



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

1-2005

An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Suits

Michael Z. Green

Texas A&M University School of Law, mzgreen@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Suits*, 4 J. Am. Arb. 1 (2005).

Available at: <https://scholarship.law.tamu.edu/facscholar/626>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

AN ESSAY CHALLENGING THE RACIALLY BIASED SELECTION OF ARBITRATORS FOR EMPLOYMENT DISCRIMINATION CLAIMS

(Complete Work Published in 4:1 J. Am. Arb. 1 (2005). Copyright, The Journal of American Arbitration and Michael Z. Green. All rights reserved.)

Michael Z. Green*

I. INTRODUCTION.....	2
II. RECOGNIZING THAT RACE STILL MATTERS IN EMPLOYMENT DISCRIMINATION	6

© Michael Z. Green. Please do not copy unless authorized by Michael Z. Green.

* Associate Professor of Law, Texas Wesleyan University School of Law; B.S. University of Southern California; M.B.A., California Lutheran; J.D., *cum laude*, & M.S. Industrial Relations, Loyola University of Chicago; LL.M., University of Wisconsin. My initial thoughts for this paper started when I attended and participated in programs held on October 27-28, 2001 and November 1-2, 2003, “Intentional Conversations About Race, Mediation and Dispute Resolution” and “Intentional Conversations about Restorative Justice, Mediation and the Practice of Law: How Does the Concept of Restorative Justice, as Compared With Justice Expressed in Mediation and the Practice of Law, Relate to a Broader Social Context, Including Dynamics of Race, Class and Other Social Identities?,” respectively, at the Hamline University School of Law Dispute Resolution Institute. This Essay ensued from a paper I presented at the American Bar Association Sixth Annual Dispute Resolution Section Program titled, “Agreements to Arbitrate Future Employment Discrimination Disputes As a Condition of Employment: Are They Really Racially Restrictive Covenants?” as a member of a panel on Perspectives on Race and ADR: From Law Professors of Color and Teachers of Dispute Resolution held in New York, New York, on April 16, 2004. I appreciated tremendously the excellent feedback from my fellow panel members, Benjamin Davis, Llewellyn Gibbons, and Isabelle Gunning, regarding my presentation. I thank Frank Wu for providing me with some related insights about recusal and other challenges made against judges of color based on race. I would also like to thank the Texas Wesleyan University Law School Research Grant program for its financial support, and the research efforts of Texas Wesleyan law students, Abigail Jansson and Eunice Kim. For her constant support and care, I remain eternally grateful to Margaret Green. I dedicate this Essay to the memory of Reginald Alleyne, a labor and employment arbitrator, who, in personal conversation and through his writings, inspired me to address this subject.

A.	<i>Studies Indicate Increasing Workplace Racism</i>	6
B.	<i>Courts and Employers Recognize the Importance of Increasing Diversity and the Lack of Racial Minorities in Leadership Positions</i> ..	8
C.	<i>Despite Increasing Diversity in the Workplace, Complaints of Race Discrimination have Significantly Increased</i>	9
III.	RECOGNIZING THAT RACE STILL MATTERS IN THE ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AND THE SELECTION OF THE ARBITRATOR.....	11
A.	<i>The Intersection of Private Dispute Resolution With Racial Prejudice in the Employment Setting</i>	15
B.	<i>No Critical Mass of Black Arbitrators For Employment Discrimination and What Leyton Hewitt Can Show Us About Race in Arbitrator Selection</i>	19
C.	<i>Selection of Arbitrators Based on Race as a Constitutional Concern Under the Equal Protection Clause</i>	41
1.	A New Form of Racially Restrictive Covenants	41
2.	Extending <i>Batson</i> to the Selection of Arbitrators: Not Likely	42
IV.	USING SECTION 1981 TO CHALLENGE RACE-BASED SELECTION OF ARBITRATORS IN EMPLOYMENT DISCRIMINATION DISPUTES	45
V.	ADDRESSING RACIALLY BIASED ARBITRATOR SELECTION THROUGH AFFIRMATIVE ACTIONS BY EMPLOYERS AND DISPUTE RESOLUTION SERVICE PROVIDERS.....	49
A.	<i>Develop A Critical Mass and Cadre of Arbitrators of Color to Handle Race Discrimination in Employment Disputes</i>	49
B.	<i>Focus on the Value of Mediation</i>	53
VI.	CONCLUSION.....	54

I. INTRODUCTION

There is virtually no evidence out there. . . .We're making this up. We're saying if you have a black mediator [or arbitrator] . . . , then the . . . alleged victim is going to feel better. I'm not going to pick people on that basis and if I were representing a claimant, I wouldn't pick a person on that basis. I just think this is overstated. . . . My point is . . . we don't have the empirical evidence on it. . . .¹

1. See *ADR Vision Roundtable: Challenges For the 21st Century*, 56 DISP. RESOL. J. 8, 83 (Oct. 2001) (comments of Samuel Estreicher, NYU law professor,

I don't think we need data. I think we can know just from our life experience. Let's say there's a group of arbitrators but they're not diverse; if . . . the only arbitrators that ever showed up were white men, over time it's going to have a lack of credibility, just like if juries were made up of all men.²

I don't know. . . I assume the attorneys representing the plaintiffs or charging parties, they'll be making decisions as to who's the best mediator or arbitrator. And that's what's going to lead to acceptability. . . . They're not making it on the basis of skin color. . . I want to downplay the importance of this element. I think from the standpoint of opening up the field, we ought to be as open as possible and if we can, in terms of recruitment, I think that's a good thing. But I think you can't make out the case that it [race of the arbitrator or mediator] really has a significant impact on acceptability.³

These conflicting statements in an exchange between two men who both represent employers⁴ in discrimination disputes, Samuel Estreicher and Charles Morgan, respectively, help illuminate the debate about the selection of arbitrators to handle employment discrimination claims and whether race matters in that selection process. This Essay examines the implications from the dearth of black arbitrators who are placed in position to handle employment discrimination claims and the corresponding possibility of racial prejudice involved when employers require that black employees relinquish jury trial rights through adhesion agreements to arbitrate such claims. This Essay shall also undertake the task that Samuel Estreicher asserted at the beginning of this Essay could not be done: make a case for the position that the race of the arbitrator

labor and employment arbitrator, and employer defense counsel).

2. *Id.* at 84 (comments of Charles Morgan, executive vice president and general counsel for a Fortune 100 company).

3. *Id.* (comments of Samuel Estreicher, NYU law professor, labor and employment arbitrator, and employer defense counsel). Professor Estreicher assumes that attorneys will be representing plaintiffs in mediation and arbitration. *Id.* But there is no support for that assumption as most evidence points to the fact that plaintiffs cannot find attorneys in court or ADR proceedings for employment discrimination matters. See Michael Z. Green, *Finding Lawyer for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 64 n.23 (2004).

4. For full disclosure, I must admit that all of my experience as a licensed attorney before becoming a full-time law professor involved defending employers in legal matters.

does have a significant impact on acceptability and selection especially in employment discrimination disputes based on race.

Title VII of the Civil Rights Act of 1964 bans discrimination in employment on the basis of race.⁵ Enforcement of Title VII relies heavily upon the filing of charges by individual employees with the Equal Employment Opportunity Commission (EEOC) and then in court.⁶ Because race still matters significantly in our society, when arbitration agreements coerce black employees into a private dispute resolution system where employers may apply racial stereotypes without little regulation, it raises concern about the integrity of that system and its effect on the enforcement of Title VII. I assert in this Essay that race also matters in the selection of arbitrators to handle these discrimination claims as the lack of diversity in the arbitrator pool may cause black employees to not pursue their discrimination claims out of a feeling that it would be futile in such a questionable system. Accordingly, employees should be allowed to challenge race-based arbitrator selections as discrimination in the making and enforcement of these arbitration agreements and as a purported violation of the Civil Rights Act of 1866, codified at 42 U.S.C. Section 1981 (“Section 1981”).⁷

5. See 42 U.S.C. §2000e-2(a) (2004). I recognize that Title VII also bans discrimination on the basis of color, sex, national and religion as well as race. *Id.* In this Essay, however, I shall focus exclusively on claims of black employees as a framework to address issues regarding the dearth of black arbitrators available to handle their employment discrimination claims. But I acknowledge that there are many similar concerns regarding the selection of the arbitrator based on sex. See Vincent J. Rolden, Note, *The Mandatory Arbitration of a Woman’s Title VII Claim in the Securities Industry*, 4 CARDOZO WOMEN’S L.J. 511, 527-31 (1998) (describing difficulties with women in selecting from a panel of arbitrators of mostly men).

6. See Robert 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) (describing the role of private litigation in the enforcement of Title VII and arguing that scholars have underestimated the impact of private litigation on the enforcement of Title VII); Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 338 (2001) (discussing private enforcement of Title VII); Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 Yale L. & Pol’y Rev. 219, 219 (1995) (same); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 U.C.L.A. L. REV. 1401, 1452-56 (1998) (analyzing the strengths and weaknesses of private attorneys versus government enforcement of civil rights laws and suggesting that reliance on government agency enforcement is fruitless).

7. See, e.g., *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.*, 7 F.3d

In Section II, this Essay discusses why race plays a significant role in employment discrimination dispute resolution regardless of whether these matters ultimately reach the courts or get resolved through some alternative dispute resolution (ADR) forum. Section III highlights the issue of race as it applies to the arbitration of these disputes and the selection of the arbitrator who will decide how these disputes shall be resolved. Section IV suggests how employees may bring Section 1981 claims against employers as a response to issues regarding the lack of racial diversity within the pool of arbitrators selected to handle these disputes. Then Section V offers some changes as to how employers and employees can agree to private resolutions of their statutory employment discrimination disputes in a way that provides fairness for both parties by addressing the racial concerns with the selection of arbitrators or possibly mediators. This Essay concludes that failure to address the issue of arbitrator diversity and race-based selection or rejection of arbitrators may result in arbitration essentially being considered a system lacking integrity and one where black employees will view it as a non-starter in resolving their workplace discrimination claims.

1085, 1086-87 (2d Cir. 1993) (finding that an individual participant in an arbitration proceeding who brought a civil rights claim under Section 1981 against a securities firm for allegedly discriminating against him on the basis of race during the arbitration proceeding could proceed with his claim and it was not prohibited by federal arbitration law). Advocates for employees have essentially lost the argument that any challenges to these arbitration agreements may exist under Title VII unless Congress takes action. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 107 (2001) (enforcing an agreement requiring an employee as a condition of employment must give up his right to go to court and go to arbitration instead); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753-54 (9th Cir. 2003) (rejecting the argument that claims under Title VII, as amended, cannot be subject to adhesion agreements to arbitrate). There are also a number of cases that have found that Section 1981 claims are subject to arbitration. *See, e.g. Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 378-79 (4th Cir. 1998) (allowing a Section 1981 claim to be arbitrated pursuant to the Federal Arbitration Act without addressing whether such claims are subject to arbitration under the statutory interpretation of Section 1981); *Kidd v. Equitable Life Assurance Soc’y*, 32 F.3d 516, 519-20 (11th Cir. 1994) (same); *Pitter v. Prudential Life Ins. Co.*, 906 F. Supp. 130, 138-40 (E.D.N.Y. 1995) (finding that plaintiff failed to establish that Section 1981 claim was not subject to arbitration under the statutory interpretation of Section 1981); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430, 1436-37 (N.D. Ill. 1993) (same). Even if Section 1981 claims can be arbitrated, I am, at least, suggesting that Section 1981 provides a current statutory basis to bring a challenge to any racially-biased selection of arbitrators. *See infra* Section IV.

II. RECOGNIZING THAT RACE STILL MATTERS IN EMPLOYMENT DISCRIMINATION

A number of historical and recent indicators suggest just how strongly race currently matters in our society.⁸ In the employment setting, some of those indicators include: empirical results from controlled testing and statistical studies; anecdotal support as acknowledged by the courts based upon the views of corporate and military leaders; and significant increases in the number and nature of racial complaints in the workplace.

A. *Studies Indicate Increasing Workplace Racism*

“Perhaps the most striking evidence that overt discrimination is still practiced is employers’ widespread use of derogatory preconceptions to judge the qualifications of young black men.”⁹ In a study reported in 2002,¹⁰ candidates with the same or similar qualifications responded to help-wanted ads in the Boston and Chicago area.¹¹ They used the names Greg Kelly or Emily Walsh in some replies and the names Jamal Jackson

8. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 46 (1999) (noting the difficulty of denying a race-conscious approach in our society given “America’s history of differential white racist treatment of minorities and the continuing socioeconomic differences between whites and nonwhite racial groups”); see also *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”). Although the *Grutter* opinion was written by Justice O’Connor, Justice Ginsburg agreed that race still matters when she stated in her concurring opinion that: “It is well-documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideas.” *Id.* at 345 (Ginsburg, J., concurring).

9. See MICHAEL K. BROWN ET AL., *WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 226 (2003).

10. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment in Labor Market Discrimination*, (unpublished paper Nov. 18, 2002), available at <http://www.econ.yale.edu/seminars/apmicro/am02/bertrand-021204.pdf> (last visited Nov. 12, 2004).

11. See David Wessel, *Racial Discrimination in Hiring is Still at Work in U.S.*, WALL STREET J. (Sept. 4, 2003), available at <http://www.careerjournal.com/myc/diversity/20030916-wessel.html> (last visited Nov. 12, 2004).

or Lakisha Washington in other replies. Candidates with the white-sounding names, Greg or Emily, were 50% more likely to get called for interviews than those with the black-sounding names of Jamal or Lakisha.¹² The parties conducting this study concluded that putting a white-sounding name on the same job qualifications amounted to giving the applicant an additional eight years of experience.¹³

In another study reported in 2003, two young high school graduates with similar qualifications applied for various entry-level jobs advertised in a Milwaukee newspaper.¹⁴ Those listed jobs included low-skilled positions as waiters, dishwashers, drivers and warehousemen.¹⁵ The only major distinction in the job histories they provided was that one applicant was white and admitted to having served an eighteen-month jail sentence for possession of cocaine.¹⁶ The other applicant was black and did not have a criminal record. In this study, these applicants visited 350 potential employers in the Milwaukee area in response to job ads.¹⁷ The success rates were similar. The white criminal applicant was called back for another interview 17% of the time and the African-American applicant with no criminal record was called back 14% of the time.¹⁸ The creators of this experiment concluded that a young black male seeking employment carried the same disadvantage because of his race as a white man carrying an eighteen-month conviction for cocaine possession.¹⁹

Another possible reason for these results comes from a study reported in 2004 which found that, in New York, “by 2003, nearly one of every two black men between [the ages of] 16 and 64 was not working.”²⁰ The author of the report, Mark Levitan, concluded from his study “that just 51.8 percent of black men ages 16 to 64 held jobs in New

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. See Janny Scott, *Nearly Half of Black Men Found Jobless*, N.Y. TIMES, Feb. 28, 2004, at B1. For the full report, see Mark Levitan, *A Crisis of Black Male Employment: Unemployment and Joblessness in New York City, 2003*, in COMMUNITY SERVICE SOCIETY ANNUAL REPORT, available at http://www.cssny.org/pubs/special/2004_02labormarket.pdf (last visited Oct. 15, 2004).

York City in 2003.”²¹ According to the report, “[t]he rate for white men was 75.7 percent; for Hispanic men, 65.7; and for black women, 57.1” and “[t]he employment-population ratio for black men was the lowest for the period Mr. Levitan has studied, which goes back to 1979.”²² In commenting on this study, David R. Howell, a labor economist and professor, said that this data shows that employers “are particularly uninterested in hiring black men for jobs that require customer or client contact, for whatever reason” including the possibility of a preference for women in that type of job.²³

B. Courts and Employers Recognize the Importance of Increasing Diversity and the Lack of Racial Minorities in Leadership Positions

In the 2003 landmark decision, *Grutter v. Bollinger*,²⁴ the United States Supreme Court found that an affirmative action plan intended to increase the racial diversity at the University of Michigan Law School constituted a compelling governmental interest.²⁵ In part, this decision relied on the support of a number of major employers including private corporations and the military. These groups argued in amicus briefs that they supported efforts to improve racial diversity in our elite colleges as a means of increasing the ranks of talented leaders of color in our companies, the government and within the military.²⁶ In making its ruling in *Grutter*, the Court expressly acknowledged that for black people, “being a racial minority in a society, like our own, . . . race unfortunately still matters.”²⁷ Likewise, a large number of employers have started to recognize that race still matters in their own legal departments and within their outside legal representatives as they are taking steps to insure that racially diverse lawyers start to handle their

21. *Id.*

22. *Id.*

23. *Id.*

24. 539 U.S. 306 (2003).

25. *Id.* at 333 (“[W]e hold that the Law School has a compelling interest in attaining a diverse student body.”).

26. *Id.* at 330-31 (finding that “major American businesses” need “widely diverse people, cultures, ideas, and viewpoints” and “high-ranking retired officers and civilian leaders of the United States military” support the need for “highly qualified, racially diverse officer corps” as “essential to the military’s ability to fulfill its principle mission to provide national security”) (citing Brief of Amici Curiae 3M at 5, Brief of Amicus Curiae General Motors at 3-4, and quoting Brief of Amicus Curiae Julius W. Becton, Jr. et al. at 27).

27. *Id.* at 333.

legal matters “and hopefully some of that will spill over to ADR.”²⁸

C. Despite Increasing Diversity in the Workplace, Complaints of Race Discrimination have Significantly Increased

From the 1980s through the 1990s, racial harassment charges filed with the EEOC increased by 500%.²⁹ Then from 1990 to 2000, EEOC racial harassment charges also increased by 100% despite minority employment only increasing by 36%.³⁰ In fiscal year 2000, the filings for employment discrimination suits in federal district courts increased by 8,413 from a decade earlier and reached a total of 21,032 suits.³¹

Over the last few years, the EEOC has seen a major increase in race discrimination complaints involving harassment due to nooses being placed in the workplace.³² In a number of these noose incidents a degree

28. See *ADR Roundtable*, *supra* note 1, at 83 (comments of Charles Morgan, vice president and general counsel for a Fortune 100 Company, describing a signed statement of commitment to diversity that involved “so far, 350 companies” and how efforts were being taken to monitor the number of women and minorities within company legal departments and from within their outside counsel who are being assigned legal work for these companies); see also David 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, 1556-58 & n.43 (2004) (suggesting that the message being sent by a significant number of corporations who signed on to amicus briefs filed in *Grutter* and by corporate counsel who signed a letter regarding their commitment to diversity is that this corporate and market-based focus on the value of diversity will also affect the hiring of more diverse lawyers for these corporate entities).

29. See Robert Trigaux, *Noose Harassment: A Growth Trend Worth Reversing*, ST. PETERSBURG TIMES, Nov. 19, 2000, at http://www.sptimes.com/News/111900/Business/Noose_harassment__a_g.shtml (last visited Oct. 10, 2004).

30. See Aaron Bernstein, *Racism in the Workplace: In an Increasingly Multicultural U.S., Harassment of Minorities is On the Rise*, BUS. WEEK, July 30, 2001, available at http://www.businessweek.com/magazine/content/01_31/b3743084.htm (last visited Oct. 2, 2004).

31. See Susan Mandel, *Equal Treatment? Study Shows a Wide Gap Between Worker, Employer Wins in Job Bias Appeals*, 87 A.B.A.J. 24 (Nov. 2001).

32. See Sana Siwolop, *Nooses, Symbols of Race Hatred, at Center of Workplace Lawsuits*, N.Y. TIMES, July 10, 2000, Financial Business Section, at 1 (describing how the EEOC received dozens of complaints about threats to blacks and other members of minority groups involving the display of “nooses” in the workplace in 2000); see also Bernstein, *supra* note 30 (describing increasing number of noose incidents in workplaces and related EEOC charges filed throughout the country including in large metropolitan areas with large African American populations

of insensitivity occurred as many white supervisors indicated that they could not understand how placing a hangman's noose in the workplace had any racial connotation or could be perceived as anything more than "harmless joking."³³ Somehow these supervisors must not have recognized the significant history in our country of mob lynchings based on race.³⁴ In 2000, EEOC Chairwoman, Cari Dominguez, made a commitment to the National Association for the Advancement of Colored People (NAACP) that the EEOC would respond accordingly to the growing number of noose-related racial harassment claims in the workplace.³⁵

With these increased filings and concerns about race discrimination in the workplace, "[e]mployment discrimination cases constitute an increasing fraction of the federal civil docket, now reigning as the largest single category of cases at nearly 10 percent."³⁶ Since the 1990s, "employment discrimination cases exploded from 8,303 cases. . . in 1991 to 22,359 cases . . . in 2000, a 270 percent increase."³⁷ This entire increase cannot be isolated to just an increase in race-based cases under Title VII as new statutes involving disability discrimination and family leave became effective during that time.³⁸ Claims from those newer statutes, however, represent only a small percentage of the increase because Title VII cases, which includes race discrimination claims, represent "nearly 70 percent" of the total cases.³⁹

including Detroit and San Francisco); Trigaux, *supra* note 29 (describing increasing number of noose-related incidents in the workplace at companies in several southern states).

33. Bernstein, *supra* note 30 (noting that "some employers dismiss nooses and racial slurs as harmless joking"); Trigaux, *supra* note 29 (describing comments from Georgia Power's David Ratcliffe that some noose incidents in his company were due to "employees practicing tying knots for purposes of their job").

34. Bernstein, *supra* note 30 (noting that "hangman's nooses [are] a potent symbol of mob lynching in our racial history").

35. See EEOC Chairwoman Responds to Surge of Workplace Noose Incidents at NAACP Annual Convention (July 13, 2000), at <http://www.eeoc.gov/press/7-13-00-b.html> (last visited October 24, 2004).

36. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. OF EMPIRICAL LEGAL STUDIES 429, 429 (2004).

37. *Id.* at 433.

38. *Id.*

39. *Id.*

III. RECOGNIZING THAT RACE STILL MATTERS IN THE ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AND THE SELECTION OF THE ARBITRATOR

Although “[n]o study has fully documented the extent of employment arbitration . . . in the United States[,]” one commentator recently detected that “the American Arbitration Association (AAA) claimed that between 1997 and 2002, the number of employees covered by AAA employment arbitration plans grew from 3 million to 6 million.”⁴⁰ It is generally understood that, over the last decade or more, employers have increasingly decided to resolve employment discrimination disputes by requiring that employees agree to arbitration as a condition of employment before any dispute arises.⁴¹ Many critics

40. Thomas J. Stipanowich, *ADR and ‘The Vanishing Trial,’ What We Know—and What We Don’t*, DISP. RESOL. MAG. 7, 9 n.12 (2004) (citing Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, in *Alternative Dispute Resolution in the Employment Arena*, Proceedings of New York University 53rd Annual Conference on Labor (Samuel Estreicher & David Sherwyn, eds.) 331, 332-33 (2004)).

41. David E. Feller, *Putting Gilmer Where It Belongs, The FAA’s Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253, 253 (2000) (“Since the 1991 decision of the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, it has become common for employers to require, as a condition of employment, that their employees agree to arbitrate rather than sue on claims of violation of federal and state anti-discrimination statutes. The number of who so agree is impossible to know. Estimates are that approximately 8 to 10% of the United States workforce is covered by such agreements. The vast majority of these agreements, estimated to be 85%, have been implemented since the *Gilmer* decision.”) (footnotes omitted); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TULANE L. REV. 1401, 1424 (2004) (“U.S. employers, long frustrated by the high cost of defending workplace discrimination claims, have begun to use contracts of adhesion to require employees to resolve employment discrimination disputes through private binding arbitration rather than in court.”); see also Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL’Y 141, 157 (2001) (discussing the increasing use of arbitration programs by employers as an effort to stop employees from bringing their employment discrimination claims into the courts). The increasing use of ADR is not just limited to employment matters as the expansion of ADR to essentially all kinds of disputes has contributed significantly to a marked decrease in the number of trials that occur in our court system. See Marc Galanter, *The Vanishing Trial, What the Numbers Tell Us, What They Mean*, DISP. RESOL. MAG. 3, 4 (2004) (“One of the most prominent explanations of the decline of trials is the migration of cases to other forums”); Hope Viner Sanborn, *The Vanishing Trial*, 88 A.B.A. J. 24, 24 (Oct.

have raised concerns about adhesion agreements as most employees lack bargaining power to reject them at the time of hire and may unknowingly give up certain rights.⁴² Also, these agreements circumvent the public dispute resolution system that Congress adopted for addressing statutory claims through the courts under Title VII.⁴³ Specifically, through a hard and long fought battle by civil rights advocates to amend Title VII in 1991, Congress developed a dispute resolution system for victims of intentional discrimination that added the right to a jury trial and allowed claimants to seek compensatory and punitive damages with caps determined by the size of the employer's total workforce.⁴⁴

2002) (describing the expansion of ADR as an explanation for the vanishing trial). *But see* John Lande, *The Vanishing Trial Report, An Alternative View of the Data*, DISP. RESOL. MAG. 19, 19, 20-21 (2004) (noting that the "report about 'vanishing trials' touches a nerve in the ADR and judicial communities—and why it would be inappropriate to blame ADR for changing patterns of litigation" while admitting that "[a]ll the changes in the litigation environment in recent decades that reduced the trial rate probably also increased ADR use" but "this story" should be about "success" and should "cast ADR as one of the heroes rather than a possible villain").

42. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); 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. 33; Jean 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 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. 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).

43. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2—2000e-17 (2004)); *see also* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924-26 (1993) (referring to changes created by the Civil Rights Act of 1991 and how it amended Title VII).

44. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101-102, 105 Stat. 1071-74 (1991) (codified 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

Because this circumvention of the courts and juries occurs essentially from the private desire of employers, some members of Congress have tried to ban these agreements to arbitrate as employers have increasingly used them.⁴⁵ Those attempts have failed to create any successful legislation. Meanwhile, courts, including the Supreme Court, have used the Federal Arbitration Act (FAA)⁴⁶ to enthusiastically enforce these agreements in most circumstances.⁴⁷ The FAA, however, only allows very limited challenges to any arbitrator bias by stating that an award may only be vacated where “there was evident partiality or corruption in the arbitrators.”⁴⁸ Due to this limited basis for challenge, any efforts to raise the lack of diversity of the arbitrator pool as a systematic problem are usually attacked as “advocacy by anecdote” or “unconscionably facile” and clearly speculative as “it would be a mistake to assume that we can know with any confidence just how” arbitrators of any particular race will actually decide matters.⁴⁹

Thus, employers, the entities being regulated by Title VII, may end up privately directing the resolution of employment discrimination disputes out of the public judicial forum and its jury-driven decision process to a private arbitral forum and its arbitrator-driven decision process. And the process to select the arbitrator who will drive the Title VII decision for black employees claiming race discrimination depends primarily upon the unregulated and private whims of the parties especially the party with the most bargaining power, the employer.⁵⁰

claimants filing claims of intentional discrimination under Title VII, as amended by the Civil Rights Act of 1991, but placing caps on recovery of \$50,000 for employers with less than 101 employees and then graduated monetary increases corresponding to the increasing number of employees in the workforce up to a maximum of \$500,000 for employers with more than 500 employees).

45. Even in early 2004, a bill, the Civil Rights Act of 2004, was offered in Congress to address certain concerns about civil rights laws and it included a provision to limit the now rampant enforcement of agreements to arbitrate future civil rights disputes as a condition of employment. See FAIRNESS: The Civil Rights Act of 2004, H.R. 3809 and S. 2088 introduced Feb. 12, 2004, available at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.2088> (last visited Oct. 24, 2004).

46. 9 U.S.C. §§ 1-16 (2004).

47. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 107 (2001) (endorsing the use of adhesion agreements between employers and their employees to arbitrate statutory employment disputes as being enforceable under the FAA).

48. 9 U.S.C. § 10(a)(2).

49. Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 515-17 (1997).

50. See Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory*

This arbitrator selection process does not undergo the same public scrutiny that applies to the jury selection process in the court system.⁵¹ Rather, as Bryant Garth has suggested, the private dispute resolution system allows for “a very special elite group of judges, retired judges, commercial courts, mediators, and arbitrators who provide tailor-made justice geared specifically to large business” and “this relatively small group dominates the agenda for court reform as well as the elite ADR market.”⁵² And, if we are to rely on this group to self-regulate itself, Dennis Nolan has identified “several reported cases” where employers have openly attempted “to control the outcome by naming a biased arbitrator” even though the courts eventually rejected those agreements to arbitrate as being patently unfair.⁵³ Accordingly, it would not be a surprise for employers to now respond by seeking biased arbitrators without being so overt about it.⁵⁴

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”).

51. See Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1183-84, 1220-25 (2004) (describing how arbitrators are privately selected in comparison to public selection of juries and describing the problem of discriminatory arbitrator selection for the “community” as it “perpetuates invidious stereotypes about the abilities of the excluded group” and recognizing the harm that can occur if the community does not view a dispute resolution system as fair); see also Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN’S L.J. 267, 281-82 (1998) (comparing the open “community process” of having the jury be determined from a cross-section of the community that “legitimizes” its result versus lack of diversity in privately selected arbitrator pools).

52. Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 930 (2002).

53. See Dennis Nolan, *Labor and Employment Arbitration: What’s Justice Got to Do With It?*, 53 DISP. RESOL. J. 40, 46 (1998).

54. *Id.* (stating that now “[s]ensible negotiators presumably know enough to avoid such flagrant evidence of bias”); Cole & Spitko, *supra* note 51, at 1147 (stating that “[w]e suspect that this problem [discriminatory selection of arbitrators] is commonplace but generally flies beneath the radar screen”). Employers already have an inherent opportunity for arbitrators to be biased in their favor in a statutory discrimination dispute because the arbitrator wants to be acceptable to the “employer [who likely] would be the single party to use the arbitration on an ongoing basis, and consequently, the only party to regularly track arbitration

A. *The Intersection of Private Dispute Resolution With Racial Prejudice in the Employment Setting*

“The percentage of jury and bench trials in civil cases has declined from 10 percent of cases resolved in 1970 to 2.2 percent in 2001.”⁵⁵ Critics have noted that this major decrease in trial rates has come as a result of using private forms of adjudication including arbitration and mediation.⁵⁶ In arbitration, decisions shrouded in secrecy and informality replace the formal and public right to trial by jury decisions. Also, the societal benefits of establishing precedent through public vindication are lost when arbitration resolves the dispute. Essentially, arbitration “shields lawsuits from the imposition of public values about important concerns, such as discrimination in the workplace.”⁵⁷

Empirical studies have also indicated that racial minorities lacking bargaining power may be disadvantaged by their race in informal dispute resolution.⁵⁸ In a 1985 Wisconsin law review article, “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,” the authors Richard Delgado, Chris Dunn, Pamela Brown, and David Hubbert concluded that the increasing use of alternative dispute resolution would create negative consequences for racial minorities and people of color.⁵⁹ These authors, using social science and psychoanalytical studies, asserted that many factors including “scapegoating, economic dislocation, power disparities, socialization, and in-group/out-group cognitive categories—contribute to the development of prejudice” in resolving disputes.⁶⁰

results.” See Alleyne, *supra* note 42, at 403.

55. See Sanborn, *supra* note 41, at 26.

56. *Id.*

57. *Id.*

58. See Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC’Y REV. 767, 768-70 (1996) (describing findings from an empirical study concluding that female and male claimants of color received less in the informal process of mediation than similarly situated white claimants in litigation based upon the actual percentages of the amounts obtained); Christine Rack, *Negotiated Justice: Gender and Ethnic Minority Bargaining Patterns in the Metro Court Study*, 20 HAMLINE J. PUB. L. & POL’Y 211, 260 & n.91 (1999) (analyzing the negative effects in bargaining differences for ethnic minorities, women and those with limited bargaining power).

59. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360-61, 1375-91.

60. *Id.* at 1382. Trina Grillo also used social science and psychoanalytical

Being forced to pursue alternatives to the court system, according to Delgado and his co-authors, denies persons of color the application of certain norms and rules of procedure available in a court trial including “the flag, the black robes, the ritual—[to] remind those present that the occasion calls for the higher, public values, rather than the lesser values embraced during moments of informality and intimacy.”⁶¹ Accordingly, the “formality of adversarial adjudication deters prejudice,” because it “counteracts bias among legal decisionmakers and disputants” and it “strengthen[s] the resolve of minority disputants to pursue their legal rights.”⁶²

Strengthening the resolve of minority disputants to come forward with their claims of employment discrimination constitutes an important societal objective.⁶³ Some commentators, however, have attacked the premises of the Delgado article directly⁶⁴ or in other ways that

theory to support her related thesis that mediation as a form of alternative dispute resolution does not necessarily benefit parties with little bargaining power, while it perpetuates cultural stereotyping. Trina Grillo, *The Mediation Alternative: Process Dangers For Women*, 100 YALE L.J. 1545, 1550, 1570-72 (1991); Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1395 (1997) (describing the work of Grillo and asserting that social science and psychoanalytical study supported her argument).

61. Delgado, *supra* note 59, at 1388.

62. *Id.* at 1388-89. In citing Stephen Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 525 (1980), Delgado and his co-authors declared: “Formal rules also counter decisionmaker bias or consideration of extraneous issues.” *Id.* at 1399 n.307.

63. See EEOC v. Waffle House, 534 U.S. 279, 290-296 (2002) (describing the societal and public importance of enforcing Title VII through individual employees filing charges that the EEOC can investigate and pursue and how that importance supersedes those individual employees’ agreements to arbitrate those claims with their employer); see also Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 675-82 (2004) (describing the importance of Title VII in opening up dialogue for reform and the significance of private enforcement under Title VII); Selmi, *supra* note 6, at 1452 (describing the statutory attempts to create incentives by allowing for attorney’s fees and increased remedies to get private attorneys to bring employment discrimination cases as a key enforcement tool).

64. See, e.g., Beryl Blaustone, *The Conflicts of Diversity, Justice, and Peace in the Theories of Dispute Resolution: A Myth: Bridge Makers Who Face the Great Mystery*, 25 U. TOL. L. REV. 253, 260-61 n.17 (1994) (arguing that the thesis of the Delgado article is not empirically supported and that it “perpetuates bias because a stranger is deciding for all members of a class that they all have the same characteristics” and instead the concerns of Delgado’s article need to be evaluated

undermine its litigation romanticist approach.⁶⁵ Also, the assumption of the Delgado article that formal adjudication deters prejudice on the part of the decisionmaker has been resoundingly debunked by the empirical studies finding significant judicial bias in the processing of employment discrimination claims either at the trial court level or on appeal.⁶⁶ This suggests that the handling of employment discrimination claims either in the courts or alternatives requires special treatment.

Despite the significance of the Delgado article and the passage of twenty years, only a few commentators have focused their racial prejudice concerns on the selection of the decisionmakers when employees, seeking public vindication from racial discrimination, must take their claims to private arbitration for resolution.⁶⁷ The views expressed in the Delgado article should be of particular concern when employees have only agreed to arbitrate because the employer required it for any future disputes as a condition of seeking employment.

Critics of these agreements may not have recognized how strongly race matters in the employment setting and in the making and enforcement of the agreement to arbitrate. However, some critics have

on a case-by-case basis).

65. See Sarah Kristine Trenary, *Rethinking Neutrality: Race and ADR*, 54 DISP. RESOL. J. 40, 44 (1999) (“[M]any critics of ADR suffer from ‘litigation romanticism’” and fail to face that many of the problems that “they identify with ADR are also present in traditional adjudication.”); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995) (describing those critics of ADR as being infected with romantic notions of the value of litigation without focusing on its problems).

66. See Clermont & Schwab, *supra* note 36, at 451-52 (“We think we have unearthed a troublesome *anti-plaintiff effect* in federal appellate courts” for employment discrimination plaintiffs because “reversal of plaintiffs’ trial victories in employment discrimination cases should be unusually uncommon” but “we find the opposite” which appears to be a bias at the trial level that is exacerbated by additional bias at the appellate level).

67. See, e.g., Alleyne, *supra* note 42, at 407-10, 419-20, 428-29 (criticizing the lack of diversity of arbitrator pools, the inability of individual discrimination claimants to have fair and mutual selection of the arbitrator for statutory claims because of employer domination of the arbitrator selection process and unchecked arbitrator bias); Cherry, *supra* note 51, at 281-82 (criticizing the lack of diversity in arbitrator pools); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 255 (1994) (same); Jean Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 325 (1999) (same).

challenged the enforcement of adhesion agreements to arbitrate on the basis of the denial of jury trial rights.⁶⁸ Fear of juries and large jury verdicts does play a major role in the decision by employers to seek arbitration for the handling of employment discrimination claims.⁶⁹

On its face, fear of juries does not raise a racial concern. When the claimant is black, you can extrapolate the fear of juries into a fear of black juries especially in employment discrimination claims based on race.⁷⁰ But in our increasingly colorblind-driven society where matters of race are considered devious, at a minimum, such claims would

68. See, e.g., 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 (2001); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TULANE L. REV. 1 (1997) [hereinafter, Sternlight, *Fresh Assessment*]. But see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 198-204 (2004) (asserting that a waiver to a jury trial should be treated no differently than any other contractual waiver and any case law inconsistent with that view has unnecessarily and incorrectly departed from general principles just for jury trial waivers and the Supreme Court should reject any special treatment for contractual waiver of jury trial rights).

69. See *ADR Vision Roundtable*, *supra* note 1, at 10, 13 (comments of NYU law professor Samuel Estreicher describing the increasing use of ADR as being in part attributable to “the initiation of jury trials . . . to the discrimination area . . . [and the] employer incentive . . . to be free of the unpredictability of jury awards” as “[e]mployers, in their self-interest to avoid jury trials are creating a new system for dispute resolution”); Barry A. Macey, *Response to Theodore J. St. Antoine and Michael C. Harper*, 76 IND. L.J. 135, 136 (2001) (“Employers impose these arbitration arrangements for one reason and one reason only—to avoid jury trials.”); Sternlight, *supra* note 41, at 1423 & n.97 (finding that “employers see the litigation system as a negative lottery” based on employer fears of juries).

70. See Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839, 1839-40, 1865-66 (2002) (finding that the higher the black population percentage in the federal district court, the higher the jury verdicts awarded in job discrimination cases); see also PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 1-3, 166-76 (1999) (discussing the results of an employment discrimination claim brought by a black attorney against his large law firm in the District of Columbia where the large black population indicated a strong likelihood of having black jurors and how the large law firm in its defense ended up hiring a black woman to try the case as a result of the racial implications but the lead white male attorney from the major defense firm representing the law firm employer did not even know the black woman's name when counsel were being introduced at the beginning of trial).

probably be considered speculative.⁷¹ Under this colorblind approach, you assume that race does not play a role in decisions absent either direct smoking gun evidence or empirical evidence to the contrary. Nevertheless, if you can translate a fear of juries into a fear of black juries, then the next extrapolation would be to assert a fear of black arbitrators given the increasing shift of employment discrimination claims out of court proceedings and into arbitral proceedings for final resolution.⁷²

If the perception created by the way the process develops appears to be an attempt to prevent certain rights from being vindicated publicly or formally, then the process creates concern as being a flawed system. Under this scenario, the process may appear to be one of lower class justice through a private system when major public values are at issue that warrant formal and open vindication.⁷³ By forcing employees to agree to arbitrate well before the dispute exists, the racial prejudice involved in informal adjudication that the Delgado article raises becomes even more prominent because of the coercion involved.

*B. No Critical Mass of Black Arbitrators For Employment
Discrimination and What Leyton Hewitt Can Show Us About Race
in Arbitrator Selection*

The impact of racial and cultural biases that foster stereotypes and what role they play in the process of agreeing to and implementing an arbitration procedure warrants more consideration.⁷⁴ Unfortunately,

71. See *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502 (7th Cir. 2000) (finding lack of diversity as speculative reason to assert bias on the part of an arbitrator chosen and that it did not, in fact, establish a basis for bias); *Olson v. Am. Arbitration Ass'n, Inc.*, 876 F. Supp. 850 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995) (finding same).

72. See *Cole & Spitko*, *supra* note 51, at 1212 (describing how the problem “with discriminatory juror selection” is that the “non-discriminating litigant is subjected to an increased risk that the judicial proceeding will be affected by the same prejudice that affected the jury selection” and finding that “[t]his risk is also present with discriminatory selection of an arbitrator”).

73. See Owen M. Fiss, *Commentary, Against Settlement*, 93 *YALE L.J.* 1073, 1085 (1984) (analyzing adjudication in terms of public values that are threatened by settlement and ADR processes); Isabelle Gunning, *Diversity Issues In Mediation: Controlling Negative Cultural Myths*, 1995 *J. DISP. RESOL.* 55, 61-62 (discussing theories supporting the value of public rights being exercised through formal adjudication); Sternlight, *supra* note 41, at 1483-85 (advocating for the importance of public court vindication of some employment discrimination claims as a matter of societal concern).

74. See generally *CONFLICT AND CULTURE READER* (Pat K. Chew, ed., 2000)

under current law, there really is no strong regulation or disincentive to prevent employers from selecting arbitrators based on race as courts do not get involved with the process of arbitration until an award has been issued.⁷⁵ Then once an award has issued, concerns about the selection process become subsumed by the enthusiastic support for arbitration by the Supreme Court and the general wholesale endorsement of it by lower federal courts pursuant to the FAA.⁷⁶ The problem of being increasingly underfunded and overworked adds to the hesitancy of federal courts to take a more active role in the regulation of arbitration of employment discrimination claims.⁷⁷ Besides, recent empirical studies indicate the appearance of a general judicial bias with respect to these claims.⁷⁸

Proving that the selection of an arbitrator resulted from an employer's bias or stereotypical notions about race raises one of the problems that confounds our legal system when looking at any form of

(suggesting that any understanding of conflict resolution must consider the cultural aspects).

75. See Cole & Spitko, *supra* note 51, at 1185-89 (describing the private nature of arbitrator selection and how any challenges to the arbitrator selection process cannot be made through interlocutory appeal under the FAA and are usually reviewed under the very limited and narrow bases for challenging an award under Section 10 of the FAA, 9 U.S.C. § 10(a)(1)-(4) (2004), after a decision has occurred). "Challenges to the qualifications of an arbitrator to serve, like those of evident partiality by an arbitrator, must await the completion of the arbitration process." See Stephen K. Huber, *Arbitration Jurisprudence*, 35 TEXAS TECH. L. REV. 497, 527-28 (2004) (describing how difficult it is to challenge the arbitrator selected under the FAA and the case of *Gulf. Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 480-81 (5th Cir. 2002) (finding that any concerns about the arbitration process must await the final award under analysis pursuant to the FAA)).

76. See, e.g., *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502 (7th Cir. 2000) (denying challenges to the diversity of arbitrator pools and finding no basis for overturning the award under Section 10 of the FAA, 9 U.S.C. § 10 (2004)); *Olson v. Am. Arbitration Ass'n, Inc.*, 876 F. Supp. 850 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995) (finding same).

77. See Green, *supra* note 3, at 70 (describing how "federal courts face significant Congressional budget and staffing cuts that leave the federal judiciary 'with \$267.2 million less than it indicated was necessary to maintain services' for fiscal year 2004") (citing Katerina M. Eftimoff, *Staffing Cuts Expected in Federal Courts: Budget Shortages Threaten "Justice for All"?*, 29 LITIG. NEWS 1, 1 (ABA May 2004)).

78. See Clermont & Schwab, *supra* note 36, at 451-56 (finding a clear bias on the part of judges at the appellate level against employment discrimination plaintiffs from reviewing empirical data and outputs and asserting that the bias at the appellate level is clearly at play even if you assume that the difficulties for plaintiffs at the trial level may have more complex explanations).

racial discrimination whether in employment or elsewhere—how to show intent by the perpetrator and why it is necessary to do so when there is clearly a significant effect on the victims.⁷⁹ Whether viewed from the perspective of the purported perpetrator or the victim, if the arbitrator selection process denies black employees the right to have blacks as part of the pool of individuals who will decide the employment discrimination case as arbitrators, some mechanism must be made available to address these concerns.⁸⁰ Otherwise, we can have a clear wrong, unilateral selection or rejection of arbitrators on the basis of race as a perceived advantage to the employer or disadvantage to the employee, and no remedy for that wrong.

Because Title VII was intended to rectify the use of racist stereotypes in addressing workplace disputes, when employers, who are regulated by that anti-discrimination law, can force employees to arbitrate employment discrimination claims as a condition of

79. See Marc Poirer, *Is Cognitive Bias at Work A Dangerous Condition on Land?*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 459, 461-63 (2003) (identifying that the "paradigm case of discrimination involves invidious intent" and highlighting other authors' criticism of this paradigm on the basis that it misses unreflective bias or the effects of cognitive bias in the workplace); see also Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329 (1987) (describing how discrimination laws, including Title VII, fail to deal with the realities of unconscious racism). Others have raised the concern about unconscious or subtle forms of discrimination and the failure of the intent paradigm to capture these forms of discrimination. See, e.g., Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 416-17 (2000) (addressing unconscious discrimination and related issues under Title VII); Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997) (same); David Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999); Jessie Allen, Note, *A Possible Remedy For Unthinking Discrimination*, 61 BROOKLYN L. REV. 1299 (1995) (asserting that the failure of civil rights laws is related to its reluctance to expand the definition of discrimination to include an objective standard that would address unconscious use of stereotypes). But see Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 645, 658-59 (2003) (describing concerns that the concept of subtle or unconscious discrimination not be stretched too far).

80. 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 of antidiscrimination law which focuses on the mindset and acts of the alleged perpetrator rather than the consequences and conditions for the victim).

employment, the law must be applied in a way to rectify the decision to then select arbitrators on the basis of race. Admittedly, empirical data does not exist and will not likely become available about the selection of arbitrators based on race.⁸¹ After some examination of the issue, it is clear that race plays a considerable role in employment discrimination matters.⁸²

Consequently, unless a person places her head in the proverbial sand, it is not difficult to demonstrate through analogy or anecdotally that race matters in the selection of arbitrators for handling employment discrimination claims. The most direct analogy is the analysis involving the selection of federal court judges.⁸³ Christopher Drahozal has recently

81. Although it would be helpful to have the empirical data as Professor Estreicher asserts, there is little chance to obtain empirical data about private dispute resolutions and settlement. *ADR Roundtable*, *supra* note 1, at 83-84. Also, there is no real incentive for ADR service providers to provide data about the racial or gender make-up of its pools if that data is not good because it could hurt perceptions about the fairness of the pool. Professor Stephen Ware has even suggested that we should not be in so much of a rush to rest our conclusions about employment arbitration based on some form of empirical data. *See* 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) (asserting that empirical studies comparing arbitration to litigation may be flawed and “we should be skeptical of declarations that empirical studies ‘prove’ one side of the debate to be correct” about employment arbitration). There is some data available about how race affects jurors. *See* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 937 n.223 (2004) (citing Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003)). One Supreme Court Justice, Justice O’Connor, has noted that “race matters” in jury selection. *See* *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (finding that the “outcome of a minority defendant’s trial may turn on the misconceptions or biases of white jurors”) (O’Connor, J., dissenting). A majority of the Supreme Court Justices, however, refuse to acknowledge that race or sex matters in jury selection and has rejected “gross generalizations” that a man might be more likely to side with a man in a paternity dispute than with a woman or vice versa, *J.E.B. v. Alabama*, 511 U.S. 127, 137-40 (1994), and, instead, they have taken the colorblind approach to race in jury selection. *See* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (stating that any assessment of “a jury’s impartiality [must be made] without using skin color as a test”); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (“This Court has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror.”).

82. *See supra* Section II.

83. *See* Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 598 (2003) (advocating

asserted that, if we want to assess the decisionmaking of arbitrators or what he refers to as private judging, judges, not juries, represent the best comparator we can use.⁸⁴ Some indicators suggest that “[b]lack judges face recusal motions more often than their white counterparts often from white litigants concerned that the judge may rule against them because of their race.”⁸⁵ A number of cases have arisen where federal judges of

the author’s view of the need for increasing the diversity of federal court judges after seeing so “many federal judges [who] did not seem to understand the position of the plaintiffs” in employment discrimination cases). The analysis of Professor Beiner would apply similarly with respect to arbitrators being asked to decide employment discrimination cases. *Id.* See also Debra Baker, *Waiting and Wondering*, 85 A.B.A. J. 52, 53 (Feb. 1999) (describing the difficulties for federal court appointments of minority and women judges by President William Clinton in 1998 as the “Republican-controlled Congress” delayed because “minorities and women nominated to the federal bench tend to be perceived as the most liberal” and “they are more likely to be perceived as judicial activists” and according to a study by the Alliance For Justice, a Washington, D.C. Group that monitors the federal judiciary, “at the end of 1987, 87 percent of those who had been waiting the longest were women and minorities, while the fastest confirmations [for Clinton federal judicial appointments] were those of white men”). Also, “[s]tereotypes abound, and unfortunately it is hard for people to overcome them” as “[t]here is still a perception that African-American lawyers are not as qualified or competent as white lawyers.” *Id.* (comments of Barbara Arnwine, executive director of the Lawyers Committee for Civil Rights Under Law regarding the lack of black judicial appointments). Another strong analogy offered by Professor Sherrilyn A. Ifill as a basis for increasing the diversity in the selection of federal judges that could also extend to the selection of arbitrators includes the analysis from those cases involving the protection of minority voters’ challenges to state judicial election schemes that have stated claims for racial discrimination under the Fourteenth and Fifth Amendments. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 462-65 (2002) (describing voting challenge cases regarding judicial elections as being a worthwhile basis for maintaining the whole integrity of the judicial selection process). Throughout Professor Ifill’s thoughtful examination of the need for more black judges in her article, she makes many key points in support of her thesis that do apply when looking at arbitrators who are now being asked to do a significant portion of the work that had been done in the past by federal court judges, especially in the handling of federal statutory discrimination claims. *Id.*

84. See Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 107 (2004) (finding it to be “a seemingly reasonable assumption” that “arbitrators are more like judges than jurors in their decisionmaking” and asserting that arbitrators, like judges, are less likely to be influenced by cognitive illusions in making their decisions).

85. Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 772 n.121 (2000) (citing Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State*

color have been challenged or asked to recuse themselves because of their race or related bias that does not seem to happen with white federal judges.⁸⁶

Trial Courts, 39 B.C. L. REV. 95, 114 (1997)). There is also starting to be some empirical support for the proposition that the race of judges does play a role in discrimination cases especially from an empirical study of federal court judges' decisions conducted by Nancy Crowe. See Beiner, *supra* note 83, at 603-66 & n.18 (citing and describing the results from NANCY CROWE THE EFFECTS OF JUDGES' SEX AND RACE ON JUDICIAL DECISION MAKING ON THE U.S. COURTS OF APPEAL, 1981-96 (1999)); Ifill, *supra* note 83, at 455 n.234 (citing NANCY CROWE THE EFFECTS OF JUDGES' SEX AND RACE ON JUDICIAL DECISION MAKING ON THE U.S. COURTS OF APPEAL, 1981-96 (1999)). See also David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 UC DAVIS L. REV. 511, 558 (2003) ("A wealth of scholarship can be found arguing that our courts are dominated by white men who are dismissive of discrimination claims by women and minorities.") (citing Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002); David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors*, 81 CORNELL L. REV. 66, 147 (1995)).

86. See, e.g., *MacDraw, Inc. v. CIT Group Equip. Fin.*, 138 F.3d 33, 37 (2d Cir. 1998) (holding that sanctioning of attorneys was proper after they wrote a letter to Judge Chin questioning his impartiality because he was Asian-American); *Marcavage v. Bd. of Trs. of Temple Univ.*, 2002 U.S. Dist. LEXIS 19397, at * 25 (E.D. Pa. Sept. 30, 2002) (denying motion to recuse a black judge on the basis of being a member of an African-American barristers association in a civil rights case); *Vietnamese Fishermen's Ass'n v. Ku Klux Klan*, 518 F. Supp. 1017, 1020 (S.D. Tex. 1981) (denying motion for recusal filed by the Ku Klux Klan against Judge Gabrielle McDonald, a black female judge and a former civil rights attorney); *Leroy v. Houston*, 592 F. Supp. 415, 424 (S.D. Tex. 1984) (denying the city's motion to recuse Judge Gabrielle McDonald from considering the award of attorneys' fees to minority voters in a class action suit which included every minority group in the city, including that of the black trial judge), *rev'd on other grounds*, *Leroy v. Houston*, 831 F.2d 576 (5th Cir. 1987); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 5 (S.D. N.Y. 1975) (denying motion for recusal in a sex discrimination suit because the fact that the judge, Constance Motley, was also a black female is not sufficient evidence requiring recusal); *Pennsylvania v. Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 182 (E.D. Pa. 1974) (denying the motion for recusal which was filed because black Judge A. Leon Higginbotham gave a speech criticizing United States Supreme Court decisions on race issues). Recusal is possible, but it cannot be based on race regardless of the parties concerns. See also *Liteky v. United States*, 510 U.S. 540, 566-68 (1994) (affirming the denial of a motion for recusal asserting that the judge displayed animosity toward one of the parties through statements made in a different case because matters arising from judicial proceedings are not a basis for recusal). But see *Liljeberg v. Heath Serv. Acquisition Corp.*, 486 U.S. 847, 861 (1988) (holding that Judge Collins should

Despite academic commentaries that have raised concerns about the lack of diversity in the arbitrator pools,⁸⁷ the very few court challenges to agreements to arbitrate that have focused on this lack of diversity have all fallen on deaf ears.⁸⁸ In *Olson v. American Arbitration Association*, the plaintiff, J. Meg Olson, had signed an agreement to arbitrate any claims that arose out of her employment with NCR.⁸⁹ Olson brought a lawsuit in state court against NCR alleging the claim of intentional infliction of emotional distress.⁹⁰ NCR moved to compel arbitration based upon the agreement to arbitrate that Olson had signed.⁹¹ Olson then filed a lawsuit in state court against the American Arbitration Association (AAA) asserting that the AAA, the neutral service provider, had made misrepresentations that constituted violations under the Texas Deceptive Trade Practices Act.⁹²

Specifically, Olson charged that the arbitration panels provided by the AAA for the resolution of employment disputes were biased in favor of employers because: (1) the panels were unfairly stacked with employers who represent employers in employment disputes; (2) a vast majority of the panelists were men; (3) a vast majority of the panelists were white; (4) a vast majority of the panelists were comprised of lawyers who did not represent a cross-section of society; and (5) the AAA received substantial compensation from the employer.⁹³ The defendants removed the case to the federal court in the Northern District of Texas in Dallas.⁹⁴ The federal court then ruled on the defendants' motion to dismiss by finding that even if everything the plaintiff had alleged was true about the make-up of the arbitration panels provided by the AAA, she did not prove any illegal activity or bias.⁹⁵ In an extremely pithy analysis, the court said the following: "[T]hese allegations do not

have recused himself because of his association as a board member of one of the parties in the dispute).

87. See e.g., Alleyne, *supra* note 42, at 407-08, 424; Cherry, *supra* note 51, at 281-82; Howard, *supra* note 67, at 255.

88. See, e.g., Smith v. Am. Arbitration Ass'n, Inc., 233 F.3d 502 (7th Cir. 2000); Olson v. Am. Arbitration Ass'n, Inc., 876 F. Supp. 850 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995).

89. 876 F. Supp. 850, 850-51 (N.D. Tex. 1991).

90. *Id.* at 851.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

as a matter of law show bias. Olson speculates based on stereotypical characteristics that the arbitration panel in this case is biased. Olson's conclusion that the panel is biased is unsupported by her remaining allegations in her complaint."⁹⁶ On appeal, the decision in Olson was affirmed without a written opinion by the United States Court of Appeals for the Fifth Circuit.⁹⁷

Another similar case also resolved by a federal court on a motion to dismiss is *Smith v. American Arbitration Association, Inc.*⁹⁸ In *Smith*, the plaintiff, Lisa Smith, was involved in an underlying dispute with defendant Argenbright regarding her contract to sell Argenbright her controlling interest in a company, PIMMS Corporation, for \$65 million dollars.⁹⁹ Pursuant to an agreement to arbitrate between Argenbright and Smith which required resolution in accordance with the AAA Rules in Chicago, Argenbright sought to arbitrate a dispute as to whether Smith had committed a breach of warranty by exaggerating about PIMM's revenue generating potential.¹⁰⁰ Argenbright notified Smith and the Chicago office of the AAA about its intent to arbitrate and the AAA office in Chicago sent Smith and Argenbright a panel listing fifteen potential arbitrators.¹⁰¹ That panel contained fourteen men and one woman.¹⁰² Pursuant to AAA procedures, Argenbright struck the name of the only female from the panel and the final panel included three men.¹⁰³

Smith then filed suit in federal court alleging that the lack of diversity in the pool, when coupled with Argenbright's action in striking the only woman from the pool constituted a breach of contract.¹⁰⁴ The federal district court refused to issue an injunction preventing the arbitration from going forward with the three males and dismissed Smith's complaint for failure to state a claim upon which relief can be granted.¹⁰⁵ Smith appealed to the United States Court of Appeals for the Seventh Circuit which then expedited its decision so that it would not have any bearing on the final decision of the arbitration panel.¹⁰⁶

96. *Id.* at 852.

97. 71 F.3d 877 (1995).

98. 233 F.3d 502 (7th Cir. 2000).

99. *Id.* at 504.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

In a decision written by Judge Richard Posner, the Seventh Circuit affirmed the dismissal by the district court. The court characterized Smith's complaint as asserting that the failure to have a woman on the panel would be detrimental to her because an all-male panel would be unsympathetic to her claims.¹⁰⁷ The court, however, found the following:

No effort to substantiate the suggestion that male judges or arbitrators are prejudiced against wealthy women who have purely commercial disputes with corporations has been made; nor has Smith pointed to any issue in this litigation to which a man might be insensitive. The relief sought, which seems premised on the belief that a female litigant is entitled to be judged by a panel that includes at least one woman, borders on the fantastic.¹⁰⁸

According to the court, Smith could have agreed to some right to have an arbitration panel that included at least one woman, but the court did not find that she had such an agreement with either AAA or Argenbright.¹⁰⁹ The court then found that Smith might have a basis for challenging the arbitrator selection as a form of unjust enrichment in that AAA breached its duty to provide a fair panel by giving a panel that essentially consisted of all men and Argenbright, being the beneficiary of this contaminated panel, should not be able to take unfair advantage from AAA's breach.¹¹⁰ The court also found that if such a claim existed, it was premature because challenges to arbitrator selection based on bias can only be raised after an award is rendered by the arbitrator.¹¹¹ By agreeing to arbitrate, the court found that the parties gave up their right to seek an interlocutory appeal to the courts about the selection of the arbitrators.¹¹²

Smith responded that being forced to wait until an arbitration award was rendered meant that she would only be able to challenge the award for evident impartiality under the limited bases provided by the FAA.¹¹³ The court, however, rejected that argument by finding that Smith gave up any right to have a broader review by agreeing to arbitrate her disputes

107. *Id.*

108. *Id.*

109. *Id.* at 505-06.

110. *Id.* at 506.

111. *Id.*

112. *Id.*

113. *Id.*

with *Argenbright*.¹¹⁴ In another argument, Smith asserted that the principles requiring constitutional protection against peremptory challenges to potential jurors in court based on race, gender or other invidious grounds should be extended to arbitration because of the strong judicial and court enforcement of arbitration.¹¹⁵ The court completely rejected this proposition by stating that “[a]rbitration is a private self-help remedy” and “[t]he American Arbitration Association is a private organization selling a private service to private parties who are under no legal obligation to agree to arbitrate their disputes or . . . to use the services of [the AAA], which is not the only provider of such services.”¹¹⁶

Smith also made a similar argument as in the *Olson* case by asserting that the AAA violated the state deceptive trade practices law which was summarily rejected by the court.¹¹⁷ Smith, however, did make another interesting argument by asserting that the discriminatory selection of the arbitrators violated state law banning discrimination by public accommodations.¹¹⁸ The court entertained the possibility that discrimination had occurred by analogy to the constitutional analysis that courts must use when analyzing peremptory strikes of jurors in that *Argenbright* had attempted to strike an arbitrator from the pool based on gender, but the court found that Smith only alleged that the AAA was a public accommodation, and not *Argenbright*, the alleged discriminator.¹¹⁹ Because there was no allegation that *Argenbright* was a public accommodation, the state statute banning gender discrimination by public accommodations did not apply.¹²⁰ The court did not indicate what would have occurred if *Argenbright* had been a public accommodation.

With the strong preference for enforcement of arbitration agreements by the courts and the very narrow statutory bases for

114. *Id.* at 506-07.

115. *Id.* at 507.

116. *Id.*

117. *Id.* at 507-08.

118. *Id.* at 508.

119. *Id.*

120. *Id.* It is my opinion that this part of the *Smith* case supports the argument of this Essay about the availability of Section 1981 claims. If an employee asserts a race discrimination claim analogized with *Batson* in terms of a discriminatory strike of an arbitrator based on race, then the employee may assert a claim under Section 1981 for discrimination in the making and enforcement of a contract which does not require state action or that the party be a public accommodation.

challenging an arbitration award under the FAA,¹²¹ employees have little chance of raising concerns about the selection of the arbitrator based on race.¹²² The most direct response by the courts to these challenges as seen by the *Olson* and *Smith* decisions has been to find that any concerns about the race of the arbitrator are speculative and absent proof of actual harm or bias, the agreement to arbitrate and any award arising therefrom should be enforced regardless of any potential racial bias in the arbitrator selection process.¹²³

This type of analysis feeds into a general view about race that has become somewhat prevalent at the beginning of the 21st century. Modern-day debates about matters of race have become clouded by a focus on colorblind approaches especially from a legal perspective.¹²⁴ Despite the significance of the Thirteenth and Fourteenth amendments to the Constitution, which only became possible through the Civil War, focusing on wrong-headed colorblind approaches has overwhelmed any race-specific measures and allowed race to continue to divide our society and drain our resources.¹²⁵ Nevertheless, many commentators believe

121. 9 U.S.C. § 10 (2004).

122. See Cole & Spitko, *supra* note 51, at 1185-89.

123. See *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502 (7th Cir. 2000); *Olson v. Am. Arbitration Ass'n, Inc.*, 876 F. Supp. 850 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995).

124. See Pauline T. Kim, *The Colorblind Lottery*, 72 *FORDHAM L. REV.* 9 (2003) (finding that although the Supreme Court upheld the Michigan Law School's affirmative action admissions policies in *Grutter*, the multiple opinions in the case revealed the deep divisions that remain in our society over the legitimacy of race-conscious policies and the meaning of equal protection because of debates about the concept of "colorblindness"); see also John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 *OR. L. REV.* 201, 207-08 (1982) (describing the argument that "achievements of blacks who rise above society's lower strata are viewed with suspicion and seen as a result of the special privilege of affirmative action rather than of merit" when looking at it "according to objective, 'color blind' criteria"); Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 *STAN. L. REV.* 1, 2 (1991) (asserting that the Supreme Court's focus on "color-blind constitutionalism" creates a mechanism for further white racial domination or subordination of non-whites); Ifill, *supra* note 83, at 414 ("In a society still deeply fractured along racial lines, 'color blindness' can merely entrench existing racial inequality.").

125. See James E. Jones, Jr., *Rise and Fall of Affirmative Action*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 345, 347-48, 367 (Herbert Hill & James E. Jones, Jr. eds., 1993) (criticizing attacks on the consideration of race in decision-making as being unconstitutional and rejecting colorblind views of the constitution as being in conflict with the Constitution which was not colorblind and required a civil war and two amendments to address race-specific measures to remedy our dark

that issues of race are no longer a concern and that raising racial objections involves a disingenuous effort at playing the race card that does nothing but divide us in our efforts to seek a fair resolution of disputes.¹²⁶

Despite this colorblind thinking about the diversity of arbitrator pools, in a 2000 article, I focused on the issue of color when I concluded that “[f]ew arbitrators [handling labor and employment disputes] tend to be women or people of color.”¹²⁷ In addition to the evidence available about the lack of diversity that some commentators had addressed at that

history of racial discrimination).

126. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 32-66 (2002) (highlighting the focus on colorblind approaches even from those with well-intentioned aspirations because raising race turns off whites who may be willing to support certain civil rights or social aims and describing the authors’ critique of this colorblind focus); see also Kimberle Crenshaw, *Playing Race Cards: Constructing A Pro-Active Defense of Affirmative Action*, 16 NAT’L BLACK L.J. 196 (1999) (suggesting the offensiveness of it being considered a negative to raise race considerations, the audacity of equating the raising of racial concerns with a game by referring to it as “playing race cards” and assessing all of this as occurring under the guise that blacks only raise race to obtain unwarranted and undeserved benefits while using the playing cards metaphor to analyze the affirmative action debate).

127. Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 RUTGERS L. J. 399, 441 n. 153 (2000) (citing *ADR Taskforce Approves Prototype For Arbitration of Statutory Rights*, DAILY LAB. REP. (BNA) No. 91, at D-14 (May 11, 1995) (listing comments of Due Process Protocol Taskforce member and former National Academy of Arbitrators President Arnold Zack stating that “there is a shortage of women and minorities” to develop a “roster of qualified arbitrators”); *Fairness of Compulsory Arbitration Debated By Lawyers at D.C. Bar*, DAILY LAB. REP. (BNA) No.34, at D-15 (Feb. 21, 1995) (noting comments of Howard Law Professor and arbitrator, Homer LaRue, that the National Academy of Arbitrators is “mostly white and male” since only 10% are women and less than 1% are people of color); EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 2 (GAO/HEHS-94-17 March 30, 1994) (estimating that “most of the NYSE New York arbitrators (about 89 percent of 726 arbitrators at the end of 1992) were white men, averaging 60 years of age”); see also *Improving Diversity In Arbitrator Pool Not Easy, Stock Exchange Officials Say*, DAILY LAB. REP. (BNA) No. 93, at D-7 (May 14, 1996) (describing difficulty of the stock exchange in filling its arbitrator pool with minorities and women despite initial criticism in the GAO report). But see Kenneth May, *Participants at SPIDR Gathering Discuss Present And Future of Labor Arbitration*, DAILY LAB. REP. (BNA), No. 188, at A-6 (Sep. 29, 1999) (noting comments of Arbitrator, Charles Donegan, that the National Bar Association’s Arbitration Section lists 75 black arbitrators as members)).

time,¹²⁸ I knew from my experience representing employers that a typical practice was to require that the dispute resolution service provide an arbitrator panel listing only those arbitrators who were members of the National Academy of Arbitrators (NAA), a non-profit organization of arbitrators.¹²⁹ On its face, this appears to be a reasonable request as members of the NAA represent the most experienced and highly regarded arbitrators as they must have been in arbitration practice for at least five years, handled at least fifty cases and cannot “serve partisan interests” by working as “advocates or consultants” for either employees or employers.¹³⁰

In a recent review of the membership roster of the NAA, I identified only twelve black members out of over 600 listings on their website membership listing or only two percent.¹³¹ In some major jurisdictions, there may be only one black arbitrator on the NAA roster, if even that

128. See sources cited *supra* note 127 (listing citations).

129. For a description of the National Academy of Arbitrators, see its website at <http://www.naarb.org>.

130. See National Academy of Arbitrators Membership Guidelines at http://www.naarb.org/member_guidelines.html (last visited Oct. 24, 2004) (describing membership requirements of having “at least five years of arbitration experience and a minimum of 50 diverse ‘countable’ arbitration cases during that five-year period”). Even the partisanship requirement seems appropriate in suggesting fairness for both sides. Although others have found that such a requirement of not being involved in the representation of employers or employees should not be a limitation in creating arbitration panels. See Carol L. Eoannou, *FMCS Shelves Expansion of Roster; Unveils New Workplace DR Initiative*, DISP. RESOL. MAG. 31 (2004) (describing a debate about a potential roster to be created by the Federal Mediation and Conciliation Service of “qualified professional neutrals for the public to access via the Internet” for issues involving employment, public policy and multi-party regulatory negotiation disputes” and the clamor about the requirements of the panel because it excluded “advocates” who were “defined as ‘a person who represents employers, labor organizations, or individuals as an employee, attorney, or consultant in matters of employment including but not limited to EEOC claims and workplace disputes’”).

131. The NAA website only lists names and does not include pictures or racial demographics. I determined the number of black members from either personal knowledge or from confirming with other member arbitrators and do not list the names of those arbitrators who are members of the NAA and are black for their own privacy. See Notes from Conversations With NAA Black Arbitrators (on file with author). From my personal observations and those conversations, I identified no more than 12 black arbitrators on their list of 600 arbitrators or a total of no more than 2%. See Membership List available at http://www.naarb.org/member_list.php (last visited Oct. 24, 2004).

many, within that entire area.¹³² Consequently, a request to have all arbitrators on the panel be members of the NAA could virtually guarantee the probability of not having a black arbitrator.

Sometimes action must be taken to level the playing field and remove the potentially racist and prejudicial consequences. Unlike the court system where the parties may look to the judge to apply publicly developed formalities to level the playing field, arbitration does not normally provide those formalities.¹³³ Because most arbitrators handling employment disputes are not people of color, racial minorities seeking vindication for employment discrimination will not likely perceive that the arbitration forum constitutes a level playing field.¹³⁴ And because it is fairly easy for employers to strike, without impunity, the very few

132. For example, only one black arbitrator in the Chicago area is listed on the roster of the NAA. See Membership List *supra* note 131. This result is shocking in light of the fact that Chicago is a city with a population of almost three million people and with more than one million black residents. See State of Illinois, Illinois Census 2000, Municipalities, Chicago, available at http://illinoisgis.ito.state.il.us/census2000/dplace_census.asp?theSelCnty=031&towns=14000 (describing census 2000 figures and showing 36% black population with total black population of 1,053,739 out of a total Chicago population of 2,896,016) (last visited Oct. 10, 2004). What is even more telling is that I know from my own practice experience in the Chicago area that this one black arbitrator has been the only black arbitrator in the Chicago area on the NAA roster for several years. If an arbitration panel was geographically broad enough, you might find one other black arbitrator who was a member of the NAA in another Midwestern state such as Indiana or Wisconsin. Those states, along with Illinois, encompass the states covered by a restrictive federal court decision made by the United States Court of Appeals for the Seventh Circuit regarding arbitrator selection challenges under the FAA. See *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502 (7th Cir. 2000). Ironically, after practicing for so many years in Illinois, I am now located in Texas, a state covered by the United States Court of Appeals for the Fifth Circuit, and it has a similarly limited ruling regarding arbitrator selection challenges under the FAA. See *Olson v. Am. Arbitration Ass'n, Inc.*, 876 F. Supp. 850 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995).

133. Delgado, *supra* note 59, at 1388-89.

134. In a 1999 study of the justice system, “nearly half of those surveyed believed that courts do not treat all ethnic and racial groups the same” but when views of lawyers were sought, “[m]ore than half of black lawyers” viewed racial bias to be “very much” a part of our justice system and only about “6 percent of white lawyers agreed.” Dennis Archer, *Eradicating Racial and Ethnic Bias in the Courts*, 1 MINORITY TRIAL LAWYER 1, 9 (2003). If blacks and whites clearly view our formal justice system differently, then the transition of the formal system of justice into a private system framed by those with the most bargaining power, whites, may also raise concerns for blacks that whites may not appreciate.

black arbitrators normally available in employment discrimination arbitration panels, the selection process further contributes to the concerns about the integrity of the system.

Those rejecting claims about the lack of people of color in the arbitrator pool, however, point to a similar lack of racial diversity in the pool of judges¹³⁵ as if the complaints about the lack of arbitrators of color may be much ado about nothing or at least the lesser of two evils.¹³⁶ For those who maintain there should be little concern about the

135. Admittedly, the federal court system does not provide a panacea-filled critical mass of black judges either. *See Baker, supra* note 83, at 53 (describing the lack of diversity amongst federal judges as indicated by a study conducted by the Alliance for Justice finding that out “[o]f 825 federal district and circuit court judges, 82 are black, 36 Hispanic, seven Asian-American, two American-Indian and one Arab-American” and “[a]nother 124 are white women”). As the first black president of the American Bar Association, Dennis Archer, has recently noted, “perceptions of racial bias in the courts . . . can only be exacerbated by the failure of us in the legal profession to do our part” because “what people see when they step into the courtroom can be at least as important as any public policies intended to address problems in the system.” [So] “[w]e need more lawyers of color . . . [and] [w]e need them on our courts in all jurisdictions.” *See Archer, supra* note 134, at 9-10. But the prospect for obtaining more black judges remains limited by the dearth of black lawyers. *Id.* at 10 (comments of Archer stating the following: “The American Bar Association estimates that there are 1,050,000 lawyers in the United States. (Fortunately, they don’t all practice.) While there has been improvement in the numbers of lawyers of color since the 1990s, they remain woefully under-represented in the legal profession. While people of color make up 25 percent of the U.S. population, more than 89 percent of the legal profession and 80 percent of enrolled law school students are white. Lawyers of color represent fewer than 4 percent of partners in the nation’s major law firms. “). This small percentage of black lawyers, especially those in position as partners in the nation’s law firms, probably helps to explain why there are so few black arbitrators. Partners at law firms who represent corporate clients in employment discrimination matters are the ones most likely to be in position to pick the arbitrators. Although arbitrators do not have to be lawyers, one can assume that their experience in handling employment discrimination matters on behalf of companies as legal counsel would have to add value to being a candidate in the arbitrator selection process.

136. *See Rau, supra* note 49, at 514-16 nn.111-113 (raising the point that race and gender-based challenges to arbitrator pools are speculative as white male judges do not have some per se clear “unconscious bias” based on stereotypes and that lack of diversity regarding judges in the court system is also such a major disparity that it would be “too embarrassing to the argument” about arbitrator diversity to compare the pool of arbitrators with the racial diversity of judges). *See also ADR Roundtable, supra* note 1, at 81, 84 (describing comments from Professor Samuel Estreicher that criticize the efforts to attack the lack of diversity in the arbitrator pool when there is little diversity among judges and surmising that the potential for

lack of diversity in the pool of arbitrators, responding to those who confront this issue provides an opportunity to raise the colorblind argument that white arbitrators can just as easily and fairly handle discrimination disputes without being biased.¹³⁷ Additionally, as the colorblind argument goes, the race of the arbitrator should not matter; nor should the selection of a white arbitrator raise any concern of bias unless there is actual bias displayed by that particular arbitrator.¹³⁸

But these arguments ignore the role that an employer and an employer's counsel can play in stacking the arbitrator selection deck pursuant to racial stereotypes.¹³⁹ That involvement in arbitrator selection cannot be replicated when randomly obtaining a judge in a court claim or even selecting a jury.¹⁴⁰ Although Professor Estreicher "assume[s] the attorneys representing plaintiffs or charging parties" will help decide "who's the best mediator or arbitrator,"¹⁴¹ he does not address the more than likely situation where the plaintiff or charging party does not have counsel.¹⁴² In that situation, the repeat player lawyers for the employer

more diversity may occur with arbitrators because they do not necessarily have to come from the limited pool of those who are lawyers as is required for judges). *But see* Beiner, *supra* note 83, at 598-99 (noting how when questions about the lack of diversity in the pool of judges are raised, then "the status quo—based on a white male norm is challenged" and how "white males" might be "unwilling to give up that power" and will rely on the defensive claim that all judges should be able to operate impartially and without bias and race should not be taken into account).

137. *See* Rau, *supra* note 49, at 514-16 nn.111-113; *ADR Roundtable*, *supra* note 1, at 81, 84.

138. Essentially these arguments frame the analysis that was adopted by the courts in two cases involving challenges to the diversity of the pool of arbitrators. *See* Smith v. Am. Arbitration Ass'n, Inc., 233 F.3d 502 (7th Cir. 2000); Olson v. Am. Arbitration Ass'n, Inc., 876 F. Supp. 850 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995). In both cases, the courts analyzed the case pursuant to challenges to the arbitration awards under Section 10 of the FAA and found no basis for overturning an award due to lack of diversity as it did not mean that the arbitrator actually chosen exhibited some bias.

139. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994) (finding that discriminatory juror selection will lead to concerns about the integrity of the justice system as a whole as if the participants believe "the 'deck has been stacked' in favor of one side"); *see also* Cole & Spitko, *supra* note 51, at 1221-22 (describing how discriminatory selection of the arbitrator can destroy the public's confidence in arbitration).

140. Cole & Spitko, *supra* note 51, at 1183-89 (describing differences in arbitrator selection versus jury selection).

141. *See* *ADR Roundtable*, *supra* note 1, at 84.

142. *Id.* (identifying thoughts of Professor Estreicher); *see* Green, *supra* note 3 (discussing the difficulties for individual employees in discrimination claims to find

are in the best position to choose the arbitrators and can take race into account in making that decision without any real limitation when dealing with the pro se black claimant.¹⁴³

Furthermore, two wrongs, lack of black judges and lack of black arbitrators, don't make it right in either circumstance.¹⁴⁴ By raising concern about the lack of diversity in the pool of arbitrators, I do not assert that whites may be unable to fairly arbitrate discrimination claims any more than an all-white jury would be unable to fairly reach a verdict for a black plaintiff in a race discrimination suit.¹⁴⁵ What is being challenged is the process that allows one side to take race into account and stack the pool or the final selection of an arbitrator based on race without any ability of the opposing party to regulate or check that behavior. In those situations, regardless of the approach of the all-white decisionmakers in deciding a discrimination claim brought by a black plaintiff, the integrity of the process is called into question.

By essentially telling black employees that they may have their employment discrimination claims heard without any chance that the arbitrator will also be black as part of a fair cross-section of individuals in the selection pool, the system allows employers to set the racial playing field for selecting arbitrators to their own perceived and racially stereotypical advantage. As repeat players, employers and their lawyers could frequently reject or strike black arbitrators from the selection pool while relying on racial stereotypes that might somehow assume that a black arbitrator is going to side with the black employee or that a black arbitrator may be more willing to nullify an employer's legal (but racially reprehensible) acts than a white arbitrator would.¹⁴⁶

legal counsel).

143. Professor Estreicher does recognize that the repeat player problem is really a "repeat lawyer" problem. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 566 (2001) ("[T]he real repeat players in arbitration are not the parties themselves but the lawyers involved.").

144. See Beiner, *supra* note 83, at *passim* (advocating for more diversity in federal court judges); Ifill, *supra* note 83, at *passim* (advocating same).

145. See Michael Higgins, *Few Are Chosen*, 85 A.B.A.J. 50, 51 (Feb. 1999) (describing comments of black plaintiff, Gary Davis, who felt that an all-white jury that had ruled against him in a racial discrimination case was biased because the only two black potential members of the jury were stricken by the panel by the defense's use of peremptory challenges so that Davis did not feel they were "his peers").

146. See Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WISC. L.

Professor Isabelle Gunning has referred to the application of these racial stereotypes in dispute resolution as involving the use of negative cultural myths.¹⁴⁷ The application of cultural myths in the selection of arbitrators can exist right now in the making and enforcement of arbitration agreements without much knowledge of it occurring.¹⁴⁸ By allowing employers to consider the race of the arbitrator in their selection process without any real regulation, the whole process becomes tinged with racial flaws and stereotypes that destroy the reality and the perception of fairness for black employees seeking a resolution of an employment discrimination claim. As Charles Morgan, a prominent employer counsel, has noted at the beginning of this Essay, this lack of diversity goes to the “credibility” of the entire process.¹⁴⁹

Those few black arbitrators who do tend to handle a significant number of employment discrimination suits are even faced with a

REV. 501, 503 (describing how “lawyers can “act upon an often seriously mistaken or ill-intended sociological judgment about the effect of a juror’s race, nationality or gender towards a particular party” with “[t]he most commonly articulated view” being “that whites will judge minorities, particularly African Americans, more harshly than they will judge other whites, and that minority jurors will look more favorably upon parties who share the same minority status”); *see also* Fred D. Butler, *The Question of Race, Gender, & Culture in Mediator Selection*, 55 DISP. RESOL. J. 36, 38 (2001) (noting that given the history of racism in our society, “parties may need to identify with someone who looks like them”); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 312 (1999) (noting the value of shared culture between an arbitrator and the claimant of the same race and that shared race should not warrant removal on some claim of assumed bias); E. Gary Spitko, *Judge Not: In Defense of Minority Culture Arbitration*, 77 WASH. U.L.Q. 1065, 1067-69 (1999) (describing concerns of minority participants regarding potential bias in the court system). The issue of nullification scares attorneys as they believe that “[w]hat may appeal to white jurors as a black defendant’s implausible story may ring true to black jurors with greater knowledge of the context and norms of black experience.” Cavise, *supra* note 146, at 503 n.15 (quoting Valerie P. Hans & Neil Vidmar, *Judging the Jury* 50 (1986)). *See also* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (asserting the value of jury nullification in criminal matters). *But see* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1645-57 (2001) (asserting that there is less of an argument to support the use of jury nullification in civil matters and how courts should take aims to limit its occurrence in civil matters).

147. Gunning, *supra* note 73, at 80-81.

148. Cole & Spitko, *supra* note 51, at 1185-89 (describing limited regulation of arbitrator selection process).

149. *See ADR Roundtable*, *supra* note 1, at 84.

persistent dilemma over time. If they rule for the employer, they have merely done what they were supposed to do from the repeat player employer's perspective. On the other hand, if they rule for the black employee, there could be a distinct possibility that certain stereotypical notions will rear their ugly head and it will be assumed that the decision must have been because of the mutual race between the black employee and the black arbitrator.¹⁵⁰

These stereotypes are easy to apply and even black lawyers who represent employers face a perverse disincentive in selecting black arbitrators that I refer to as an interest divergence between black lawyers and black arbitrators.¹⁵¹ By applying stereotypes, their white clients or

150. See *infra* text accompanying notes 152-55 (discussing the Leyton Hewitt situation).

151. I raise this allegedly perverse disincentive based upon my own personal experience while attending a conference held nearly seven years ago that involved mostly attorneys of color who represented companies in employment disputes. A discussion occurred at that conference about the pressures affecting attorneys of color when deciding to select arbitrators of color. From that discussion, it became clear that the selection of black arbitrators by black attorneys can present a lose-lose opportunity. First, there are very few black attorneys at major law firms. See Archer, *supra* note 134, at 10 ("Lawyers of color represent fewer than 4 percent of partners in the nation's major law firms."); Wilkins, *supra* note 28, at *passim*; Mitu Gilati & David B. Wilkins, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 502-06 (1996) (describing how blacks are underrepresented in corporate law firms). Because they represent such a small percentage of blacks in corporate law firms, the decisions of black counsel for employers in selecting a black arbitrator from the very small percentage of black arbitrators available may raise questions. It is not an unnecessarily unusual experience for attorneys of color who represent employers to have certain stereotypical assumptions made about how and why they handle discrimination cases when representing employers and the basis for their decisions in those cases. See, e.g., *Lee v. Am. Eagle Airlines*, 93 F. Supp. 2d 1322, 1325 (S.D. Fla. 2000) (describing sanctions against an attorney for the prevailing plaintiff in an employment discrimination suit brought on the basis of race and noting that as part of his misconduct he refused to talk with a black female attorney representing the defendant employer and said the only reason she was involved in the case was because of her race and these discussions led her to leave her litigation practice); see also Barrett, *supra* note 70, at 1-3, 166-78 (describing the implications from hiring a black female lawyer to defend a large law firm in a race discrimination lawsuit brought by a black attorney against that law firm and suggesting that her race played a major role in her selection because of a black jury in Washington, D.C.). Cf. *Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306, 1310-11 (11th Cir. 2002) (describing sanctions against a black plaintiff's counsel in an employment discrimination case when she made allegations throughout about the "white" opposing counsel that involved many "ad hominem attacks" and "similar vitriol"

senior partners may assume that race played a role in the selection of the black arbitrator by the black lawyer representing the employer. If a black lawyer then loses, it was the black lawyer's fault for choosing the black arbitrator in the first place. And, if the black lawyer wins, that was expected because the race of the arbitrator matches the race of the black lawyer. Thinking about the merits becomes clouded by racial stereotypes involving the decisionmaker's race. Black lawyers representing employers do not face these added dilemmas and concerns of interest divergence when choosing white arbitrators to handle employment discrimination claims.

A situation that occurred a couple of years ago in the sport world highlights this situation. At that time, white Australian tennis player, Leyton Hewitt, apparently wondered if the race of a black line judge mattered when close line calls were being ruled in the favor of his black opponent.¹⁵² This incident arose during the 2001 U.S. Open Tennis

and also involved derogatory remarks made against opposing counsel and the court). Derrick Bell has raised the unique conflict of interest that black attorneys can have with their clients. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472, 489 (1976) (identifying the dilemmas that black attorneys may face in addressing the conflicting interests of their various constituencies including conflicts between those funding the case and the actual clients that the attorneys are trying to obtain relief for in the representation). According to Derrick Bell, this problem may exist for black lawyers because they may only succeed with racial concerns by merging their interests with those of the white majority. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524-28 (1980) (asserting that blacks must articulate their demands in ways that show that their interests and values converge with the interests and values of whites); 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, 371-72 (2002) (“Bell hypothesized that racism serves such powerful economic and psychic interests that only equally strong countervailing interests would hold it in abeyance.”); see also Michael Z. Green, *Addressing Race Discrimination under Title VII after Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOWARD L.J. (forthcoming Spring 2005) (applying Bell's interest-convergence theory to focus on using ADR in meshing black employees' interests in rooting out race discrimination with employers' interests in valuing diversity and globalization).

152. Charles Bricker, *Blake Goes Down Fighting in Loss to Hewitt*, SOUTH FLORIDA SUN-SENTINEL, Sept. 1, 2001. Sports Sect., at 18C, available at 2001 WL 22752896 (9/1/2001). Apparently, Hewitt automatically assumed under some stereotypical tribal notion that similar skin color would make a line judge treat him differently because his opponent was the same color as the judge. Now imagine what this means for black employees bringing claims of discrimination in a society

Tournament when Hewitt allegedly complained about calls that he received from a black line judge, Marion Johnson, while he was playing against a black opponent from the United States, James Blake.¹⁵³ If the line judge ruling against him had been white, Hewitt could not have raised race or color as a reason for complaining about the judge's rulings. And likely if Blake had then raised the issue of the matching white races of the line judge and Hewitt if close calls had gone against Blake, it would have been quickly dismissed as some form of race baiting or playing the race card and not an issue of merit. Because, after all, white judges rule fairly everyday regarding white and black participants. But in Hewitt's case, when close calls were not going his way, all indications suggest that he immediately assumed that the mutual black color of the line judge and that of his opponent was the reason why the calls were going against him.¹⁵⁴ Likewise, many black jurists have been challenged through similar uses of stereotypes.¹⁵⁵

that has a terrible history of discrimination and the chances are that the skin color of most of the arbitrators who will be listening to their claims are white. There is no legal concern about rectifying this problem for employment discrimination claimants who may believe the race of the decision maker stacks the deck against them on close calls. But a rich white tennis player can openly assume that a black line-judge has it out for him because his opponent is black when it comes to making close calls on whether a tennis ball was on the line or out.

153. *Id.* Because it was the U.S. Open and his opponent, Blake, is an American and Hewitt is from Australia, one must wonder why race or color became the first option that Hewitt chose in addressing the close calls instead of nationality.

154. *Id.* When asked why he was so sure that the line judge was making poor calls, it was reported that Hewitt responded "look at him and tell me what the similarity is" suggesting that it was the similar color of the judge with that of his opponent. *Id.*

155. *See* Ifill, *supra* note 85, at 114 (describing a case in which the defendants charged that black federal judge, Judge, A. Leon Higginbotham, should disqualify himself based on race because of his views and history of seeking civil rights improvement). Obviously, if the defendants in that case could have stricken Judge Higginbotham from a panel of arbitrators based on his race, they would have done so. Also, I recognize that a countervailing argument is that race still does not matter and rather it is ideology that is being challenged. *See* Baker, *supra* note 83, at 53 (describing comments that the selection of judges may not be based on race and rather ideology). For example, there are many employer defendants that might probably keep former EEOC Chair and current Supreme Court Justice Clarence Thomas, an African American, on an employment discrimination arbitration panel instead of former civil rights attorney and current Supreme Court Justice Ruth Bader Ginsburg, a white female. *See* Ifill, *supra* note 83, at 414 (stating that "advocates need not, and indeed should not, argue that the African American community is monolithic in its configuration, views, or values, or that only one

Because this kind of racially-biased thinking and stereotyping still represents the mentality of those in our society, a practical application to that thinking would be to do what Leyton Hewitt apparently did. Under this thinking, you can assume that any decisions that go against you when the decisionmaker is black and your opponent is black must be based on the race of the decisionmaker. If Hewitt were in the position of choosing that black line judge again, he would probably refuse to do so. And if he had the right to prevent any black judge from being involved in his matches with Blake in the future, he would likely use that right because his actions have indicated that he believes that the race or color of the line judge does definitely matter.

Due to the unusually low number of arbitrators of color who handle employment discrimination disputes and the number of increasing claims of racial discrimination being brought by people of color, it is essential that a critical mass of qualified arbitrators of color be developed and employed to handle these disputes.¹⁵⁶ Then the perception of fairness and the balance of power resulting in diminished results for people of color in informal disputes may reach a fairer conclusion. With intentional employment discrimination claims, this issue is of paramount concern because Congress, as part of a long hard fight for civil rights in 1991, expressly granted to employee plaintiffs the right to a trial by jury and compensatory and punitive damages for those claims.¹⁵⁷

'black perspective' exists"); see also A. Leon Higginbotham, Jr., *An Open Letter to Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992) (identifying clearly different ideologies of two African Americans, Judge Leon Higginbotham and Justice Thomas). However, ideology can be used for proxy as we learned from the Leighton Hewitt example. In close calls or when you don't know ideology, then you may start to stereotype by using race as a proxy for so-called ideology.

156. In the Supreme Court's recent decision about affirmative action, it found that the University of Michigan Law School's attempt to seek a "critical mass" of underrepresented minority students to achieve its compelling interest in student body diversity was a "goal" designed to obtain meaningful numbers of minority students beyond token numbers. *Grutter v. Bollinger*, 539 U.S. 306, 334-36 (2003). Similarly, employers and, in particular, dispute resolution service providers need to reach a critical mass of arbitrators and mediators of color beyond just token representation.

157. Cherry, *supra* note 51, at 281 & n.7.

C. *Selection of Arbitrators Based on Race as a Constitutional Concern Under the Equal Protection Clause*

1. A New Form of Racially Restrictive Covenants

Underlying racist goals and intended or unintended consequences from private adhesion agreements to arbitrate may result in the same type of pernicious effects that arose in the early 1900s when racially restrictive covenants were used to prevent black people from owning land and living in certain areas.¹⁵⁸ In 1948, the United States Supreme Court found that judicial enforcement of these racially restrictive covenants violated the Constitution because using the courts to enforce private agreements that perpetuate race discrimination constitutes government action covered by the Equal Protection Clause.¹⁵⁹ Similarly, one could argue that using the courts to enforce private agreements to arbitrate can perpetuate race discrimination in the selection of the arbitrator that should also constitute government action covered by the Equal Protection Clause as possibly a new form of racially restrictive covenants.¹⁶⁰

The problem, however, would be the difficulty in establishing state or governmental action to raise a constitutional concern.¹⁶¹ Racially restrictive covenants that existed in the early part of the 20th century expressly stated that blacks could not obtain land or live in certain areas.¹⁶² Whereas agreements to arbitrate now being pursued in the early part of the 21st century do not openly state that they are intending to

158. Racially restrictive covenants were found to be in violation of the equal protection clause of the Constitution in 1948. *See Shelley v. Kraemer*, 334 U.S. 1(1948) (prohibiting states from enforcing racially restrictive covenants under the 14th Amendment).

159. *Id.* at 20.

160. *See* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 112-13 (1992) (finding that “a tenable argument for Shelley-style state action exists” to challenge the enforcement of arbitration agreements). *But see* Cole & Spitko, *supra* note 51, at 1169-70 (“Since *Shelley*, no other case has found state action solely on the basis that the court enforced an otherwise private arrangement.”).

161. *See* Cole & Spitko, *supra* note 51, at 1159-60 (“A necessary prerequisite for constitutional challenges to arbitration, however, is some theory under which arbitration constitutes state action, since constitutional prohibitions apply only to state action. And, at least as an initial matter, it is difficult to see how agreements between private parties regarding arbitration meet this threshold requirement.”).

162. *See Shelley*, 334 U.S. at 20.

prevent blacks from exercising certain rights.¹⁶³ Thus, the enforcement of these agreement by courts does not clearly involve state action. Without a more direct focus on the racial discrimination that can occur, challenging arbitration clauses as being racially restrictive covenants in the selection of arbitrators does not have a strong legal foundation.¹⁶⁴

2. Extending *Batson* to the Selection of Arbitrators: Not Likely

The public jury selection process provides certain guarantees, even in a civil matter, that allow the participants to challenge the use of certain stereotypes in efforts to prevent jurors from serving on the basis of race.¹⁶⁵ These so-called “*Batson* challenges are more common in criminal than civil trials, but the issue arises in discrimination cases or other racially sensitive matters, observes U.S. District Judge Clifford Scott Green,” who acknowledged that “[i]n his own courtroom, . . . [m]ost lawyers don’t seem to intentionally strike black jurors—but maybe that’s because [Judge Green is] a black judge.”¹⁶⁶ Therefore, trust in the jury system and the value of eradicating workplace discrimination through a jury of peers represents a significant balance to racial prejudice that should not be so easily ignored.¹⁶⁷ If arbitration continues as a

163. Cole & Spitko, *supra* note 51, at 1170 & n.99 (finding that “you had to look at the color of Shelley’s skin in order to decide whether to enforce the contract” and “the Shelley case involved a court’s enforcement of a covenant that was contrary to the wishes of both parties to the case and resulted in race discrimination” and “[t]his element . . . [a]s with the race aspect of Shelley . . . is unusual and unlikely to be repeated”).

164. I had intended to explore this option in more detail. As I started to complete this Essay, I discovered that Sarah Cole and Gary Spitko had recently published a detailed and thorough analysis of this issue. *Id.* at *passim*. See also Brunet, *supra* note 160, at 113 (describing a belief that there might be a “tenable argument” that *Shelley* state action analysis might allow constitutional protection involving arbitration matters but seemingly being resigned to accept that courts will not likely allow this to occur” given the “existing disfavor for broadened use of state action” in court analysis so that “it requires examination of other ways to incorporate increased standards of procedural fairness in arbitration hearings”).

165. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (finding as a matter of constitutional equal protection requirements that prosecutors may not strike jurors from the jury pool on the basis of race); *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson* to prevent defense counsel from employing the tactic of striking potential jurors on the basis of race); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* prohibitions to civil cases).

166. See William C. Smith, *Challenge of Jury Selection: Seeing Through Stereotypes*, 88 A.B.A. J. 34, 37 (2002) (quoting Judge Green).

167. See Delgado, *supra* note 60, at 1404 n.60 (recognizing the value of a jury as

substitute for the jury trial, it would appear that the same concerns about representative juries in the court system would translate equally to concerns about representative arbitrators as the decisionmakers.¹⁶⁸

As mentioned above, this concern transcends the lack of judges of color because arbitrators always act as both judge and jury and the employer plays a significant role as a repeat player in the continued and ongoing selection of the arbitrator that does not resemble the selection of a judge or a jury in the court system. Potential selection of the arbitrator based on race presents pitfalls that remain unique to the arbitration system and its private and party-controlled selection process.¹⁶⁹ Absent efforts to provide similar kinds of *Batson* guarantees in arbitration as the courts must provide for selecting the decisionmaker, then not much else remains to support or establish public trust that arbitration provides just as good of a process for dispute resolution as the courts provide for addressing race discrimination in the workplace.

There are many who do not feel that *Batson* guarantees provide much protection for black participants in the court system and that they are easily avoided.¹⁷⁰ Nevertheless, this guarantee still provides a measure of protection not available in the arbitration forum that would be available in the judicial forum. The lack of teeth behind the *Batson* protection does not mean parties in the arbitral forum should operate without that same protection when arbitration is being used as a substitute for a jury trial. Instead, it means that more expansive protections beyond *Batson* should be made available to protect black participants in both the court and arbitral forums.¹⁷¹ These protections would prevent black participants from being denied a fair opportunity to

a balance to racial prejudice and noting that a jury might even nullify the legal concerns at issue as a form of racial justice) (citing Butler, *supra* note 146 (advocating jury nullification by black jurors as a form of black empowerment and racial justice)).

168. Cherry, *supra* note 51, at 281-82 (describing the importance of having a good cross-section of the community represented as jurors as a constitutional concern and also when looking at the minimal number of arbitrators of color available to handle employment discrimination disputes).

169. See Cole & Spitko, *supra* note 51, at 1183-89 (describing the unique traits of arbitrator selection as compared to jury selection).

170. See, e.g., Cavise, *supra* note 146, at 501 (“Only the most overtly discriminator or impolitic lawyer can be caught in *Batson*’s toothless bite and, even then, the wound will only be superficial” as “significant under-representation of minorities and the obvious role of stereotyping in jury selection seriously undermine the fairness of our criminal and civil trials”).

171. *Id.*

have their employment discrimination disputes decided by those drawn from a fair cross section of individuals including an unbiased possibility of having black individuals as their arbitrators.

Nonetheless, in the court system, the *Batson* protection occurs as a result of the analysis of the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court considers the selection of the jurors through the court process as constituting state or governmental action.¹⁷² It is unlikely, however, that courts will consider the striking or rejection of arbitrators by private parties on the basis of race as involving or entangling enough state action to warrant sufficient concern under the Equal Protection Clause of the Fourteenth Amendment.¹⁷³ Co-authors, Sarah Rudolph Cole and E. Gary Spitko, have recently claimed that “[e]very federal court considering the question [of whether arbitration can involve state or government action] has concluded that there is no state action present in contractual arbitration.”¹⁷⁴

172. *Id.*

173. See Brunet, *supra* note 160, at 113 (“Any contention that constitutional rights exist in arbitration runs the risk of summary rejection because of the absence of state action” and it “would be an uphill fight.”); Cole & Spitko, *supra* note 51, at 1159-86 (2004) (describing state action cases and concluding that the Supreme Court’s analysis of state action would not apply to private arbitration proceedings with respect to the parties’ private decisions in arbitrator selection). *But see* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Justice*, 47 UCLA L. REV. 949, 1004-06 (2000) (applying the court involvement rationale from *Batson*’s extension to civil cases in *Edmonson* and arguing that civil court approval and endorsement of arbitration supports the argument that it constitutes state action); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 621-22 (1997) (contending the development of state actor involvement with the significant handling and overall encouragement of the courts in enforcing arbitration agreements); Sternlight, *Fresh Assessment*, *supra* note 68, at 1 (asserting a state action theory for agreements that require mandatory arbitration). Although the arguments of Reuben and Sternlight are persuasive, similar to Brunet, I am resigned to the view that courts will not give arbitration the expansive state action analysis that they propose. Brunet, *supra* note 160, at 113 (acknowledging that we must seek other ways to address fairness in arbitration beyond the Constitution because of the dismal prospects from the courts regarding extension of the state actor doctrine to arbitration). Because of their finding that the state action doctrine will not apply to private arbitration selection, Cole and Spitko recommend statutory amendments as the best way to address arbitrator selection problems based on race and gender. See Cole & Spitko, *supra* note 51, at 1226-39.

174. See Cole & Spitko, *supra* note 51, at 1161 n.68 (citing cases).

IV. USING SECTION 1981 TO CHALLENGE RACE-BASED SELECTION OF ARBITRATORS IN EMPLOYMENT DISCRIMINATION DISPUTES

Arbitration of employment disputes has raised concerns from a racial perspective as far back as to the Reconstruction Era when the Freedmen's Bureau adopted processes that resembled arbitration panels. These panels, created after the Civil War to address labor and employment disputes between planters and the freed slaves, were criticized for their racial biases.¹⁷⁵ As part of this process, the planters required that blacks select white arbitrators in resolving any labor disputes.¹⁷⁶ One may question whether employers in the 21st century intend to expressly restrict the rights of blacks as the planters did in the Reconstruction era with newly emancipated black slaves by forcing arbitration and requiring that they choose only white arbitrators.

Professor Cynthia Mabry has explained the inherent difficulties for blacks in trusting a dispute resolution system designed and controlled by whites:

Many African-Americans distrust non-African Americans especially white Americans. This suspicion of white Americans derives from direct or indirect exposure to racism. . . . White Americans did not allow African Americans to vote, to be educated, to be witnesses or jurors in adversarial proceedings, to travel freely or to marry whomever they want to marry. White people lynched and murdered African Americans for acts as harmless as speaking to a white woman. Consequently, some advocates believe that this distrust is a "healthy cultural paranoia" because it helps African Americans to survive.¹⁷⁷

175. See Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 450 (1999) (describing criticism of arbitration panels used during Reconstruction labor disputes as being biased against the freed slaves on the basis of race and were designed to protect the dominant group, white employers); Sternlight, *supra* note 67, at 305 & n.69 (noting the criticisms of biased arbitration being used during Reconstruction by the Government's Freedmen's Bureau, because, in order to appease white employers, they "actually required" freed slaves "to choose whites as their representatives" on a tripartite arbitral body resolving labor disputes and that body included a representative from the freed slaves, a representative of the planter employer and a representative from the Freedmen's Bureau).

176. *Id.*

177. See Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans: The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 425 (1998) (footnotes omitted).

With this distrust, a likely response of those blacks being required to participate in a white-dominated system would include passivism, withdrawal, anger and other non-verbal reactions.¹⁷⁸

Parties to any dispute resolution process will more likely feel that it is fair if they play a key role in choosing the process and get to actively participate in it.¹⁷⁹ If black employees experiencing workplace discrimination tend to view the arbitration forum as significantly limited and permeated by employer controls and racial stereotypes, they won't bring claims out of fear or resignation that it will be futile to seek a fair resolution. Then the prospect of vindication through arbitration becomes a non-starter and the public value of eradicating workplace discrimination will suffer.

With any agreement to arbitrate, the selection of the arbitrator plays a fundamental role in the enforcement of the agreement. Allowing the employer to reject or prevent black arbitrators from being selected to handle an employment discrimination dispute under the guise of striking the few black arbitrators who might be available denies the black employee of certain rights available under the judicial forum and arguably by the agreement to arbitrate. When the employer makes a stereotypical selection of an arbitrator based on race, it appears under current law that employees may bring a Section 1981 claim to challenge directly the discriminatory selection of the arbitrator as involving discrimination in the making and enforcement of the agreement to arbitrate.¹⁸⁰

178. *Id.* at 426-27, 431-34.

179. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 821-22 (2001); Sternlight, *supra* note 41, at 1486.

180. See *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1086-87 (2d Cir. 1993) (allowing a participant in an arbitration to bring a section 1981 claim based upon alleged discriminatory treatment during the arbitration proceeding). See also *Smith v. Am. Arbitration Ass'n*, 233 F.3d 502, 508 (7th Cir. 2000) (suggesting in dicta that the striking of the only woman possible to be an arbitrator "depending on the company's motive . . . could conceivably be a form of gender discrimination . . . by analogy to *Batson*"). Unfortunately, Section 1981 claims do not allow for discrimination on the basis of sex. See, e.g., *Angelino v. New York Times Co.*, 200 F.3d 73, 78 (3d Cir. 1999) ("We will, however, affirm the dismissal of the claims of sex discrimination and sex-based retaliation under section 1981 because section 1981 does not reach these forms of discrimination"); *Bobo v. ITT Cont'l Baking Co.*, 662 F.2d 340, 343 (5th Cir. 1981) ("The drafters of section 1981 had no intention to disturb public or private authority to discriminate against women."). But race under Section 1981 has been broadly interpreted to

If employers now recognize some of the racial prejudice that may be inherent in requiring arbitration and they still push to adopt these agreements without any efforts to limit that prejudice, then these agreements appear to be intended to create race-based limitations that should be challenged. In order to establish a claim under Section 1981, a plaintiff must allege that “(1) the plaintiff is a member of a racial minority; (2) the defendants intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities listed in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.).”¹⁸¹

In the case of *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.*, an investor, Mian, involved in a securities dispute with the handlers of his investment was required to arbitrate that matter.¹⁸² He filed suit pursuant to Section 1981 alleging that the defendant securities brokerage companies discriminated against him during the course of that arbitration proceeding.¹⁸³ The defendants asserted that the complaint should be dismissed because Mian had not filed it within the three-month timeframe required by the FAA for challenging arbitration awards. The United States Court of Appeals for the Second Circuit found that although the procedures under the FAA are normally the exclusive means for challenging an arbitration award, Mian could challenge the alleged discriminatory actions of the brokerage firms during the arbitration for violations under Section 1981.¹⁸⁴ This Section 1981 challenge was considered to be separate from any challenge to the merits of the arbitration award, which would have to follow the narrow bases and short limitations period under Section 10 of the FAA.¹⁸⁵ Although considered a separate claim from seeking to review the arbitration award, his recovery under the Section 1981 claim for the discriminatory treatment during the arbitration proceedings could affect the results from the arbitration award.¹⁸⁶

In analyzing this balance between requirements under the FAA and

include the meaning of race at the time of the Civil War and that would possibly allow a large number of claims that are currently considered discrimination on the basis of national origin under Title VII to be brought as section 1981 claims. *See Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

181. *See Mian*, 7 F.3d at 1087.

182. *Id.* at 1086.

183. *Id.*

184. *Id.*

185. *Id.* at 1086-87.

186. *Id.*

the vindication of rights protected by Section 1981, the Court in *Mian* quoted language from a then-recent Supreme Court decision:

Section 1981 embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race. In this respect, it prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race, [and it] covers wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private parties . . . in enforcing the terms of a contract.¹⁸⁷

Mian's Section 1981 claim was valid because he was addressing actions by the defendant that did infect the legal process in ways that prevented him from allegedly being able to enforce his contract rights in arbitration based on his race. The alleged actions of the defendants obstructed the nonjudicial methods of adjudicating disputes through arbitration by using race. The court found that, if *Mian* could prove that but for the discrimination the arbitrators would have ruled in his favor, then he could recover what he lost in arbitration.¹⁸⁸

In *Mian*, the plaintiff never alleged sufficient facts to support his race discrimination claim so the court remanded the case to the district court to allow *Mian* to amend his complaint.¹⁸⁹ If an employer strikes the only black arbitrator from a panel and no other black arbitrators are even made available to the pool to be selected, however, this would support a claim that the black employee is being discriminated against in the enforcement of the contract to arbitrate by improperly injecting race as a component for the arbitrator's selection.¹⁹⁰

Under Section 1981, the key to developing a potential remedy for discriminatory arbitrator selection is to show the use of racist stereotypes in the making and enforcement of the agreement to arbitrate. In pursuing this theory, employees must show that employers intentionally choose

187. *Id.* at 1087 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 177 (1989)). Aspects of the *Patterson* case were overturned by the Civil Rights Act of 1991, but those changes are not relevant to this analysis. See *Jones v. R.R. Donnelly & Sons*, 124 S. Ct. 1836, 1839-40 (2004) (describing the effects of the Civil Rights Act of 1991 as it relates to the holding in *Patterson* about the scope of Section 1981 claims).

188. *Mian*, 7 F.3d at 1087.

189. *Id.*

190. *Cf. Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 508 (7th Cir. 2000).

arbitrators, strike arbitrators from possible selection panels or use certain arbitration service providers because they are not racially diverse and because they are acting on stereotypes based on race. The effect of these deliberate actions is to infect the legal process under Title VII in ways that prevent black employees from pursuing their contractual rights to resolve employment discrimination claims in arbitration. Likewise, these racist selections of arbitrators obstruct the nonjudicial method of adjudicating these disputes through binding arbitration. If employers or their legal counsel can apply racist stereotypes as a means to prevent black employees from having a fair cross-section of their peers, including fellow blacks, selected as the arbitrator, it breaches the agreement to arbitrate on the basis of race and violates Section 1981. Of course, rather than subjecting themselves to these attacks under Section 1981 or any other basis, employers may find ways to circumvent the concerns about the selection of arbitrators on the basis of race.

V. ADDRESSING RACIALLY BIASED ARBITRATOR SELECTION THROUGH AFFIRMATIVE ACTIONS BY EMPLOYERS AND DISPUTE RESOLUTION SERVICE PROVIDERS

Approximately twenty years ago, the Delgado article highlighted some of the reasons why racial prejudice may occur in arbitration versus proceeding in court. Today agreements to arbitrate employment discrimination claims raise certain concerns because of the lack of racial diversity in the arbitrator pool. Overall, this process affects the ability of a black employee to fairly seek vindication for a race discrimination claim. Instead, the process suggests that black employees are being discriminated against in the making and the enforcement of these agreements to arbitrate, a purported violation of Section 1981. Rather than facing the prospect of Section 1981 claims, employers and dispute resolution service providers can respond to these concerns by being more proactive in establishing more diverse pools of arbitrators who can be selected to handle employment discrimination claims and by seeking other less coercive forms of dispute resolution, like mediation.

A. *Develop A Critical Mass and Cadre of Arbitrators of Color to Handle Race Discrimination in Employment Disputes*

In order to address the concerns about discrimination in the selection of arbitrators based on race, a key solution would be to provide a critical mass of qualified arbitrators of color as part of the selection

pool. Although arbitration operates informally, the appearance of a fair system would be demonstrated by the value of knowing that qualified people of color will possibly be involved in the final decision and its related processes.¹⁹¹ This symbol provides an even greater appearance of fairness when compared to robes, flags, etc. in the court system.¹⁹² Two commentators have recently explained the phenomenon that can result from this symbolism as follows:

Moreover, the utility for the disputants in being able to utilize a minority-culture neutral does not depend entirely upon that neutral actually understanding the culture at issue better than any particular neutral from outside the culture. There is added utility so long as the disputants believe that the neutral enjoys this understanding. A disputant who is arbitrating his dispute before such a neutral is more likely to accept an adverse outcome if he is comfortable with the process that he has received. The disputant's perception that the arbitrator heard and understood his case likely is essential to this comfort. Thus, where the disputant believes that an appreciation of and a respect for his minority culture is critical to an understanding of his case, his belief that the arbitrator did in fact appreciate and respect that culture will lead to his greater relative satisfaction with even an adverse arbitration award.¹⁹³

Many corporations have promoted the value of achieving diversity in their workplaces.¹⁹⁴ Now if those corporations also choose to arbitrate disputes involving race discrimination, they must consider the value of having arbitrators of color handle these disputes if they want the perception as well as the reality of having a fair dispute resolution system.¹⁹⁵ Although the dispute may not be publicly resolved, the value

191. See Cole & Spitko, *supra* note 51, at 1216.

192. See Delgado, *supra* note 59, at 1388.

193. Cole & Spitko, *supra* note 51, at 1216 (footnotes omitted).

194. See *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (finding that major American businesses need diversity as evidenced in their amicus briefs to the Supreme Court). Apparently, law firms have also made similar commitments to diversity and have signed pledges confirming their commitment. See *ADR Roundtable*, *supra* note 1, at 83 (quoting Charles Morgan statement).

195. See Spitko, *supra* note 146, at 295-297 (describing how minorities can be empowered by arbitration if they are allowed to pick their own arbitrator who can understand their unique needs).

of having arbitrators who have lived through racism in America while also having the experience and qualifications to know the law of employment discrimination represents a win-win combination for all parties.¹⁹⁶

Additionally, employers may do themselves a favor by becoming more inclusive in their arbitrator selection process by possibly allowing the employee to have a party-designated arbitrator to sit as a member of a three-person arbitrator panel.¹⁹⁷ “Parties have attempted to ameliorate the fear of a single arbitrator’s bias by dictating panels of three decisionmakers.”¹⁹⁸ The employer would also have a party-appointed member and the two party-appointed arbitrators could then select the third arbitrator.¹⁹⁹ This would give the black employee more of a perception of fairness by having the right to appoint his or her own arbitrator.²⁰⁰

Employers could also adopt a policy similar to that of Haliburton Company (formerly Brown & Root) that helps an employee obtain legal representation up to \$2500 out of a legal service plan.²⁰¹ That type of plan could be expanded to also allow the employee to select a party-

196. See Wallace Warfield, *Building Consensus for Racial Harmony in American Cities: Case Model Approach*, 1996 J. OF DISP. RESOL. 151, 157-58 (describing self-analysis that a black mediator went through and saw values from his experience that would help him in understanding both sides of the dispute).

197. See Cole & Spitko, *supra* note 51, at 1233-34 (describing a party-appointed tripartite arbitration process).

198. See Scott Atlas & Nancy Atlas, *Potential ADR Backlash, Where Have All the Trials Gone? To Mediation or Arbitration*, DISP. RESOL. MAG. 14, 16 (2004).

199. See Rau, *supra* note 49, at 497-509 & nn.46-97 (describing a tripartite panel and a party appointed arbitrator process); Spitko, *supra* note 146, at 312-313 (describing a party-appointed tripartite proceeding).

200. Cole & Spitko, *supra* note 51 at 1215-16, 1233 (describing the need for parties to be able to select an arbitrator of their own choosing and culture and race). Although historically, party-appointed arbitrators were presumed to be non-neutral, recent changes in The Code of Ethics for Arbitrators in Commercial Disputes (2004) have reversed that presumption in a “somewhat controversial change.” See Sarah Rudolph Cole, *Updating Arbitrator Ethics, Code Revisions Acknowledge Developments in Consumer, International Arbitration*, DISP. RESOL. MAG. 24, 25 (2004). That change was based upon a reflection that any code of ethics for arbitrators must have an international application and most international practice would require arbitrator neutrality for enforcement. *Id.* In purely domestic labor disputes of the type where party-appointed arbitrators tend to be selected, however, the use of non-neutral arbitrators can be agreed to by the parties. *Id.*

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

appointed arbitrator from a similar type of list of legal service providers as long as there was a critical mass of attorneys of color provided.

Access ADR, a joint program being sponsored by the American Bar Association's Section of Dispute Resolution and JAMS dispute resolution services, offers an example of a program seeking to increase the number of full-time mediators from a variety of ethnic and racial backgrounds.²⁰² Access ADR will "identify experienced neutrals of color and ethnic diversity" to become fellows in the program and try to match them up with entities "needing mediators from a variety of ethnic and racial groups under-represented in the ADR field."²⁰³ More dispute resolution service providers and employers should develop similar affirmative action initiatives to increase the pool of qualified arbitrators of color. This may require that dispute resolution providers and employers become creative to find, develop and increase the pools for arbitrators of color and address whatever concerns may arise that these efforts not be racially divisive, a concern of any affirmative action effort.²⁰⁴

If a critical mass of racially diverse arbitrators can develop through a dispute resolution provider-sponsored program, possibly modeled after the Access ADR program, then employers can actually back up their statements about valuing diversity by selecting more arbitrators of color. These affirmative efforts to improve the pool for arbitrators of color can reduce the racial prejudices inherent with mandatory arbitration. It is probably important at this stage to reiterate the point that in an individual case, employers may end up selecting arbitrators without considering race. If white male arbitrators are selected, they may be able to fairly decide an employment discrimination claim of a black female. But, if the arbitration system being offered as a solution to a jury trial right

202. See Access ADR: Promoting Diversity in ADR—Executive Summary available at http://www.accessadr.org/executive_summary.html (last visited Oct. 24, 2004).

203. *Id.*

204. There are also other dispute resolution services and other organizations where black arbitrators may be found including the National Bar Association, the National Conference of Minority Professionals in Alternative Dispute Resolution, and even minority caucuses of professors in human resources, social sciences, management, and law school programs, to name a few. If companies really want to reach out and take significant and affirmative steps to build up a pool of qualified arbitrators and mediators of color to handle statutory employment discrimination claims, they can approach these groups and put to rest unsubstantiated claims about being unable to find people of color with this expertise.

created by congressional statute to help eliminate workplace discrimination does not offer the choice of a broad racial cross section of arbitrators, the integrity of that system remains in doubt. This doubt will discourage people of color from bringing discrimination complaints, clearly contrary to the purposes of Title VII. With such doubts about the dispute resolution system's integrity, it will further suggest that employer efforts to use arbitration instead involve an intentional attempt to invoke a prejudicial system of dispute resolution to handle workers' claims of race discrimination without employing arbitrators of color. If that is the intention, these acts should constitute a Section 1981 violation.

B. Focus on the Value of Mediation

This author continues to be an advocate for using mediation to resolve employment discrimination claims.²⁰⁵ Employers are also starting to see some other developing problems in the workplace as a result of forcing arbitration on its employees including lowered employee morale and increasing opportunities for union organization.²⁰⁶ Whatever the reason, mediation has become an increasing choice for resolving employment discrimination claims.²⁰⁷

If public and formal vindication becomes a necessary objective, as

205. See Green, *supra* note 6, at 346-50 (promoting the use of mediation to resolve employment discrimination claims filed with the EEOC); see also 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) (asserting the benefits of mediating employment discrimination disputes when mediators focus on what the parties want and need instead of a predetermined approach).

206. 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, 97-99 & nn.89-93 (2003) (describing possible problems for employers dealing with mandatory arbitration could be morale issues and creating incentives for union organizing).

207. See 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) (describing how mediation is replacing arbitration as a preferred dispute resolution option); Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases Is Too Little Too Late: An Organizational Conflict Management Perspective On Resolving Disputes*, 21 HAMLINE L. REV. 261 (1998) (encouraging use of mediation to resolve employment disputes especially if companies change their culture of conflict resolution); Michael J. Yelnosky, *Title VII, Mediation, And Collective Action*, 1999 U. ILL. L. REV. 583 (identifying the potential value of mediating Title VII claims).

indicated by the Delgado article and others,²⁰⁸ this concern should become clear in mediation. For example, if black employees truly need a public and formal forum to vindicate their dispute as a response to racial prejudice, that issue can be highlighted through mediation, especially through qualified mediators of color.²⁰⁹ Those mediators can quickly recognize that the employee's need for public vindication constitutes a deal breaker preventing the parties from reaching an agreement in mediation. Then formal adjudication can go forward because the beauty of mediation is that it does not require that the parties must reach an agreement. And formal adjudication as a necessary check on racial prejudice would still remain a viable option when parties determine that their interests in a particular dispute are too important to have them resolved in a private way.

VI. CONCLUSION

Professor Susan Sturm has asserted that the increasing number of racial harassment complaints in the workplace represents a sign of how race relations in our country have improved.²¹⁰ Under that rationale, the increased filings indicate that blacks and other ethnic groups no longer despair as much about the atrocities of discrimination in private. By believing that they have an opportunity for redress through our public and formal court system, black employees come forward as part of a strong societal objective in remedying discrimination in the workplace through the availability of compensatory and punitive damage remedies and the right to a jury trial as provided for by Congress.²¹¹

Despite the growing complaints of racial harassment that might have been fostered by the incentives to seek these remedies, the reality is that only a small percentage of those who believe they have been

208. See Sternlight, *supra* note 41, at 1430, 1483-85 (discussing the societal value of still having formal court precedents involving employment discrimination claims).

209. Gunning, *supra* note 73, at 88-90 (discussing the value of having diverse mediators and matching them with diverse participants); Warfield, *supra* note 196, at 157-58 (describing self-analysis that a black mediator took into account to determine what role his blackness and the effects of the culture of racism in our society play when being involved in a dispute between subordinate and dominant groups in a racial conflict and how that black mediator must decide if his experiences will be helpful to both blacks and whites in resolving the conflict).

210. See Bernstein, *supra* note 30.

211. *Id.*

discriminated against by their employers end up filling charges with the EEOC.²¹² Employees who complain of race discrimination know there is a strong likelihood of retaliation and hardship for having complained.²¹³ Consequently, the prospect of being compensated and having their cases viewed by their peers in a public and formal proceeding represents significant rights for victims of employment discrimination. These rights counter their inherent fears about trusting the dispute resolution system created by whites and that fear originates from the historically rampant and unabated discrimination against blacks in this country. Also, these rights foster the resolve to endure the slings and arrows of retaliation that may occur from having filed a claim.

By realizing that race still plays a major role in our society and how disputes are processed, employers who choose to force their employees' race discrimination claims into the narrow forum of arbitration may be calling for more trouble in the long run, especially if this choice involves an attempt to control the race of the selected arbitrators. If black employees are forced to choose arbitration as a condition of employment before a dispute arises and the resulting pool of arbitrators provides little chance that a black arbitrator will be chosen, this raises a concern about the system's integrity and credibility. Instead of fostering a positive environment where employees of color feel comfortable to voice their complaints as Professor Sturm suggested, the coercion of arbitration and its potential for secret resolution and private arbitrator selection based on race may make black employees reluctant to seek redress under Title VII.

Efforts at highlighting these potentially harmful racial consequences are long overdue.²¹⁴ As these consequences become more evident and

212. See Wessel, *supra* note 11.

213. In explaining the terrible circumstances attending the fear of retaliation, one commentator recently explained: "Perhaps more important than the actual frequency of employer retaliation, however, is the pervasiveness of the fear of retaliation among employees, and the resultant impact from such fear in dissuading employee action to combat workplace discrimination. Indeed, the court's understanding of the deterrent effect fear of reprisal might have on employees' willingness to come forward and report unlawful discrimination led the courts to provide 'exceptionally broad protection' under [Title VII for retaliation]."

See Edward Marshall, *Title VII's Participation Clause and Circuit City Stores v. Adams: Making the Foxes Guardians of the Chickens*, 24 BERKELEY J. EMP. & LAB. L. 71, 99 (2003).

214. See Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1058-59 (1996) (criticizing the lack of scholarly discourse about ADR and noting the general imbalance in power for those who may not benefit from an informal dispute resolution option, especially those lacking power

nothing is done to ameliorate them, a reasonable inference might be that some employers are choosing arbitration so that they can intentionally select arbitrators based on race. These actions can create Section 1981 liability for employers under the theory that discrimination on the basis of race in the selection of arbitrators constitutes discriminatory actions related to the enforcement of the agreement to arbitrate with their black employees.

In response to the challenges to the integrity of the arbitrator selection process, employers should take affirmative efforts, along with dispute resolution service providers, to insure that a critical mass of arbitrators of color are available and used. The perceptions and realities of fairness that protect racial minorities from further racial prejudice in the court process must follow into the arbitration system. If employment discrimination claimants know they have a fair chance of being heard by persons of color who know what it means to be exposed to racial discrimination in the workplace and society, then the protections against racial prejudice available in the court system will fairly translate to the arbitration system. These protections may even transcend the court system which offers abysmal results that some commentators have attributed to a judicial hostility and bias toward employment discrimination claimants.²¹⁵

Similarly, employers may be wise to consider dropping their efforts to require arbitration as a whole and instead start focusing on mediation to resolve their discrimination disputes. Employers and dispute resolution service providers must also take affirmative steps to create a critical mass of mediators of color to be selected.²¹⁶ Then the selection

because of racial, gender or economic status).

215. See Clermont & Schwab, *supra* note 36, at 451-56; see also Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 583-92 (2003) (asserting that poor results for claimants in employment discrimination claims brought in courts reflect a growing decline in sympathy for blacks or other victims of discrimination).

216. Gunning, *supra* note 73, at 88-90 (noting the value of having qualified and skilled mediators who are able to respond to racial and cultural issues as they arise and suggesting that parties with issues of race, sex and sexual orientation may be best addressed by matching those parties with mediators who have similar backgrounds if that is possible); see also Fred D. Butler, *When Should Race, Culture, or Gender Be a Factor When Considering a Mediator?* 26 SAN FRANCISCO ATT'Y 33 (2000) (suggesting that mediators should be selected upon race, gender and understanding of those concepts as needed to address the interests of the parties involved in the dispute); Cynthia Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J GENDER SOC. POL'Y & L. 269, 291 (1996) (calling for an increase in the

of the neutral mediator will not raise concerns about the system's integrity or credibility. Rather, this will dispel concerns that mediation, like arbitration, is just another dispute resolution system perpetuating prejudice through its informality. As a consequence, the fair and consistent selection of a neutral of color will add value to the perceptions about the dispute resolution system's integrity.

number of mediators of color); Trenary, *supra* note 65, at 46 n.39 (discussing the value of matching the gender and race of mediators with participants).