reconsidering Burdens of Proof, Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL'Y & L. 43, 69 (1993) (predicting problems in instructing juries when there is a mixed-motive case and how employers may fear that by shifting the burden of persuasion to the employer "the jury will impose most of the burden of persuasion" on the employer).

96. *Id.* at 71.

97. In two cases decided since *Acosta*, it is not clear how broadly *Acosta* may be applied or whether it will just add another level of analysis to an already difficult proof structure. Compare *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312-13 (5th Cir. 2004) (adopting a modified *McDonnell Douglas* approach that adds a final stage of *Acosta* analysis to the *McDonnell Douglas* scheme and applying it to the case under review, the Court ended up reversing a summary judgment ruling in favor of the employer), with *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004) (finding that the effect of *Acosta* is one of a trial burden as it involved a jury instruction and that it does not affect the summary judgment analysis under Title VII through *McDonnell Douglas*, which was not even mentioned in *Acosta*).

98. See Derrick A. Bell, Jr., *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) [hereinafter Bell, Jr., *Diversity's Distraction*] ("read together, [The Supreme Court's two recent decisions regarding affirmative action plans at the University of Michigan] provide a definitive example of interest-convergence.").

grams,<sup>99</sup> a number of corporate and military leaders made it clear to the Court through amicus briefs that they found it essential that their organizations have people of color develop as future leaders.<sup>100</sup> Similarly, the needs of the military and global concerns about race played a major factor in enacting Title VII.<sup>101</sup> The focus on racial diversity, which has become the goal for a number of multinational corporations, grows out of a concern for competing effectively in a global economy. With this interest in hand, employers and their desire to hire and maintain a critical mass of employees of color now merges with the interests of Black employees in having fair mechanisms to protect their employment.

With the increasing divisiveness in this country over race,<sup>102</sup> the numerous circumstances in which Black employees may seek vindication under Title VII in the twenty-first century will require a panoply of various dispute resolution options.<sup>103</sup> Under this approach, the par-

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99. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

100. *Grutter*, 539 U.S. at 330-31 (stating that “American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints” and noting that “[h]igh-ranking retired officers and civilian leaders of the United States military” had argued that a “‘racially diverse officers corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’”) (quoting Brief for Julius W. Becton, Jr., et al., *Amicus Curiae* 27).

101. See Hemeryck, *supra* note 79, at 493-94 & nn.112 & 117 (noting that treatment of Black war veterans and condemnation of racial practices in the United States by foreign visitors fostered the civil rights movement of the 1950s, along with developments from the Supreme Court decision, *Brown v. Board of Education*, as the country sought to be a key global leader).

102. Most Blacks and Whites view the issue of race quite differently. See J. Clay Smith, Jr., *Open Letter to the President on Race and Affirmative Action*, 42 *How. L.J.* 27, 27-28 (1998) (describing a 1997 poll finding that “53.2% of most Americans believe [B]lack are less intelligent, 62.2% believe they are less hardworking, and 77.7% believe they have a greater preference for living on welfare than [W]hites.”); Karen L. Ross, Note, *Combating Racism: Would Repealing Title VII Bring Equality to All?*, 21 *SETON HALL LEGIS. J.* 141, 166 n.149 (1997) (comparing views of most Whites from opinion poll who believe “that racism is an aberration, a flaw of individuals that is rapidly diminishing,” with poll views from Blacks that “racism is a systematic flaw, permanently imbedded in society and infecting attitudes of individuals who think they know better”) (citations omitted); Dennis Archer, *Eradicating Racial and Ethnic Bias in the Courts*, *MINORITY TRIAL LAWYER*, Spring 2003, at 1 (describing a survey of lawyers where “[n]early 70[%] of [B]lack lawyers said there was the same amount of racial bias in the justice system as in society at large” and, in contrast, “only 40% of [W]hite lawyers felt “the justice system’s bias mirrored society’s”).

103. This model probably resembles more of the multi-door courthouse that Professor Frank Sander mentioned in his important statements made in 1976 that were a precursor to the modern day ADR movement. See Frank E. A. Sander, *Varieties of Dispute Processing*, 70 *F.R.D.* 111, 130-31 (1976) (referring to Professor Sander’s vision of many options for dispute resolution by analogizing it to a multi-room courthouse where participants would go to a different room depending on their particular dispute); see also Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 *OHIO ST. J. ON DISP. RESOL.* 1 (2000) (describing the founders of the modern ADR movement and the multi-door courthouse proposal of Frank Sander); Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 *NEV. L.J.* 305

ties match and choose the dispute resolution option, ADR or the courts, for their specific needs in each individual situation.<sup>104</sup> Despite his earlier criticism of ADR as being a concern due to racial prejudice, Richard Delgado has since recognized that increasing racial divisions possibly based on a “right-wing surge in this country . . . over the last few years” may demonstrate that “[t]he equation of higher values with the public sphere is . . . not necessarily true” because “[m]any conservative judges and mean-spirited laws have been put in place.”<sup>105</sup> According to Delgado, we should realize that “conflict is normal” where “society is made up of competing classes in endless struggle: consumers and manufacturers; [W]hites and the descendants of former slaves; workers and factory owners.”<sup>106</sup> Similar to the craftsman with different tools in his toolbox who must select the right tool for the job at hand,<sup>107</sup> Black employees must be allowed to have flexibility in their employment discrimination dispute resolution systems.<sup>108</sup> There can be no single approach to successful dispute resolution for Black claimants under Title VII.

Rather than relying on old mechanisms for change, such as new legislation or successful court strategies, Blacks today must be creative in how they focus their efforts in seeking the eradication of discrimination in the workplace.<sup>109</sup> That creativity must transcend historical

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(2003) [hereinafter Stempel, *Fuzziness*]; Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 308, 324-34 n.26 (1996) (discussing the Pound Conference where Sander proposed his multi-door courthouse idea) [hereinafter Stempel, *Reflections*]. The only difference is that some of the doors that you enter through to resolve your employment discrimination dispute may not be at the courthouse, at all.

104. Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 43 (2002) (describing how the best approach is to apply the right dispute resolution process depending on the type of problem involved).

105. See Delgado, *supra* note 6, at 1399-400.

106. *Id.* at 1401.

107. See Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?* 75 N.Y.U. L. REV. 283, 285 & n.11 (2000) (describing “how marginalized groups may sometimes, jiu-jitsu, fashion, turn the master’s tools into a device for dismantling that famous house.” This is based on “an old civil rights adage [which] holds that one cannot use the master’s tools (civil rights categories) to dismantle his house,” but Delgado argues that you can dismantle that house with “major modification of those tools.”).

108. See Sternlight, *supra* note 19, at 1490-99 (suggesting flexibility in the dispute resolution systems provided to employees seeking discrimination claims in this country and others).

109. In this respect, I disagree with my co-panelist, Lamont Stallworth, who still thinks there is legislation that can pass that will force employers to take certain acts with respect to using mediation fairly in its workplace, if those employers are federal contractors. See Lamont E. Stallworth, *Employing the Law to Provide Early Access to Internal Conflict Management Systems: The Proposed National Employment Dispute Resolution Act*, 48 HOW. L.J. (forthcoming Fall 2005) (promoting the National Employment Dispute Resolution Act (NEDRA)); Stallworth

efforts at using the law to effectuate change. Any creativity must further rely on non-legal interests of employers as a carrot rather than using the force of law as a stick. Then redress for employment discrimination over the next forty years may occur through the myriad approaches to enforcement under Title VII that can continue to develop along with the use of ADR.

The use of the diversity rationale by employers offers an interest-convergence opportunity because employers want this focus.<sup>110</sup> In relying on the amicus briefs from Fortune 1000 companies and military leaders, the *Grutter* decision focused on “the needs of the global marketplace” as the rationale for allowing affirmative action to continue.<sup>111</sup> Frymer and Skretny have asserted the *Grutter* decision is possibly “just another example of what Derrick Bell calls interest-convergence.”<sup>112</sup> They further elaborate, “that civil rights progress only occurs in moments when it benefits [W]hite elites, whether for economic profit or national security.”<sup>113</sup>

“Diversity training is now commonplace in corporate America” and some form of diversity initiative has become a part of most class action discrimination lawsuit settlements involving major corpora-

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et al., *supra* note 78 (proposing NEDRA legislation that would require federal contractor employers to develop mediation programs). Stallworth’s continued stalwart efforts to seek legislative change despite the limited chances of success involve what I call legislative romanticism. I do think that the use of the federal government’s spending power does provide an adequate mechanism to place restraints on employers, and I think others have made that argument. See, e.g., Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. Rev. 1575 (2002). Nevertheless, as a pragmatic approach, I strongly believe that the divergent interests in our society and within our political system will not result in any forthcoming legislation or use of the government’s spending power to regulate employers in the discrimination context. In fact, for those who still are willing to fight that fight, I have decided to call them “legislative romanticists” because they ignore the pragmatic realities of passing such legislation and think that changes in the law are the only way to effectuate change.

110. See Schuck, *supra* note 56, at 51 n.257 (describing how employers had started to rely on regulations regarding racial goals and timetables in hiring and that employers would continue to use them even if they were abandoned by the government); see also Frymer & Skretny, *supra* note 9, at 678 (suggesting that the Supreme Court’s *Grutter* decision embraced a diversity rationale as a form of interest-convergence rather than doing so under a rationale of rectifying past wrongs, an important concern).

111. *Grutter*, 539 U.S. at 330-31.

112. Frymer & Skretny, *supra* note 9, at 678; see also Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present and Future*, 47 How. L.J. 795, 810 n.81 (2004) (describing how interest-convergence according to “Bell suggests that beyond whatever moral arguments may have swayed White elites in favor of desegregation, pragmatic concerns in the post-World War II political and social climate ultimately led White elites to support desegregation”) (citation omitted).

113. Frymer & Skretny, *supra* note 9, at 678.



tions.<sup>114</sup> Professor Michelle Adams recently concluded that arguments for integration must focus on interest-convergence: “The political reality is that integration, when constructed solely from the minority access perspective, lacks a sufficient constituency strong enough to champion it. And in that manner, we have come full circle to the ‘interest-convergence’ idea articulated by Derrick Bell a generation ago.”<sup>115</sup> Although skeptical about other efforts to seek change given the political realities, Adams is “more optimistic about the ability to craft an argument that says: Given that we are a multiethnic society operating in a global economy, integration is absolutely imperative if we seek to be competitive in the twenty-first century.”<sup>116</sup> Likewise, improvements for Black employees must converge around the diversity principle of being a global competitor.

Relying on interest-convergence does have its limits in that it may deny key arguments or positions that are important or even significant.<sup>117</sup> I only suggest that it be a consideration at this point in time where our country is so divided and it would not be realistic to expect change in any other way. That does not mean that we forget or give up other strategies or arguments. It merely places a priority on interest-convergence while there is such a division in the country around issues of race and no key political support for civil rights. Because legal changes remain cyclical, the focus must be on what can keep the movement going forward rather than what the next legal changes should be.<sup>118</sup> In addition to legal means, eventually political means

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114. Michael Selmi, *The Price of Discrimination: The Nature of the Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1306 (2003).

115. Adams, *supra* note 112, at 827 n.168.

116. *Id.* at 827-28.

117. For example, by coalescing around class issues instead of race as part of interest-convergence, we may be missing out on more important problems. See, e.g., Maurice R. Dyson, *Multiracial Identity, Monoracial Authenticity & Racial Privacy: Towards an Adequate Theory of Multiracial Resistance*, 9 MICH. J. RACE & L., 387, 418-19 nn.134-35 (2004) (describing the concern that a focus on class may leave crucial issues of racial disadvantage unaddressed). Likewise, the diversity rationale adopted by the Supreme Court in support of affirmative action which appears to represent interest-convergence neglects the use of affirmative action as being necessary to rectify the wrongs of the past, an important argument that is left out under interest-convergence. See Frymer & Skretny, *supra* note 9, at 678; see also Bell, Jr., *Diversity's Distraction*, *supra* note 98, at 1624-26 (decrying the result of the *Grutter* decision because the diversity rationale is a distraction that ignores the premise of rectifying wrongs against Blacks).

118. See Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759, 761 (2003) (“Like the national economy, law has a cyclical quality to it, depending on, among many things, the political composition of the Supreme Court” and how “[i]t is important for lawyers and law professors immersed in the letter of the law, to recall that civil rights law cannot be relied on exclusively—or even primarily—in the struggle to ensure respect for rights of all Americans.”).

and coalitions “will be necessary to displace [W]hite domination of the electoral process in this country.”<sup>119</sup> But given the results from the recent 2004 elections, it appears that such political coalitions either did not materialize or failed to capture the hearts and minds of America in pursuing civil rights issues. Accordingly, at this time, the only realistic mechanism for change must focus on the convergence of any racial justice interests with the diversity interests of corporate America.

Harvard Law Professor David Wilkins has also noted the significance of the use of the diversity rationale as adopted by the Supreme Court in *Grutter*. Professor Wilkins goes on to recognize that the adoption was based upon the requests of corporate and military leaders.<sup>120</sup> In what Professor Wilkins considered to be one of the most startling and significant events involved in the *Grutter* decision, the Supreme Court “received two briefs in support of the [U]niversity’s policies signed by a veritable who’s who of the country’s largest and most profitable corporations [and] [n]ot a single corporation weighed in on the other side.”<sup>121</sup> Those companies included: “3M, Microsoft, Coca-Cola, Intel, Xerox, Fannie Mae, General Motors, American Airlines, KPMG, Johnson & Johnson, Alcoa, DaimlerChrysler, Pfizer, Nike, Boeing, Shell Oil, Ernst & Young, Kraft Foods, and Lockheed Martin.”<sup>122</sup>

Professor Wilkins has asked quite poignantly: “When did American business and the military—two institutions with long histories of racism and exclusion—become stalwart advocates for diversity and inclusion?”<sup>123</sup> Specifically, in a General Motors’ amicus brief in *Grutter*, the company argued that it is essential for global businesses to have employees with “cross-cultural competence.”<sup>124</sup> The hiring of Blacks, because it makes sense out of an economic necessity in competing in the global market, resonates more with employers and majority interests than doing it because of past discrimination or because the law

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119. *Id.* at 766.

120. See David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business,” the Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1552 (2004).

121. *Id.* at 1552.

122. *Id.* at 1552 n.26.

123. *Id.* at 1554.

124. *Id.* at 1576.

requires it.<sup>125</sup> Advocates for diversity feel compelled to justify their arguments by basing them on “the bottom line.”<sup>126</sup>

Over the last fifteen years, many corporations have invested in “diversity consultants” and focused on methodologies to leverage diversity in their workplaces as being good business given the growing number of racial minorities expected to join the workforce.<sup>127</sup> Wilkins highlights the focus of the arguments made by corporate and military leaders as to why diversity is in their self-interest. He also suggests that we can use this corporate self-interest to our advantage without forgetting a social justice perspective;<sup>128</sup> for those who reap the benefits of the diversity rationale must look at their opportunity as creating an obligation to use their improved positions to work for social justice for others not as fortunate.<sup>129</sup>

Essentially, Professor Wilkins has whittled down the amicus briefs’ argument for diversity into three core approaches: “markets, managerialism and problemsolving—[each] highlight[ing] important advantages of promoting an open and diverse workforce.”<sup>130</sup> With markets, employers want to hire diverse individuals who can understand and appeal to diverse customer markets.<sup>131</sup> With respect to managerialism, as the U.S. population increases with more people of color, companies need a diverse group of managers who can supervise and motivate these individuals.<sup>132</sup> Then regarding problemsolving, a diverse group of individuals can bring a unique perspective to creatively resolving problems in the workplace.<sup>133</sup> The problem-solving leg of the “diversity is good for business” argument raises some concerns, including the lack of empirical support for this proposition, and it neglects indicators showing that companies may not want too diverse of an approach to problemsolving if it impinges on standard norms and profitmaking goals of the company.<sup>134</sup> Nevertheless, the

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125. *Id.* at 1554-55.

126. *Id.* at 1556.

127. *Id.* at 1556 nn.39-42. As a personal example, nearly twenty years ago I worked as a Black manager at Procter & Gamble, one of the companies that signed off on an amicus brief in *Grutter*. Procter & Gamble sent managers to corporate-wide diversity training taught by outside diversity consultants and some of its top managers because the company considered “valuing diversity” to be one of its key tenets.

128. *Id.* at 1559 n.218.

129. *Id.* at 1603-04.

130. Wilkins, *supra* note 120, at 1576.

131. *Id.* at 1576-77.

132. *Id.* at 1583.

133. *Id.* at 1586-87.

134. *Id.* at 1587-90.

market focus perspective appears to offer a good opportunity to meld social justice concerns with diversity goals of employers.<sup>135</sup> Accordingly, this bottom line diversity goal for employers can place more Blacks in positions to make their companies “pay attention to the concerns of Black America.”<sup>136</sup>

Merging ADR with initiatives that focus on business diversity interests in the design of the ADR system provides the best opportunity for long-term advancement under Title VII. As Professor Wilkins notes, “[o]nce we acknowledge that resolving these [racial justice] concerns has as much to do with what happens in corporate boardrooms as it does with legislative pronouncements or Supreme Court victories, it becomes clear that considerations of racial justice must be brought into corporate decisionmaking.”<sup>137</sup> If corporations have embraced the diversity rationale because of its global significance, it is important for those companies to recognize that ADR is used somewhat differently in other countries; so they should offer it to their employees on a flexible basis.<sup>138</sup>

### III. ADR TO THE RESCUE?: BUT NOT SO FAST AS YOU MIGHT GET BURNED UNLESS YOU CONVERGE INTERESTS

After forty years of enforcing Title VII and at least a decade of increasing use of ADR to resolve these disputes, we must now examine the impact of ADR. Most of the criticism, in response to the initial pursuit of arbitration by employers, has focused on the use of adhesion agreements.<sup>139</sup> By merely requiring that all employees, as a

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135. *Id.* at 1607.

136. *Id.* at 1608.

137. *Id.*

138. See generally Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002) (asserting that attempts to require arbitration through adhesion agreements appears to be a unique approach in the United States); Sternlight, *supra* note 19, at 1464-67 (describing the handling of employment discrimination claims in Britain and Australia and comparing them to the United States).

139. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999); David Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV., at 33; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Discrimination Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996). But see Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 771-72 (asserting there are sound business

condition of employment, must agree to arbitrate any future disputes, employers can make employees adhere to these terms and give up the option of going to court even for Title VII claims. Amazingly, the courts tend to find no problem with the fact that employers, the ones regulated by Title VII, may so easily get around the hard-fought right to a jury trial created by Congress in 1991. In response to concerns about arbitration and some of the backlash about how it has been used, some commentators have suggested the value of using mediation instead of arbitration.<sup>140</sup> Following that line of thought, a number of scholars have started to assert that mediation may offer some value in resolving statutory employment discrimination disputes.<sup>141</sup> Even other forms of ADR, such as early neutral evaluation and fact-finding, may start to be used more by employers in resolving statutory employment discrimination claims.<sup>142</sup>

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reasons for standard form adhesion agreements to arbitrate so that they are not necessarily unfair); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL., at 89, 91-92 (asserting that adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers).

140. See generally Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111 (2002).

141. See, e.g., Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487 (2003); Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLIN L. REV. 261 (1998); Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135 (1999); Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431 (1996); Ann C. Hodges, *Mediation and the Transformation of Labor Unions*, 69 MO. L. REV. 365 (2004); see also Yelnosky, *supra* note 5, at 597 ("Mediation is emerging as a means of resolving Title VII discrimination claims."). I have also asserted the value of using mediation to resolve employment discrimination claims. See Green, *Proposing a New Paradigm*, *supra* note 20, at 354 ("[A]t least one program, mediation, appears to be a tool that all the stakeholders and political pundits have enthusiastically endorsed for the long-term" and "Congress should expressly require the use of mediation under Title VII.").

142. See Stallworth, *supra* note 109; see also Joshua Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 77 (2004) (referring to neutral evaluators). Fact-finders have been used for quite a while in investigating sexual harassment in the workplace. See Susan R. Meredith, *Using Fact Finders to Probe Workplace Claims of Sexual Harassment*, 47 ARB. J. 61, 61 (Dec. 1992) (describing a program offered by the American Arbitration Association of providing "male/female teams of arbitrators who are familiar with the Civil Rights law and will be independent and impartial people who can investigate the situation and recommend solutions"). The American Arbitration Association (AAA) lists fact-finding as one of its focus areas and started a special fact finding program in 2002 for organizations facing crises. See AAA Announces Launch of New Independent Fact-Finding Service and Panel, available at <http://www.adr.org/index2.1.jsp?JSPssid=15721&JSPsrc=upload/LIVESITE/focusArea/Fact-Finding/Independent%20Fact-Finding%20Services.htm> (last visited Sept. 24, 2004). Their full fact-finding program is described at [http://www.adr.org/upload/LIVESITE/focusArea/Fact-Finding/75-282\\_IFFSS\\_mech.pdf](http://www.adr.org/upload/LIVESITE/focusArea/Fact-Finding/75-282_IFFSS_mech.pdf). (last visited Sept. 24, 2004).

ADR, especially mediation, does provide some wonderful opportunities for Black claimants seeking vindication under Title VII.<sup>143</sup> There are, however, significant systematic problems with how ADR systems are being designed.<sup>144</sup> Furthermore, racial justice and cultural concerns continue to plague these informal systems with little exploration by their proponents.<sup>145</sup> The role that employees can play in those system designs and what limits may arise from various other procedural aspects of any adopted ADR system still warrant significant concern.<sup>146</sup> Also, because employers and courts have readily adopted ADR as a complete substitute for the court system under an approach more akin to an aggressive hawk rather than a cooperative dove, employees (especially Blacks who already have a significant history and a number of recent instances to doubt that they will be treated fairly based on race) need to have the right to eventually opt out of the ADR process. As part of the ADR system design, in some instances employees can be allowed to still seek complete relief in the court system when that option becomes necessary. This accounts for the societal importance and significance of public vindication for some claims under Title VII.

In a landmark 1973 Supreme Court case that identified the methodology for establishing circumstantial evidence under Title VII, the court stated: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."<sup>147</sup> Employers and their Black employees must focus on mechanisms that will accentuate their joint interests in trustworthy workmanship. Therefore, instead of focusing on ADR as the elixir for all that ails enforcement of Title VII, ADR should only comprise one form of dispute resolution. That is, ADR operates as only one tool in the appropriate dispute resolution toolbox that Title VII claimants can

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143. See Berger, *supra* note 141; Yelnosky, *supra* note 5.

144. See Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 907 (2002) (suggesting the importance of having employees involved in the dispute resolution system design).

145. See Coben, *supra* note 6, at 72 & nn.39-40.

146. Bingham, *supra* note 144; see also Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (2004) (calling for more scrutiny of dispute systems that are designed by only one of the parties to see the effects).

147. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

pursue. Using ADR ought not represent the end of litigation as a whole by becoming the only tool in the toolbox.

Despite its significant failures, employees must bargain with employers in resolving their disputes under the legal enforcement shadow of Title VII.<sup>148</sup> If court enforcement becomes a complete non-starter, then negotiating fairer results in ADR may become more difficult because the alternative of pursuing litigation comes off the bargaining table.<sup>149</sup> Without a viable court mechanism, such as class actions,<sup>150</sup> to allow employees to pursue discrimination cases in court, the prospects for enforcement under Title VII through ADR or any other mechanism will become even more dismal in the next forty years than what currently exists in federal courts. If we acknowledge “‘the civil jury has grown into perhaps the most diverse and representative governmental body in America’[,]” then “the embrace of trials by people of color, concomitant with the rejection of trials by [W]hites, would also be revealing, even if it only confirmed a racial divide that one would hope had been significantly eroded since the 1960s.”<sup>151</sup> Certainly, if U.S. businesses have focused on global concerns and perceptions of our workplaces, then they must also recog-

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148. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (describing the effects of the law in negotiating a resolution of disputes); see also Stempel, *Fuzziness*, *supra* note 103, at 347 & n.149 (finding that “competent mediation or other ADR requires good lawyering skills and substantive legal knowledge [and] [i]t also requires courts to cast the shadow of the law that will give rise to a framework for resolution”); Stempel, *Reflections*, *supra* note 103, at 308 n.30 (noting the importance of still having legitimate court options involving an “adjudicatory core to cast the shadow of law that enables ADR and settlement to function effectively”).

149. Menkel-Meadow, *When Adjudication Ends*, *supra* note 1, at 1623; Stempel, *Fuzziness*, *supra* note 103, at 347 n.149 (Bargaining and negotiation is dependent upon the “likely outcomes if [a] dispute is adjudicated to conclusion.”).

150. See Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 815 (2004) (asserting that jury trial right and damage claims made available by the Civil Rights Act of 1991 do not hinder the use of class actions for resolving Title VII claims). *But see* Geoffrey E. Parmer, *What “Erin Brockovich” Failed To Tell You About the Realities of Class Action Litigation*, 57 DISP. RESOL. 19 (2002) (describing the realities about the difficulties in pursuing class action claims); Selmi, *supra* note 114, at 1313-21 (questioning the value of class action employment discrimination litigation as resulting in benefits that do not appear to benefit claimants and do not deter employers who fail to see any stock degradation or incentive to stop discriminating); Panel 3 Transcript Closing Gaps, *supra* note 27 (describing comments of Joseph Sellers asserting a disconnect with the passage of the Civil Rights Act of 1991 and its availability of damages, especially compensatory damages, so that the historically sound and easy certification of Title VII class actions under Rule 23(b)(2) of the federal rules of civil procedure has become increasingly difficult “[s]o this has vexed the class action practice considerably, and ironically has left practitioners and plaintiffs who pursue these cases, the class action cases, largely embracing the olden days fondly, when class actions were readily certified, and the remedies were limited to backpay and frontpay”).

151. Butler, *supra* note 6, at 632-33 & n.24 (quoting Stephen Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 881 (2000)).

nize that one of the most important global concerns remains the right to have fair and public hearings to protect equality before the law and to put the judiciary and judicial independence at the fore.”<sup>152</sup>

What are some of the things that can occur to have employer interests and Black employees’ interests merge? I have asserted many of these things already in other contexts.<sup>153</sup> In general, employers must allow employees to play some role in the design of the system, provide opportunities for legal representation, provide a critical mass and cadre of dispute resolution neutrals of color from which to select a mediator or arbitrator, and allow for timely and fair procedures that provide the same remedies and opportunities as the court system allows but in a faster and more open and effective manner. Many employers are already doing this. Either they have become heavily invested in diversity<sup>154</sup> or they have become proactive in the design of conflict resolution systems in their companies.<sup>155</sup>

For example, Thomas Stipanowich has recently documented the significant importance for companies in being actively involved in designing a comprehensive conflict management system through a 2002 survey of forty-three Fortune 1000 companies.<sup>156</sup> “[M]ediation was

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152. See Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 809-11 (2004) (describing global efforts at promoting rights at public hearings and the role of judicial independence in being significant in the development of global markets).

153. See Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4 J. AM. ARB. (forthcoming Spring 2005) (attacking the dearth of arbitrators of color involved in handling employment discrimination claims and suggesting related legal challenges while proposing a mechanism to develop a qualified cadre and critical mass of neutrals of color to arbitrate and mediate employment discrimination claims involving claimants of color as a means of providing a fair selection process for these neutrals and a fair dispute resolution system for these claimants); Green, *Debunking the Myth*, *supra* note 17 (asserting that employers not rush into adhesion agreements to arbitrate without understanding their advantages in the court system); Green, *Finding Lawyers*, *supra* note 1 (asserting that Black employees must be afforded legal advice in pursuing their employment discrimination claims and proposing that unions fill that legal representation gap); Green, *Opposing Excessive Use*, *supra* note 16 (asserting that employers not unilaterally require arbitration as a matter of human resource management but rather that employees use their collective strength to negotiate better arbitration processes while using the help of unions and the threat of union organizing as a tool in negotiating better workplace resolution systems); Green, *Proposing a New Paradigm*, *supra* note 20 (asserting the benefits of using mediation to resolve employment discrimination claims filed with the EEOC).

154. See Terry Carter, *Coming Out of Her Shell*, A.B.A. J. 31 (Dec. 2004) (describing the background of and commitment to diversity of Shell Oil Company’s General Counsel, Catherine Lamboley, and discussing the pledge to diversity that legal officers of about 500 companies signed in 1999).

155. See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 875-912 (2004) (describing several thoughtfully designed conflict management systems and their use in various companies).

156. *Id.* at 885-86.



the most frequently preferred approach in employment . . . disputes [and] in other areas companies appeared to place more emphasis on litigation or arbitration.”<sup>157</sup> Nevertheless, the “American Arbitration Association (AAA) has claimed that between 1997 and 2002, the number of employees covered by AAA employment arbitration plans grew from 3 million to 6 million.”<sup>158</sup>

The Brown & Root ADR program provides several elements that may allow for interests of employers and employees to converge through a collaborative process that has functioned as a model for many companies.<sup>159</sup> For example, Haliburton (formerly Brown & Root) helps an employee obtain legal representation up to \$2,500 out of a legal service plan.<sup>160</sup> A 2002 CPR Institute for Dispute Resolution survey, *How Companies Manage Employment Disputes, A Compendium of Leading Corporate Employment Programs*, indicates that many important conflict management tools are being used by twenty employers and offers some hope for fair employment dispute resolution. Some of the programs offer either “incentives” or “rewards” as motivation for employees to obtain independent counsel, which I believe is a necessary component of any program.<sup>161</sup>

This survey covers the comprehensive conflict resolution programs of the following companies: Alcoa; Anheuser-Busch; Bank of America; CIGNA; Credit Suisse First Boston; General Electric; Haliburton Company; Johnson & Johnson; Masco; McGraw-Hill; MG Company; Pfizer; Philip Morris USA; Rockwell Automation; Shell; Texaco; United Parcel Services; UBS; U.S. Air Force; and the U.S. Postal Service.<sup>162</sup> As an example, the Shell RESOLVE program offers many steps before culminating in mediation, and it allows arbitration as an optional choice where the employee may still file suit in court afterwards.<sup>163</sup> The Shell program is an example of a program that also offers incentives to employees to obtain legal counsel. Programs like Shell’s can certify that they are doing what is necessary to provide fair

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157. *Id.* at 886 n.175.

158. *Id.* at 900.

159. *Id.* at 901.

160. *Craig v. Brown & Root, Inc.*, 100 Cal. Rptr. 2d 818, 820 (Cal. Ct. App. 2000) (describing Brown & Root’s arbitration program).

161. Stipanowich, *supra* note 155, at 901 nn.234-35.

162. *Id.* at 902-03 (Table 31 describing the nature of the ADR programs for each of the twenty companies).

163. *Id.*

mechanisms to employees who have disputes.<sup>164</sup> Their focus truly appears to be based on fair resolution rather than jury avoidance. In most situations, their program will likely allow a fair and quick result. And in those rare situations where a public and formal adjudication is necessary, an employee needing that forum to obtain racial justice may still seek that method of resolution.

## CONCLUSION

Black employees and their advocates must continue to find creative ways to improve the workplace while being mindful that interest-convergence will likely offer the best way to accomplish these goals in the immediate future. Therefore, ADR should only be viewed as appropriate dispute resolution when the interests of Black employees can converge with the interests of employers. ADR must not be used to deny or destroy the interests of Black employees by preventing any viable court option.

For the next forty years, fair dispute resolution processes under Title VII must allow employees to be involved in the design of the process and play a major role in implementing its procedures. Any fair dispute resolution process must also allow the opportunity to pursue formalized court claims in those unique circumstances that warrant that option. This represents the best way to use ADR when viewed under the lens of its enthusiastic enforcement by courts and when it is applied to resolve Title VII race-based claims. The fact that several Fortune 1000 companies already allow these options in their conflict resolution programs bodes extremely well for the future of dispute resolution under Title VII.

Over the last decade, we have learned enough about the use of ADR to know that it can offer opportunities for fairness, but that it is not a cure-all for the problems Black employees face in the courts either. In closing the lens of examination, ADR should present one of many possible options that allow Black employees and their employers to reach fair resolutions of their employment discrimination disputes. But ADR should not be presumed to be the predominant

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164. In addition to the materials referred to in Mr. Stipanowich's article, some of the information I gleaned about Shell's program was offered directly by its Ombudsman, Wilbur Hicks, an African American male, who was one of the key speakers at a special program for minorities in dispute resolution held in New York, New York as part of the American Bar Association's Annual Dispute Resolution Program on Thursday, April 13, 2004. At this program, Mr. Hicks also indicated that his company was making every effort along with other CPR members to increase the diversity amongst the dispute resolution professionals being used in their programs.

mechanism for resolution. Each resolution may have to be evaluated on a case-by-case basis. In developing approaches that use ADR or the courts in seeking the eradication of workplace discrimination and the protection of Black workers, any significant long-term and even short-term strategy must focus on applying and recognizing Derrick Bell's interest-convergence theory.

Because major U.S. employers have adopted a diversity rationale as a measure of good business, the interests of Black employees can converge with the interests of employers in having a diverse and successful workforce. To achieve this convergence, employers must take affirmative steps to make sure that their ADR processes offer Black employees fair dispute resolution options. At the same time, employers must also acknowledge that there are some disputes that must have an open, public resolution in court. Then the corporate interest in the diversity rationale can converge with interests of racial justice in the workplace and provide a win-win opportunity for corporate employers and their Black employees.