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## Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims

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# MEASURES TO ENCOURAGE AND REWARD POST-DISPUTE AGREEMENTS TO ARBITRATE EMPLOYMENT DISCRIMINATION CLAIMS

Michael Z. Green\*

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\* Professor of Law, Texas Wesleyan University School of Law. I would like to thank Jean Sternlight for inviting me to participate in the Symposium, "Rethinking the Federal Arbitration Act: An Examination of Whether and How the Statute Should Be Amended," sponsored by the Saltman Center for Conflict Resolution and held at the University of Nevada, Las Vegas, Boyd School of Law on January 26, 2007. At that time, I had wonderfully rich discussions with many outstanding scholars regarding possible amendments to the Federal Arbitration Act and presented the paper that became this Essay. I value the thoughtful comments made on a prior draft by Carol Brown and appreciate the financial support given to me by the Texas Wesleyan University School of Law along with the research assistance provided by students Anca Adams, Chris Baumann, and Chris Norris. Margaret Green continues to inspire me in immeasurable ways and I remain eternally grateful.

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I. INTRODUCTION: THE INSIDIOUS NATURE OF PRE-DISPUTE AGREEMENTS TO ARBITRATE STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS	

When the [Federal Arbitration Act] was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court “has effectively rewritten the statute,” and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration.<sup>1</sup>

These words of United States Supreme Court Justice John Paul Stevens in his dissenting opinion from the 1991 decision of *Gilmer v. Interstate/Johnson Lane Corp.*<sup>2</sup> highlight the urgency for those who advocate for changes to the Federal Arbitration Act (“FAA”)<sup>3</sup> and the necessity for legislative action today.<sup>4</sup> The *Gilmer* decision addressed the use of arbitration to resolve statutory employment discrimination claims when employers require their employees to agree to arbitrate future employment disputes as a condition of

<sup>1</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42-43 (1991) (Stevens, J., dissenting) (footnote omitted). Justice John Paul Stevens has issued a number of key dissents expressing concerns about the bargaining power involved when an individual employee or a consumer is required to arbitrate a statutory claim as differentiated from two sophisticated merchants, and he has consistently argued that Congress could not have intended this result. See, e.g., *id.*; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., dissenting); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646-50 (1985) (Stevens, J., dissenting). Although he did not dissent in the *Gilmer* decision, Justice Harry A. Blackmun raised similar concerns about the Court’s changes to the scope of arbitration enforcement under the FAA before *Gilmer*. See *McMahon*, 482 U.S. at 246-48 (Blackmun, J., dissenting).

<sup>2</sup> *Gilmer*, 500 U.S. 20.

<sup>3</sup> 9 U.S.C. §§ 1-16 (2000). “The FAA was originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code.” *Gilmer*, 500 U.S. at 24.

<sup>4</sup> A number of the papers presented at this Symposium advocate for amendments to the FAA. See, e.g., David S. Schwartz, *If You Love Arbitration, Set It Free: How “Mandatory” Undermines “Arbitration,”* 8 NEV. L.J. 400 (2007); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385 (2007). Over the last fifteen years, others have also argued for changes to the FAA that would address pre-dispute agreements. See, e.g., Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789 (2002). Even one commentator has asked that the FAA be amended to clearly endorse pre-dispute agreements to arbitrate. See Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 284 (2004).

employment—so called pre-dispute agreements to arbitrate. By allowing the use of arbitration for statutory employment discrimination claims, the Supreme Court in the *Gilmer* decision provided the impetus for a pervasive change in workplace dispute resolution. Before *Gilmer* was decided in 1991, most employers and employees would not have thought it possible to enforce a pre-dispute agreement to arbitrate a statutory employment discrimination claim.<sup>5</sup> Since *Gilmer*, the use of arbitration through pre-dispute agreements to resolve statutory employment discrimination claims has exploded.<sup>6</sup>

Although many scholars have asserted that pre-dispute agreements to arbitrate should not be enforceable,<sup>7</sup> the critical thesis of this Essay declares that Congress must establish measures that create incentives to enter into post-dispute agreements to arbitrate along with any ban on pre-dispute agreements if any positive effects will ever occur from legislative change. Because arbitration has vast potential as an effective dispute resolution tool for workplace disputes and its impact continues to be clouded by the controversy surrounding pre-dispute agreements, a win-win result can be achieved if Congress focuses on encouraging and rewarding post-dispute agreements to arbitrate such claims. This Essay asserts that employees will win by having a fair process that resembles some of the formalities of the court system without the harsh results that employees obtain through the courts. Employers, on the other hand, will win by having a certain and verifiable process that removes their concerns about unpredictable jury verdicts.

While most scholarly commentary has challenged employer use of pre-dispute agreements to arbitrate statutory employment discrimination claims,<sup>8</sup>

<sup>5</sup> See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 408 & n.26 (2000); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1637-38 & n.31 (2005).

<sup>6</sup> See Sternlight, *supra* note 5, at 1639-40 & nn.41-43 (declaring “how common” pre-dispute arbitration clauses are in employment and how they “certainly seem ubiquitous”); Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 900 (2004) (noting that “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>7</sup> A recent example of this argument was made by Professor Richard Bales at this Symposium. See Christopher J. Kippley & Richard A. Bales, *Extending OWBPA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers*, 8 NEV. L. J. 10 (2007). For a number of years, many others, including me, have questioned the propriety of enforcing pre-dispute agreements to arbitrate in the employment and consumer setting because of concerns about bargaining power and the inability to appreciate that such agreements preclude unsuspecting claimants from seeking relief through the courts. See, e.g., David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS U. L.J. 561 (1997); Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap For The Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112, 112 (1993); Sharon Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 131, 135 (1996).

<sup>8</sup> Since *Gilmer*, scores of articles have illuminated many of the critical aspects of pre-dispute agreements to arbitrate employment discrimination claims. Some of the key articles that occurred within a few years after *Gilmer* are listed here to indicate just how pervasive

an employee's inability to appreciate the ramifications from giving up the right to go into court continues to represent a key factor in the criticism of an agreement to arbitrate when made before the dispute occurs.<sup>9</sup> In what may suggest a suspicious conspiracy of interests to many concerned about employees' rights, the judicial expansion in *Gilmer* (by extending enforcement of pre-dispute agreements to arbitrate under the FAA to statutory employment discrimination claims) occurred the same year in which Congress amended Title VII of the Civil Right Act of 1964<sup>10</sup> as part of the Civil Rights Act of 1991 ("CRA of 1991").<sup>11</sup> Specifically, the CRA of 1991 provided, for the first time, that employees bringing claims of intentional discrimination against their employers under Title VII would have the right to a jury trial and the ability to seek

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the criticism has become. *See, e.g.,* Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 383-84 (1996); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 678-85 (1996); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 235 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1019 (1996). The criticism has continued for well more than a decade after *Gilmer*. *See generally* Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 340-41 (2006); Ellen E. Deason, *Perspectives on Decisionmaking from the Blackmun Papers: The Cases on Arbitrability of Statutory Claims*, 70 MO. L. REV. 1133, 1140 (2005) (finding that the Supreme Court's "expansion [of arbitration enforcement to statutory claims] is not universally applauded"); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 156-57 (2006) (asserting that the judicial expansion of the FAA beyond what its drafters could have intended has resulted from policy choices that prefer the economically powerful such as corporations over consumers and employers over employees). However, there are some scholars who do not necessarily agree with all of the criticism aimed at pre-dispute agreements. *See, e.g.,* Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 537-41 (2002) (arguing that agreements to arbitrate do not require that one party has to assent at the same level as the other party and to force mutual assent will make the agreements unfair for consumers and employees); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-259, 262-64 (2006) (asserting that pre-dispute agreements should be enforced because they reduce process costs, especially attorney's fees, for employees and consumers that would not be possible through post-dispute agreements).

<sup>9</sup> *See* Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 251 (2004) (asserting that arbitration systems created through adhesion agreements designed by one party over a weaker party should be treated "with a healthy dose of skepticism" by the courts because it may "allow [ ] one party to nullify public policy as embodied in law").

<sup>10</sup> Civil Right Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to 2000e-17 (2000)).

<sup>11</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *see also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CIVIL RIGHTS ACT OF 1991, <http://www.eeoc.gov/policy/cra91.html> (last visited Nov. 27, 2007) (providing many of the provisions of the Civil Rights Act of 1991).

compensatory and punitive damage remedies based upon the size of the employer.<sup>12</sup> Accordingly, the insidious nature of pre-dispute agreements to arbitrate becomes extremely transparent if you understand that employers can merely use their overwhelming bargaining power by requiring their employees agree to arbitrate any future disputes as a condition of being employed.<sup>13</sup> Thereby, employers can unilaterally opt out of the intricate jury trial process that Congress so meticulously developed under Title VII (as amended by the CRA of 1991) to resolve employment discrimination claims.<sup>14</sup>

Part II of this Essay explores the significant expansion of the FAA through judicial action allowing the enforcement of pre-dispute arbitration agreements involving statutory employment discrimination claims. Part III describes the doubts about the value of pre-dispute agreements to arbitrate that have evolved after more than fifteen years of experience with this process. Part IV explores the dynamic of whether employers and employees will be able to have successful post-dispute agreements to arbitrate statutory claims. Part IV also highlights the need for legislative action and offers a proposal that would create incentives to foster post-dispute agreements to arbitrate these claims by allowing employers to have predictable expenditures and employees to have a fair resolution process. The Essay concludes that if arbitration will ever reach its potential as an effective tool for resolving statutory employment discrimination claims, Congress must develop measures that encourage and reward employers and employees for choosing to enter into post-dispute agreements to arbitrate.

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<sup>12</sup> See Civil Rights Act of 1991, § 102, 105 Stat. at 1072-74 (codified in pertinent part at 42 U.S.C. § 1981a (2000)) (granting the right to compensatory and punitive damage remedies and the right to a jury trial to claimants asserting intentional discrimination under Title VII while placing caps on recovery of \$50,000 for employers with less than 101 employees and gradual monetary increases corresponding to the increasing number of employees in the workforce up to a maximum of \$300,000 for employers with more than 500 employees).

<sup>13</sup> See Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 864 & n.10 (2004) (asserting that it is the employers who discriminate the most that seek to avert their risks of large jury verdicts through arbitration and the employers who tend to not discriminate will be more willing to take their chances with the courts because arbitration does not represent a major aversion from a recognizable risk for these employers).

<sup>14</sup> See Joseph R. Grodin, *On the Interface Between Labor and Employment Law*, 19 BERKELEY J. EMP. & LAB. L. 307, 310-11 (1998) (noting that it is unusual that the parties regulated by employment discrimination law, employers, may opt out of that regime by requiring their employees go to arbitration as a condition of employment); see also Green, *supra* note 5, at 409 (arguing same); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 397 (1999) (asserting that pre-dispute arbitration agreements should not be enforced because a strong public policy in eradicating workplace discrimination requires a public forum to handle these disputes).

## II. SIGNIFICANT JUDICIAL EXPANSION ALLOWING PRE-DISPUTE ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION

### A. *Before and Up to Gilmer*

In 1953, the Supreme Court decided in *Wilko v. Swan*<sup>15</sup> that a statutory claim under the Securities Act of 1933 for securities fraud was not subject to resolution through arbitration under the FAA.<sup>16</sup> The *Wilko* case led to the general understanding that statutory claims were not subject to arbitration. However, more than thirty years after *Wilko*, the Supreme Court embarked on a clear path that would eventually broaden the scope of the FAA significantly and lead the court to overrule *Wilko*. Those changes culminated with its landmark *Gilmer* decision in 1991 allowing pre-dispute arbitration of statutory employment discrimination claims.

Probably the first direct step in the Supreme Court's actions that would reverse the *Wilko* case and eventually lead to wholesale application of the FAA to enforce arbitration of statutory disputes occurred in 1985 with the decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>17</sup> The Court in *Mitsubishi* held that statutory antitrust claims brought in the context of an international contract dispute between an automobile distributor in Puerto Rico and a Japanese vehicle manufacturer were subject to arbitration under the FAA.<sup>18</sup> Although the *Mitsubishi* case might have become a limited exception pertaining to solely international matters, in the 1987 case *Shearson/American Express, Inc. v. McMahon*,<sup>19</sup> the Court found that a solely domestic dispute involving a claim brought pursuant to the Exchange Act of 1934 and RICO statutes was subject to arbitration under the FAA because the holding in *Wilko* was limited to concerns about statutory claims under the Securities Act of 1933.<sup>20</sup> In its 1989 decision, *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>21</sup> the Supreme Court expressly rejected the holding in *Wilko* and found that a claim brought pursuant to the Securities Act of 1933 was subject to arbitration under the FAA as arbitration represented an adequate forum in which parties could resolve such statutory disputes.<sup>22</sup>

The next major step in the Court's expansion of the FAA to statutory claims occurred in the *Gilmer* decision in 1991.<sup>23</sup> As a condition of employment as a financial manager for Interstate/Johnson Lane, Gilmer had to sign a

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<sup>15</sup> *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

<sup>16</sup> *Id.* at 434-35.

<sup>17</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Although the Court probably signaled its expansive arbitration efforts in the international setting when it allowed for arbitration of an Exchange Act claim in an international dispute as early as 1974, it took great aims to distinguish *Wilko* in that case. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974). Starting with the *Mitsubishi* case in 1985, the Court's hostility to *Wilko* became quite evident.

<sup>18</sup> *Mitsubishi*, 473 U.S. at 626.

<sup>19</sup> *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

<sup>20</sup> *Id.* at 228-29.

<sup>21</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

<sup>22</sup> *Id.* at 484-86.

<sup>23</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

registration application with the New York Stock Exchange ("NYSE") requiring that he arbitrate any dispute with his employer.<sup>24</sup> Because he signed the application with the arbitration provision, his employer filed a motion to compel arbitration years later when Gilmer sued under the Age Discrimination in Employment Act ("ADEA").<sup>25</sup> Applying the analysis from *Mitsubishi* and its progeny, the Court enforced the pre-dispute agreement to arbitrate under the FAA and stated: "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."<sup>26</sup> Pursuant to the FAA and relying on its *Mitsubishi* precedent, the Supreme Court in *Gilmer* compelled the arbitration of the employment discrimination claim brought under the ADEA statute and found that the plaintiff could "'effectively . . . vindicate [his] . . . statutory cause of action in the arbitral forum.'"<sup>27</sup>

Thus, it took merely six years from its 1985 *Mitsubishi* opinion to the 1991 *Gilmer* decision for the Supreme Court to change significantly the arbitration of statutory claims by its expanded analysis of the FAA. The impact from the Court's decision to reverse *Wilko* after nearly thirty-five years of long-standing precedent presents an interesting question regarding the Court's role when Congress has given no indication that a change in statutory interpretation is warranted.<sup>28</sup> The Court's reversal actions tended to violate "standard canons of statutory construction" that would "normally give rise to a presumption of congressional approval" when Congress had not acted for several years to correct any prior precedent.<sup>29</sup>

### B. After Gilmer

The *Gilmer* decision was not just criticized by academics. In 1997, the Equal Employment Opportunity Commission ("EEOC"), the agency charged with enforcement of most of the primary federal laws banning employment discrimination including Title VII,<sup>30</sup> issued a policy statement criticizing the

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<sup>24</sup> *Id.* at 23.

<sup>25</sup> *Id.* at 23–24. The ADEA can be found at 29 U.S.C. §§ 621–634 (2000).

<sup>26</sup> *Gilmer*, 500 U.S. at 26. Unfortunately, by this time and due to the prior precedents, even the members of the Court who had become frustrated with the Court's expansion of the FAA to statutory claims found the extension to statutory employment discrimination claims in *Gilmer* an inevitable result. See Deason, *supra* note 8, at 1177–79 (reviewing notes of Justice Harry Blackmun regarding the deliberations in the *Gilmer* decision and suggesting that the pro-arbitration stance for statutory claims that the Court had adopted in *Mitsubishi* seemed to foreclose any efforts to prevent statutory employment discrimination claims from also being arbitrated under the FAA, and also suggesting that the prior precedent indicated why Justice Blackmun did not file a separate dissent in *Gilmer*).

<sup>27</sup> See *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi* as support for the Court's decision).

<sup>28</sup> See Deason, *supra* note 8, at 1138 (discussing how the Court's decision to reverse prior precedent finding statutory claims to not be arbitrable would instead "abrogate[ ] an interpretation that had been solidly entrenched in the law and not altered by Congress").

<sup>29</sup> *Id.*

<sup>30</sup> See U.S. EEOC, Laws Enforced by the EEOC, [www.eeoc.gov/policy/laws.html](http://www.eeoc.gov/policy/laws.html) (last visited Nov. 27, 2007) [hereinafter *Laws Enforced by the EEOC*] (referring to the following laws, among others, that the EEOC enforces: Title VII of the Civil Rights Act of 1964, as amended ("Title VII") (EEOC enforcement authority codified at 42 U.S.C. §§ 2000e–4 to e–5 & e–12 (2000)); Age Discrimination in Employment Act of 1967 ("ADEA") (EEOC enforcement authority codified at 29 U.S.C. § 628 (2000)); and Title I of the Americans With Disa-



use of pre-dispute arbitration to resolve statutory employment discrimination claims.<sup>31</sup>

Despite the criticism of *Gilmer*, including those points raised by the EEOC in its policy statement, the Supreme Court has expanded the significance of its holding while also leaving many unanswered questions regarding the enforcement of pre-dispute agreements to arbitrate employment discrimination claims.<sup>32</sup> As an example of one of the many unanswered questions, in 1974 the Court decided *Alexander v. Gardner-Denver Co.*<sup>33</sup> and held that claims brought pursuant to Title VII could not be compelled into arbitration under a provision to arbitrate made within a collective bargaining agreement between a company and a union representing its employees.<sup>34</sup> Whether *Gilmer* had essentially overruled *Gardner-Denver* was a question that could have been answered by the Court in its 1998 decision, *Wright v. Universal Maritime Service Corp.*<sup>35</sup> Although the Supreme Court acknowledged a difference between the *Gilmer* and *Gardner-Denver* decisions and required an unmistakable waiver before a court could compel arbitration of an individual employee's statutory employment claim in the union setting, it did not explain exactly what would be required to effectuate such a waiver.<sup>36</sup>

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bilities Act of 1990 ("ADA") (EEOC enforcement authority codified at 42 U.S.C. § 12116 (2000))).

<sup>31</sup> See U.S. EEOC, Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997), available at <http://www.eeoc.gov/policy/docs/mandarb.html>. Professor Richard Bales has interpreted the EEOC policy to include eight reasons for its opposition to pre-dispute arbitration including: 1) inability to develop judicial precedents; 2) lack of deterrent effect because arbitration awards are not published; 3) limited judicial review prevents courts from correcting any errors by arbitrators involving statutory interpretation; 4) waiver of the right to a jury trial; 5) the availability of only limited discovery; 6) the employer has a structural advantage as a repeat player in the selection of the arbitrator and potential influence on the arbitrator due to the possible need to select the arbitrator for future cases; 7) improper influence by the employer as the party with the most bargaining power in drafting one-sided agreements; and 8) inability of the EEOC to perform its role as employees would not be able to file charges. Richard A. Bales, *Compulsory Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 20-26 (1999). Unfortunately, the EEOC has focused a lot of its energy on mediation over the last ten years rather than continuing to address the concerns raised by its 1997 policy against pre-dispute arbitration. See generally Michael Z. Green, *Ruminations About the EEOC's Policy Regarding Arbitration*, 11 EMP. RTS. & EMP. POL'Y J. 154 (2007) (criticizing the EEOC's inaction with respect to addressing arbitration issues since its 1997 policy statement and suggesting many reasons for this inaction including the EEOC's enthusiastic endorsement of and increased focus on mediation).

<sup>32</sup> See generally Bales, *supra* note 8, at 340-41 (describing events over the last fifteen years regarding enforcement of arbitration agreements as a condition of employment regarding statutory employment disputes).

<sup>33</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

<sup>34</sup> *Id.* at 50 ("The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.").

<sup>35</sup> *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

<sup>36</sup> *Id.* at 79-80.

Then in its 2001 decision, *Circuit City Stores, Inc. v. Adams*,<sup>37</sup> the Supreme Court adopted its broadest application of the FAA to employment disputes by narrowly interpreting the language from section 1 of the FAA, which excludes certain “contracts of employment” from FAA coverage.<sup>38</sup> The Court interpreted the “engaged in foreign or interstate commerce” language at the end of section 1 as limiting its exclusion to those contracts of employment for workers who literally work in transportation or commerce while allowing the application of the FAA to essentially any other type of employment contract.<sup>39</sup> The Supreme Court’s most recent discussion of the arbitration of employment discrimination claims occurred five years ago in its 2002 decision, *EEOC v. Waffle House, Inc.*<sup>40</sup> The Court found that the EEOC could still pursue all forms of statutory relief in court even if individual employees had agreed to arbitrate through a pre-dispute agreement.<sup>41</sup> Under *Waffle House*, an employer may still have to defend a discrimination claim in court even if the employee allegedly being discriminated against had agreed to arbitrate. The Court reasoned that because the EEOC is not a party to the agreement to arbitrate and it operates as a public enforcement agency charged with addressing employment discrimination, the EEOC may independently decide which suits to bring against employers in court to vindicate broader public interests.<sup>42</sup>

One of the flaws in the expansion of the FAA to statutory employment discrimination claims involves the flimsy statutory support for Congress’s desire to enforce pre-dispute agreements to arbitrate these claims. The lack of legislative support to suggest that Congress would want employers to so easily require arbitration for employees was definitely palpable in 1991 when *Gilmer* was decided. Congress had just undergone Herculean efforts to provide employment discrimination claimants with the statutory right to a jury trial through the CRA of 1991. Yet, in one fell swoop after *Gilmer*, the Supreme Court has allowed that right to a jury trial to be limited through pre-dispute agreements to arbitrate, which employers can use to require that their employees have these claims decided by an arbitrator rather than a jury.<sup>43</sup> Although it may be exceedingly difficult to discern what Congress could have thought about enforcing pre-dispute agreements to arbitrate such statutory claims when it enacted the FAA in 1925, the Supreme Court consistently found agreements to arbitrate statutory claims unenforceable for decades after the FAA was passed. If there was a need for change, the Supreme Court should have left that change in the hands of Congress.

Nevertheless, as the Supreme Court expanded the scope of its enforcement regarding pre-dispute agreements to arbitrate statutory claims under the FAA

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<sup>37</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>38</sup> 9 U.S.C. § 1 (2000) (“[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).

<sup>39</sup> *Circuit City Stores, Inc.*, 532 U.S. at 118-19.

<sup>40</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

<sup>41</sup> *Id.* at 292, 297-98.

<sup>42</sup> *Id.* at 294-96.

<sup>43</sup> See Sternlight, *supra* note 5, at 1643; Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 669-70 (2001).

over the last twenty years, Congress has failed to articulate its clear view on this matter—effectively abdicating any responsibility for determining the intersecting strictures regarding employment discrimination and arbitration and leaving it solely within the hands of the courts. As of 2007, Congress must start to address this expanded coverage under the FAA of pre-dispute agreements to arbitrate statutory employment discrimination claims from *Gilmer* and identify exactly how arbitration of these claims should be encouraged in light of what both employers and employees have learned from their arbitration experience since *Gilmer*.

### III. ONGOING DOUBTS ABOUT ARBITRATION'S CONTINUED VITALITY

#### A. Employer Doubts About the Value of Pre-Dispute Agreements

Over the last fifteen years, as the number of pre-dispute agreements to arbitrate has increased, many advantages have been claimed for employers including savings in time and costs, privacy, end of nuisance value settlements, encouraging early settlement, and most importantly removing fear and uncertainty about unpredictable and large jury verdicts.<sup>44</sup> On the other hand, a number of disadvantages for employers have also been asserted about pre-dispute agreements to arbitrate including the following: some instances where costs are exorbitant and time is extensive; lack of formal discovery; lack of application of the rules of evidence; last minute surprises; public and employee relations concerns; limited review/challenge; union organizing incentives; the inability to block the EEOC from pursuing claims; and the existence of many legal challenges to fairness that still keep employers in the court system despite the arbitration clause.<sup>45</sup> And while it may not represent a specific disadvantageous result from arbitration, one of the biggest threats to the use of arbitration continues to be the increasingly strong preference of employers to pursue mediation much more than arbitration.<sup>46</sup>

In assessing these advantages and disadvantages after fifteen years of experience, some employers have started to question whether arbitration remains a preferred option for resolving employment discrimination claims.<sup>47</sup> With still many unsettled issues in terms of legal enforcement of pre-dispute

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<sup>44</sup> See Green, *supra* note 31, at 174 (describing employer advantages in pursuing arbitration).

<sup>45</sup> *Id.* at 174-76 (describing employer disadvantages in pursuing arbitration).

<sup>46</sup> See Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 507-13 (2003) (discussing the increasing popularity of mediation to resolve employment disputes); 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. 321, 331-34 (2005) (describing how mediation is becoming a preferred tool for employment dispute resolution); see also Leslie A. Gordon, *Clause for Alarm: As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach*, A.B.A. J., Nov. 2006, at 19 (describing how in-house counsel are starting to become more interested in mediation instead of arbitration to handle employment disputes).

<sup>47</sup> See Gordon, *supra* note 46, at 19 (describing how in-house counsel are becoming more familiar with the impacts from pre-dispute arbitration clauses and are starting to become more disenchanted with arbitration to handle employment disputes).

agreements to arbitrate and general questions about the overall adequacy of arbitration versus mediation, employers may be ready to resist any continued growth in the use of arbitration in any matter, especially the resolution of employment discrimination claims. A recent empirical study of contracts involving publicly-held companies suggests that corporations fail to see much value in using arbitration when dealing with each other and rarely use it as compared with their increasing use of arbitration in their dealings with individual employees and consumers.<sup>48</sup> With the increasing dissatisfaction of companies with arbitration for individuals, we may be at a point in corporate employment dispute resolution where arbitration may no longer have an impact.

### *B. Employee Doubts About the Value of Pre-Dispute Agreements*

Employees may also have a number of advantages that may arise in arbitration whether it is entered into pre-dispute or post-dispute, including savings in time and costs while providing a better chance for resolution and voice than in the courts, which offer dismal results especially due to the summary judgment pre-trial resolution process.<sup>49</sup> On the other hand, employees must confront a number of disadvantages that are exacerbated by the pre-dispute agreement process: the coercion/involuntary nature of the agreement due to lack of bargaining power; lack of formality, including rules of discovery or evidence and sometimes no detailed written opinions; lack of attorney representation; limited judicial review and no public precedent; repeat player concerns; lack of public vindication or constitutional guarantees; and no statutory protections regarding the arbitrator selection process as compared to the courts for judge and jury selection.<sup>50</sup>

Although there have been many efforts to assess the value of arbitration for employees,<sup>51</sup> few studies have focused on the employees' reactions to being in a pre-dispute arbitration. One study did analyze the viewpoints of employees who had participated in arbitration under pre-dispute agreements at two companies, Travelers Corporation (now Citigroup) and Cigna Corporation.<sup>52</sup>

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<sup>48</sup> Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 367-68 (2007) (asserting that very few corporations choose arbitration as a dispute resolution tool when they enter into transactions with each other, but use them often to require that individuals must arbitrate claims against them).

<sup>49</sup> Green, *supra* note 31, at 176; *see also* Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 48-49 (2005) (describing challenges for employees in resolving employment discrimination claims due to difficulties in the court system under the summary judgment process).

<sup>50</sup> Green, *supra* note 31, at 176-80.

<sup>51</sup> *See, e.g.*, Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405 (2007); Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573 (2005); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998).

<sup>52</sup> *See* E. Patrick McDermott & Ruth Obar, *Workplace Dispute Resolution After Circuit City: A Complainant's Perspective on Employer Dispute Resolution Programs Requiring Mandatory Arbitration*, 48 WAYNE L. REV. 1157 (2002).

The researchers who conducted this study focused on the employees' perceptions of fairness and the effectiveness of the process in resolving their claims. They mailed a questionnaire to all employees who had filed a complaint under the Travelers and Cigna dispute resolution programs over a two-year period.<sup>53</sup> They received a 31% response rate or a total of 38 actual responses from Cigna complainants and a 39% response rate or a total of 43 actual responses from Travelers complainants.<sup>54</sup> The results indicated that for "both programs, the number of persons who proceeded to arbitration was less than 5% of all complainants."<sup>55</sup> The researchers conducting the study concluded that the complainants did not consider the procedures as fair or effective unless they obtained the result that they had been seeking.<sup>56</sup> They also concluded that if the procedures were fair and if employees' concerns about procedural due process were satisfied, then the employees were more willing to recommend the arbitration program to other employees.<sup>57</sup> Although there was some perception of fairness in the employees having their day before the arbitrator, the most significant factor derived from the researchers was their ultimate finding that employee satisfaction with pre-dispute agreements to arbitrate primarily ended up being outcome determinative.<sup>58</sup>

According to some scholars, any ongoing analysis about the impact on employees from agreements to arbitrate still requires more empirical study.<sup>59</sup> Getting the empirical data may be easier said than done. Absent the existence of a solid database in which you can compare arbitration with court resolution, employees cannot make informed decisions as to whether a pre-dispute agreement to arbitrate would represent a wise decision.<sup>60</sup> Thus, even though some scholars have asserted the need for more empirical data, a concern remains about whether the data sets to compare information about employment arbitration versus litigation can offer enough input to develop any definitive conclusions.<sup>61</sup>

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<sup>53</sup> *Id.* at 1169.

<sup>54</sup> *Id.* at 1169 & nn.73-74.

<sup>55</sup> *Id.* at 1174.

<sup>56</sup> *Id.* at 1187.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1189.

<sup>59</sup> See, e.g., David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557 (2005) (asserting the need for new directions in the development of empirical research regarding employment arbitration).

<sup>60</sup> See Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 161 (2004) (asserting the importance of well-designed and matched data sets to compare arbitration with litigation because "[t]his is information policy-makers need in order to decide how to address competing claims about efficiency or bias in mandatory [pre-dispute] employment arbitration").

<sup>61</sup> See Bales, *supra* note 8, at 351-52 (describing difficulties in gathering and analyzing data from empirical studies that have been conducted regarding the effect of arbitration on employees due to small sample sizes and high standard deviations); Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 736 (2001) (identifying problems with sparse empirical information regarding employment arbitration and suggesting that the information that does exist offers little help in understanding the parameters of employment arbitration analysis).

### C. Prospects for Future Use

Despite the criticism and doubts about pre-dispute agreements involving statutory employment discrimination claims, arbitration, as a whole, may still represent an effective mechanism to resolve these disputes.<sup>62</sup> After comparing whatever data sets that exist regarding results from arbitration of employment disputes with the results from the court system process, employees should not be in such a rush to criticize arbitration.<sup>63</sup> Although major concerns still exist regarding whether anyone has been able to obtain sufficient empirical data comparing arbitration results with litigation,<sup>64</sup> the court system provides such dire possibilities that virtually any other process would provide a hopeful option.<sup>65</sup>

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<sup>62</sup> See, e.g., Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1069 (1996); Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141, 158 (2001); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bathwater, and Constructing a New Sink in the Process*, 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).

<sup>63</sup> See Green, *supra* note 46, at 327-30 (suggesting benefits for employees in pursuing arbitration given the harsh results presented by the court system). In 1998, Lewis Maltby analyzed comparative data between results in arbitration versus results in litigation as follows: "Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court." Maltby, *supra* note 51, at 46 (finding that employees prevailed in up to 63% of cases in arbitration versus less than 15% in the courts); see also LeRoy, *supra* note 51, at 576 (asserting from empirical analysis that employees tend to win in arbitration at a much higher percentage than in the courts although men tend to win more "full awards" than women in arbitration). More recently, Alexander Colvin has analyzed a data set of employment arbitrations held through the American Arbitration Association ("AAA") in California and found employee win rates of 21.8%. See Colvin, *supra* note 51 (describing a sample of 1779 employment cases administered by the AAA in California from Jan. 1, 2003 - Sept. 30, 2006, which produced 349 employment arbitration awards). Colvin asserts that his figures indicate much lower employee win rates for employees in arbitration as compared to prior studies because the type of claims involved in these arbitrations now include a higher number of statutory employment discrimination disputes. *Id.*

<sup>64</sup> See Bingham, *supra* note 60, at 161 (asserting that "[t]he field needs a well-designed empirical examination of how arbitration compares to the traditional litigation process, preferably using random assignment or matched pairs of cases").

<sup>65</sup> See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 894 (2006) (finding from an empirical study of court cases alleging employment discrimination based on race and national origin that "[t]he bottom line for all cases studied is simple: plaintiffs almost always lose when courts resolve their claims"); 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 at the pretrial stage). Professor Kevin Clermont, along with his co-authors, has also captured through empirical data the extreme difficulties that employees face in seeking to prevail when bringing employment discrimination claims in the federal courts. See 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

#### IV. ADDRESSING THE SIGNIFICANT POTENTIAL FOR ARBITRATION OF STATUTORY CLAIMS THROUGH POST-DISPUTE AGREEMENTS

As it stands in 2007 and after more than fifteen years of judicial precedents since *Gilmer*, arbitration in the workplace has reached a critical juncture. Both employers and employees have started to become disenchanted with a number of its aspects. Employers, employees, and legislators know by now that many questions remain in terms of employer and employee doubts about the value of pursuing arbitration through pre-dispute agreements. Congress must finally take some action as part of an overall rescue mission if arbitration can continue to become a major force in resolving employment discrimination disputes. That mission must provide concrete measures that encourage employers and employees to choose fair arbitration processes after a dispute arises.

Pre-dispute agreements to arbitrate remain the bane of arbitration's existence when it comes to statutory employment discrimination claims. In addition to the tremendous criticism from academics and the EEOC, the plaintiff's bar continues to address many legal challenges that remain.<sup>66</sup> Given that Congress has failed to clarify the impact of the FAA when addressing pre-dispute agreements to arbitrate statutory employment discrimination claims, concerns about such agreements will likely continue to spiral. And this may not bode well for the ongoing use of arbitration in resolving statutory employment discrimination claims as the initial employer enthusiasm for arbitration may be starting to wane for many reasons. Because arbitration has real potential as a fair mechanism for employment discrimination claimants, its potential loss could represent a major blow to those seeking opportunities for vindication of rights under statutory employment discrimination regimes.

As we reach a crucial time for reflection on the impact of the FAA in resolving employment discrimination claims, eliminating pre-dispute agreements from the analysis would allow a proper focus on how to leverage the benefits of arbitration. All the hostility and controversy has focused on pre-

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discrimination claimants along with a bias against plaintiffs at the trial level); Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. 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.

<sup>66</sup> See Cliff Palefsky, *Only a Start: ADR Provider Ethics Principles Don't Go Far Enough*, DISP. RESOL. MAG., Spring 2001, at 18, 20-23 (describing criticism of pre-dispute arbitration agreements by plaintiff's attorney who has consistently challenged their enforcement and raising concerns about the inability of the parties and the free market system to regulate arbitrators' neutrality and ethics given that employers who are satisfied with arbitrators' performance will want to select those arbitrators repeatedly and thereby give a large volume of business to only those arbitrators); Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58, 58-59 (asserting challenges by the National Employment Lawyers Association ("NELA"), a group comprised primarily of plaintiff's employment lawyers, and how they initially threatened a boycott of arbitration service providers that offered arbitration through pre-dispute agreements to arbitrate statutory employment discrimination claims). Congress must address employees' concerns about fair arbitrator selection processes and provide challenges to the selection of the arbitrator as with jurors in the court system.

dispute agreements and taking that red herring out of the equation can allow an opportunity to evaluate the impact of arbitration effectively. Also, because the enforcement of Title VII occurs primarily through private lawsuits, if Congress can turn its focus to fostering post-dispute agreements, it will remove concerns about the insidious nature of pre-dispute agreements to arbitrate from the discussion while establishing legislative intent regarding this important issue.

A concern with focusing on a process that does not allow enforcement of pre-dispute agreements to arbitrate could be that employers and employees find no motivation ever to enter into post-dispute agreements to arbitrate. If this concern is correct, that result would effectively lead to the end of arbitration of employment discrimination claims because no parties would agree to use it after a dispute arises. Accordingly, the question of whether employers and employees will have the same motivations to enter into agreements after a dispute arises will control the value of post-dispute agreements to arbitrate. A number of scholars have asserted that employers and employees have little incentive to enter into post-dispute agreements to arbitrate.<sup>67</sup> However, the reality of this claim has not been effectively established to date and may end up being merely speculative.<sup>68</sup>

Few question the propriety of settling disputes after they arise, and agreeing to arbitrate under those circumstances would have the same value. Many times employees and employers reach confidential agreements to settle claims, and these agreements are made after a dispute arises.<sup>69</sup> If post-dispute agree-

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<sup>67</sup> See generally Baker, *supra* note 13 (asserting post-dispute agreements do not raise the same incentive concerns as pre-dispute agreements); Estreicher, *supra* note 62, at 567 (finding post-dispute agreements to be an “illusory” alternative); Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313 (2003) (enforcing post-dispute agreements to arbitrate will not work well in practice); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1 (2003) (asserting post-dispute agreements to arbitrate are unwise and not likely to occur); Ware, *supra* note 8, at 262-64 (asserting that employees and consumers gain by lowering transaction costs through pre-dispute agreements and that gain would not be possible with post-dispute agreements). But see Matthew T. Bodie, *Questions About the Efficiency of Employment Arbitration Agreements*, 39 GA. L. REV. 1, 46 (2004) (asserting that post-dispute agreements to arbitrate provide a much more economically efficient result for employees than pre-dispute agreements while acknowledging that there may be important societal benefits over time if employers choose to take on all the costs involved with arbitration). For further description of some of these arguments asserting that employers and employees have little incentive to enter into post-dispute agreements to arbitrate, see *infra* Part IV.A.

<sup>68</sup> See Sternlight, *supra* note 5, at 1658-59 (questioning the validity of the arguments by those who assert that post-dispute agreements to arbitrate are unlikely).

<sup>69</sup> See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 877 n.46 (2007) (describing incentives that parties have to settle cases and referring to “data from the federal courts” identifying that “ninety-eight percent of all civil cases and ninety-five percent of criminal cases settle through agreement of the parties or are withdrawn from the court without a final court decision”) (citation omitted)); Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 226 & n.131 (2007) (“In the real world, however, trial is a highly infrequent event, and most cases settle.”). However, the fact that settlement occurs at such a high level has also raised questions as to whether settlement should be discouraged. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984) (stressing the importance of a public resolution



ments to arbitrate can operate in a similar fashion to settlement agreements in terms of general support for this method of resolving a dispute, then Congress should adopt measures to encourage employers and employees to agree to arbitration after a dispute arises. Given how controversial enforcement of pre-dispute agreements has become and especially due to the dynamics posed by the jury trial and advanced remedies made available to employment discrimination claimants pursuant to the CRA of 1991, Congress must address the dilemmas involved with arbitrating these statutory disputes.

*A. Assessing the Scholarly Criticism of Post-Dispute Agreements to Arbitrate Statutory Employment Discrimination Claims*

A comprehensive analysis of the arguments that have been made as to why employers and employees have little incentive to enter into post-dispute agreements is beyond the scope of this Essay. However, an empirical study by David Sherwyn focuses on the motivations of employment attorneys in the Chicago area and provides background for understanding the critical analysis by those who question the propriety of focusing on post-dispute agreements to arbitrate:

Invariably, what is advantageous to one is disadvantageous to the other. Attorneys are hesitant to take any action that could signal weakness to the other side or hinder his or her chances of obtaining a desirable outcome. Parties are wise to consider not only the technical advantages and disadvantages of arbitration, but also the psychological effects of suggesting (or agreeing voluntarily to) an alternative forum. It may be the case that parties are reluctant to offer to arbitrate when either the underlying facts of their case appear weak or the opposition aggressively postures its willingness and readiness to proceed to trial.<sup>70</sup>

Although Sherwyn focused on the views of employment attorneys, Lewis Maltby looked at the views of corporate attorneys and, importantly, their corporate clients when he conducted an empirical study of American Arbitration Association employment arbitration files from its New York office in 2001 and found that post-dispute agreements to arbitrate employment claims were rare.<sup>71</sup> In his survey, Maltby also found that corporate attorneys do not want to arbitrate after a dispute arises because they believe either cases will be resolved through pre-trial proceedings or the employee cannot afford the costs of litigation.<sup>72</sup> Interestingly, Maltby also found that the corporate clients did not like to agree to arbitration after a dispute arises because similar to settlement, these clients were resistant to resolving a case early.<sup>73</sup>

Many of the arguments asserting that employers and employees will not agree to arbitrate after a dispute arises express similar concerns about the lack

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over private settlement). *But see* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669-70 (1995) (arguing that settlement and other dispute resolution choices should fall within the province of party determination and should not be denigrated as a viable option even before a dispute has occurred).

<sup>70</sup> Sherwyn, *supra* note 67, at 37.

<sup>71</sup> Maltby, *supra* note 67, at 319.

<sup>72</sup> *Id.* at 324-28.

<sup>73</sup> *Id.*

of economic incentives and purported cost savings that may exist before a dispute arises as opposed to after it arises.<sup>74</sup> However, it is surprising that this same analysis of purported benefits in agreements to arbitrate before a dispute arises does not match the limited empirical analysis suggesting that corporations rarely enter into pre-dispute agreements with each other.<sup>75</sup> And there is also some empirical analysis that shows that corporations rarely enter into post-dispute agreements to arbitrate with each other.<sup>76</sup>

Thus, the issue appears to be more about what motivates corporations to enter into agreements to arbitrate, in general, rather than assuming that employers will only agree to pre-dispute agreements with their employees and not do so after a dispute arises. Much of the criticism of post-dispute agreements to arbitrate results from an economic incentives analysis asserting that either the employee or the employer will not want to enter into a bad deal once either knows the nature of the employee's complaint and can assess the strengths and weaknesses of the employer's potential defenses.<sup>77</sup>

However, the decisions of employers are not rationally based and rather operate more from uninformed fears about the risks of litigation.<sup>78</sup> Furthermore, if we analogize the decisionmaking process for post-dispute agreements to arbitrate with decisions to settle where both sides can better assess the strengths and weaknesses of a claim, one will find that settlement decisions fail

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<sup>74</sup> See, e.g., Ware, *supra* note 8, at 262-64. General arguments that choosing arbitration represents a sound economic choice because it offers a social good have also been asserted. See, e.g., Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 212-13 (2000) (discussing economic incentives to choose arbitration); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 8 (1995) (same).

<sup>75</sup> See Eisenberg & Miller, *supra* note 48, at 367.

<sup>76</sup> Maltby, *supra* note 67, at 321-23.

<sup>77</sup> Estreicher, *supra* note 62, at 567-68 (asserting that agreeing to arbitrate would have an economic effect on settlement by taking off the table the effect of a jury trial); Maltby, *supra* note 67, at 314 (asserting that employees have little chance of convincing employers to give up the chance for resolution in court and instead arbitrate due to the costs involved); Sherwyn, *supra* note 67, at 57 (arguing that attorneys for plaintiffs and employers will rarely agree to arbitrate the same case); Ware, *supra* note 8, at 263 ("Neither party is likely to agree, post-dispute, to arbitrate claims for which arbitration is expected to be less favorable to that party than litigation would be.").

<sup>78</sup> Green, *supra* note 5, at 454-59 (describing concerns about jury verdicts—albeit based on little supporting data and unrealistic fears due to a few highly publicized awards—as the concern of employers that led the rush into the use of arbitration); Maltby, *supra* note 67, at 326-27 (describing how clients rarely make pragmatic evaluations at the "beginning of a dispute"). In a recent empirical study of nearly sixty United States corporations where the motivations of managers and attorneys in using ADR were surveyed, "interviewees hardly ever uttered the word 'fairness'" and "almost always reported that their major motivation was to avoid the costs associated with resolving disputes in court . . . ." See David B. Lipsky, *Resolving Workplace Conflict: The Alternative Dispute Resolution Revolution and Some Lessons We Have Learned*, 10 PERSP. ON WORK 11, 12 & n.3 (2007) (citing DAVID LIPSKY ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* (2003)). However, it appears that these motivations are not dispute-specific and are just based on generalized notions about the high costs of litigation. Maltby, *supra* note 67, at 326-27.

to follow typical economic analysis.<sup>79</sup> Thus, as Jean Sternlight has asserted: "Voluntary postdispute arbitration is not impossible. . . . [R]ather than dismiss the possibility of voluntary postdispute arbitration, we should consider what changes or regulations might be necessary to make this a reality in the United States."<sup>80</sup> Essentially, the changes that will be necessary must address employers' concerns about cost and predictability and employees' similar concerns about costs, while also offering a fair forum in which employees have all the same substantive rights as in courts and the potential to pursue all procedural rights that may have an effect on their substantive rights.

*B. Providing Incentives to Enter into Post-Dispute Agreements to Arbitrate Statutory Employment Discrimination Claims*

Although it remains an open question, if post-dispute agreements are not likely to occur as some have argued, then Congress should adopt incentives for post-dispute agreements to arbitrate in support of the FAA's strong policy supporting arbitration. Congress can create effective measures to reward employers by limiting punitive damages and unpredictable costs along with attorney's fees by offering a fair arbitration agreement after a dispute arises. Employees will have an incentive to use arbitration after a dispute arises if they can fairly choose the arbitrator and obtain a fast and effective resolution in a relatively cost-effective manner as compared to the difficulties that arise when pursuing a claim through the courts. Then arbitration will work just as well for the parties when agreed to even after a dispute arises.

*1. Rewarding Employers: Waiving Punitive Damages and Costs*

Employers' biggest fear regarding resolution of employment discrimination claims continues to be the unpredictability of large jury verdicts.<sup>81</sup> Employers do not seem to act rationally by agreeing to settle or pursue arbitration given their tremendous success rates in the courts.<sup>82</sup> However, certainty of not having a large jury verdict by being in arbitration seems to provide more of an incentive to employers than the minimal likelihood that such a jury verdict will occur in the courts. With punitive damages being the most uncertain aspect of a jury trial, if that component could be more reliably quantified in a

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<sup>79</sup> See Rhee, *supra* note 69, at 227 (finding economic theory suggesting that parties have the highest incentives to settle early does not match "empirical observation" that demonstrates "[s]ettlements occur at all stages of litigation, seemingly at random points in time" and many at a point "when virtually all transaction costs have been expended").

<sup>80</sup> Sternlight, *supra* note 5, at 1658.

<sup>81</sup> See Sullivan, *supra* note 4, at 317 ("Much of the advocating for arbitration on the part of employers results from verdicts that have been pursued before sympathetic-to-employee and hostile-to-employer juries in proceedings that have become known as 'workplace lotteries.'"); see also David T. López, *Realizing the Promise of Employment Arbitration*, 69 TEX. B. J. 862, 862 (2006) ("Employers have opted for mandatory, binding arbitration of employment disputes as a way to avoid the fear of disproportionate jury awards or jury bias, among other reasons.").

<sup>82</sup> See Green, *supra* note 5, at 454-59 (describing how employers ignore the tremendous success rate in the courts due to worries about unlikely jury verdicts and how those concerns led employers to start using arbitration right after jury trials became possible for discrimination claims brought under Title VII).

particular dispute resolution process, employers would have more of an incentive to follow that process. Accordingly, if Congress really values arbitration as a dispute resolution tool for statutory employment discrimination claims, it could amend Title VII by giving employers an affirmative defense to punitive damages and the possibility of attorney's fees as costs in the court system if employers offered post-dispute arbitration and the employee refused it.<sup>83</sup> This concept would be modeled in some aspects after Rule 68 of the Federal Rules of Civil Procedure, Offers of Judgment, which can cut off costs and attorney's fees when a party makes a written offer of judgment and it is refused by the other party who later does not receive as much in court as would have been received by accepting the offer of judgment.<sup>84</sup>

Under this proposal, if the employee proceeds in court, the employee would lose the chance for punitive damages by having rejected the post-dispute offer to resolve the matter in arbitration, and if the employee does not prevail in court, the employee would have to pay the attorney's fees as costs of the employer from a reasonable date after not accepting the offer.<sup>85</sup> If the employee accepts the post-dispute offer to arbitrate, then the employee can effectively vindicate all statutory rights in arbitration, including all punitive

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<sup>83</sup> This is not the first time that I have raised this type of affirmative defense as a possible methodology to create incentives for employers to agree to arbitration. See *id.* at 467-68 (suggesting that the offer of a post-dispute agreement to arbitrate would give employers an affirmative defense to a punitive damages claim). However, within this Essay, I also add attorney's fees and costs as a possible incentive for employers to agree post-dispute while trying to balance the needs for employees to have fair selection processes and the right to vindicate all rights that would have been available in court.

<sup>84</sup> FED. R. CIV. P. 68. Professor Danielle Shelton has described Rule 68:

The relevant text of the "Offer of Judgment" rule is as follows:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 869 n.6 (2007).

<sup>85</sup> Although Rule 68 of the Federal Rules of Civil Procedure does not represent such a fee shifting statute because it does not explicitly address the payment of attorney's fees as costs when an offer of judgment has been rejected and the plaintiff prevails, when a statute allows recovery of attorney's fees, then Rule 68 also authorizes recovery of attorney's fees as part of the other party's costs in that situation. See generally *Marek v. Chesny*, 473 U.S. 1 (1985). By expressly providing in this new legislation that a losing employee who rejected a post-dispute offer to arbitrate would have to pay the attorney's fees as costs, it will shift the employer's fees to the plaintiff in the courts. More importantly, it will create incentives to resolve employment discrimination disputes through post-dispute agreements to arbitrate and create more incentives for plaintiff's attorneys to take these claims into arbitration where attorney's fees will be more available without their clients having to pay the employer's attorney's fees if they lose.

damage remedies, costs, and attorney's fees, which could not be waived through an agreement to arbitrate.<sup>86</sup>

## 2. *Rewarding Employees: Fairer Procedures That Have Substantive Impacts and Address Difficulties Arising in the Courts*

Along with addressing the opportunity for employers to predict costs and fees more accurately in litigation, Congress must ensure that employees have all the same remedies available in arbitration that would be available in the courts. This would essentially add and codify many of the concerns that neutral service providers and interested parties have agreed to adopt through the Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes.<sup>87</sup> The Due Process Protocol was created ten years ago and needs to be updated.<sup>88</sup> A component of any congressional change must also include the adoption of fair selection procedures for arbitrators from a cross section of the population.<sup>89</sup> This requirement would also provide employees with the guarantee that arbitrator pools are not stratified on the basis of gender or race.<sup>90</sup> With this process, employers should also be responsible to provide a forum where the costs are not prohibitive and the employees have a fair opportunity to engage attorney representation.

### C. *A Legislative Proposal to Encourage Post-Dispute Agreements to Arbitrate*

With mediation becoming much more of a preferred tool for employers and after little regulation by courts, service providers, or Congress for more than fifteen years, if arbitration will have any long term potential for growth in resolving employment discrimination disputes, the employment discrimination statutes, the FAA, or both, will have to be amended. Given the difficulties

<sup>86</sup> See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 397-98 (2006) (referring to the "effectively vindicate" doctrine as a creature of the Court's application of the FAA to allow statutory claims to be arbitrated as long as all the rights and remedies available in the courts can be vindicated in arbitration); Ware, *supra* note 8, at 269-73 (describing the "effectively vindicate" doctrine along with its origins and applications).

<sup>87</sup> See Bales, *supra* note 8, at 341 (describing the Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes, developed by several groups representing employers, employees, and neutral organizations in 1995, and asserting that "[i]t has been adopted by the major arbitration service providers" who "will refuse to arbitrate cases under rules inconsistent with the . . . Protocol"). For more details about the Due Process Protocol, see Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005).

<sup>88</sup> See generally Bales, *supra* note 87.

<sup>89</sup> A few scholars have identified this concern. See generally Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145 (2004); William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006); Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Suits*, 4 J. AM. ARB. 1 (2005); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 312 (1999).

<sup>90</sup> See generally Green, *supra* note 89.

presented by the court system, and because mediation has not demonstrated that it will be the cure-all it is purported to be,<sup>91</sup> Congress should take steps to make post-dispute arbitration amenable to both employers and employees.

The possibility that Congress might even consider banning pre-dispute agreements to arbitrate may have some new resonance. Congress recently passed legislation that protects members of the armed forces from such pre-dispute arbitration agreements in the consumer setting by stating:

Notwithstanding section 2 of title 9, or any other Federal or State Law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member [of the U.S. armed forces] or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.<sup>92</sup>

Also, United States Senator Jeff Sessions, a Republican from Alabama, has repeatedly sought to introduce legislation in Congress that would address some of the concerns for employees and consumers regarding arbitration by amending the FAA.<sup>93</sup> Likewise, United States Senator, Russell Feingold, a Democrat from Wisconsin, has also made several attempts to pass legislation addressing pre-dispute agreements to arbitrate under the FAA.<sup>94</sup> Given the growing bipartisan interest and the recent enactment of the ban on such agreements for military personnel, Congress may finally be ready to attack this issue.<sup>95</sup>

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<sup>91</sup> Sherwyn, *supra* note 67, at 20 (describing how mediation is inadequate as a mechanism to “curb discrimination and harassment from the workplace”).

<sup>92</sup> See John Warner National Defense Reauthorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006); see also Posting of Paul Bland to CL&P Blog, [http://pubcit.typepad.com/clpblog/2006/09/defense\\_department.html](http://pubcit.typepad.com/clpblog/2006/09/defense_department.html) (Sept. 29, 2006) (citing same language from then proposed legislation and asking whether Congress’s decision to protect military personnel from the unfair practice of pre-dispute agreements to arbitrate might extend to other consumers). This bill was passed after a comprehensive Department of Defense report criticized the use of pre-dispute arbitration. See U.S. DEP’T OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 7, 14, 21, 46, 51 (2006), available at [http://www.defenselink.mil/pubs/pdfs/Report\\_to\\_Congress\\_final.pdf](http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf) (describing how pre-dispute arbitration of consumer loans to military personnel should be banned).

<sup>93</sup> See *Fair Arbitration Act of 2007: Statements on Introduced Bills and Joint Resolutions* (2007) (statement of Sen. Jeff Sessions), available at <http://sessions.senate.gov/pressapp/record.cfm?id=273715> (describing comments of Senator Sessions as he introduced the Fair Arbitration Act legislation on April 17, 2007); Press Release, U.S. Senator Jeff Sessions, U.S. Sen. Jeff Sessions Introduces Fair Arbitration Act of 2007 (Apr. 18, 2007), available at <http://sessions.senate.gov/pressapp/record.cfm?id=272618> (press release by Senator Sessions discussing introduced legislation, Fair Arbitration Act of 2007).

<sup>94</sup> See generally Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 281 (2002) (describing efforts by Senator Feingold to pass legislation addressing pre-dispute agreements to arbitrate). Senator Feingold continues to support legislation to address pre-dispute agreements. See Press Release, U.S. Senator Russ Feingold, Sen. Feingold, Rep. Johnson Introduce Measure to Preserve Consumer Justice (July 12, 2007), available at <http://feingold.senate.gov/~feingold/releases/07/07/20070712.html> (describing actions by Senator Feingold and U.S. Congressman, Henry Johnson, from Georgia, to introduce legislation on July 12, 2007 to ban pre-dispute arbitration agreements).

<sup>95</sup> On July 12, 2007, Senator Feingold and Congressman Johnson introduced new legislation to ban the use of pre-dispute arbitration agreements in employment and consumer disputes. See Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007) (legislation introduced by Senator Feingold and co-

Although most of this Essay has addressed the FAA, any congressional amendments should probably come as changes to Title VII and the other federal employment discrimination statutes because of the special nature of employment discrimination disputes. Changes to the FAA that merely exclude pre-dispute employment agreements from coverage would not address the comprehensive nature and potential for using arbitration to resolve statutory employment discrimination disputes. Any attempts to deal with arbitration in more detail for employment discrimination claims through an amendment to the FAA would just create confusion in light of the overall breadth of the FAA's coverage of many other types of transactions including consumer matters.

Section 118 of the CRA of 1991 was intended to encourage arbitration of employment discrimination claims, and it provides an excellent model for further legislative action to amend Title VII and other federal employment discrimination statutes.<sup>96</sup> That provision states:

Section 118. Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.<sup>97</sup>

The legislative history behind this ADR provision in the CRA of 1991 did not clearly indicate whether it was endorsing the use of arbitration as an agreed condition of employment before a dispute has arisen or only when agreed to after the dispute has arisen.<sup>98</sup> This provision was drafted before *Gilmer* when the general understanding was that agreements to arbitrate statutory employment discrimination claims could not prevent an employee from pursuing resolution in court.<sup>99</sup> Because section 118 of the CRA of 1991 failed to clarify whether it was encouraging pre-dispute or post-dispute agreements to arbitrate, further congressional changes to this provision of Title VII could easily clarify Congress' intent regarding pre-dispute agreements to arbitrate statutory employment discrimination claims.

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sponsored by Democratic U.S. Senator from Illinois, Richard Durbin, as Senate Bill 1782 and introduced in the House of Representatives by Congressman Johnson, with several Democratic co-sponsors, as H.R. Bill 3010, which would amend the FAA by prohibiting the enforcement of pre-dispute agreements to arbitrate employment and consumer disputes).

<sup>96</sup> Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (codified as a note at 42 U.S.C. § 1981 (2000)).

<sup>97</sup> *Id.*

<sup>98</sup> See Sara Lingafelter, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum*, 28 SEATTLE U. L. REV. 803, 821-26 (2005) (describing analysis and legislative history of the ADR provision in the CRA of 1991, section 118, found at 42 U.S.C. § 1981 (2000) (statutory note)). But see *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753 (9th Cir. 2003) (finding the language in the ADR provision to be unambiguous and thus no need to resort to meaning from legislative history suggesting that the ADR provision in section 118 of the CRA of 1991 was only intended to have a post-dispute application).

<sup>99</sup> Lingafelter, *supra* note 98, at 823.

Thus, the actual language proposed by this Essay would model Section 118 of the CRA of 1991 and would act as an amendment to Title VII and other employment discrimination statutes enforced by the EEOC<sup>100</sup> as follows:

**Fair Arbitration Civil Rights Act of 2007.**

*Section 1.* Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

*Section 2.* For all agreements to arbitrate claims under these Federal laws to be enforceable, the dispute must have arisen at the time of entering into the agreement.

*Section 3.* If employers offer employees the opportunity to arbitrate after a dispute arises, this offer will establish an affirmative defense of good faith in response to any claims for punitive damages available under these laws if the employee rejects this offer and pursues the claim in court. Then if the employee does not prevail in court after rejecting the offer or not accepting it, the employee will pay the employer's costs and reasonable attorney's fees starting at a reasonable time after the offer to arbitrate was made and not accepted.

*Section 4.* To be enforceable, any offer to arbitrate made by an employer must be in writing and allow the employee all the substantive remedies and rights that would normally be available to the employee if the matter had been pursued in court without an offer to arbitrate. Such terms of the offer shall include but will not be limited to the right to have an attorney, the right to have costs of paying the arbitrator's fees and filing fees not be prohibitive, the right to participate in the selection of the arbitrator and challenge selections based upon race, gender or any other improper basis, and all other rights consistent with those available to parties involved in arbitration under the Federal Arbitration Act.

**V. CONCLUSION: CONGRESSIONAL ACTION NEEDED BEFORE EMPLOYMENT DISCRIMINATION ARBITRATION BECOMES A PASSING FAD**

Despite the tremendous growth of arbitration involving statutory employment discrimination claims over the last fifteen years, any ongoing impact will require some legislative action. As employers become more frustrated with the legal challenges and costs involved in enforcing pre-dispute arbitration agreements, their support has started to dissipate. Unless employers start to see additional benefits beyond the initial thoughts that arbitration would be a less costly and faster means for a private, final, and binding resolution, arbitration may fade into oblivion. Also, as employers and the EEOC have become more excited about the prospects from mediation, arbitration has become a little used tool in the employment dispute resolution tool bag.

Although post-dispute agreements to arbitrate statutory employment discrimination claims present no more of a concern than private agreements to settle such claims, some scholars have argued that employers and employees have little incentive to enter into these agreements. Whether these arguments correctly predict employer and employee behavior, Congress can change the playing field by offering incentives that will make employers and employees

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<sup>100</sup> See Laws Enforced by the EEOC, *supra* note 30.



willing to consider post-dispute agreements to arbitrate statutory employment discrimination claims. By providing employers with more predictable outcomes in limiting punitive damages as an affirmative defense and limiting their costs and attorney's fees if an employee does not prevail in court after rejecting the employer's written offer to arbitrate after a dispute arises, employers will be motivated to offer such agreements. Likewise, by also requiring that employees must receive fair procedures in selecting arbitrators, paying for the costs of arbitration, being provided attorneys, and being afforded other process guarantees that may affect their substantive rights, employees will have a similar motivation to accept such agreements given the unpleasant prospects available through the courts.

Congress can provide employers and employees with a win-win opportunity by expanding the potential that arbitration can have in resolving statutory employment discrimination claims. Given that the impact of arbitration has started to reach a desperate crossroads regarding its continued use in the employment setting, only Congress can truly resolve the issues that have arisen since the 1991 *Gilmer* decision. Because statutory employment discrimination claims represent a unique issue, the best way for Congress to address this matter would be through an amendment to Title VII and other federal employment discrimination statutes rather than a change to the FAA. Regardless of how it is done, Congress must address the judicial expansion of the FAA to statutory claims that has occurred over the last twenty years. And when it comes to the issues regarding arbitration of statutory employment discrimination claims that have evolved with the expansion of FAA enforcement, Congress has to act in enough time to save arbitration as a vital tool that both employers and employees can use to resolve these disputes.