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ARTICLES

WHEN THE COURT MAKES LAW AND POLICY (WITH SPECIAL REFERENCE TO THE EMPLOYMENT ARBITRATION ISSUE)

Ronald Turner*

I. INTRODUCTION

At the beginning of the twentieth century, courts in the United States, following the rules established by English courts, generally refused to enforce pre-dispute arbitration agreements.¹ Changes in the established view of, and judicial approach to, arbitration were sought by merchants and their lawyers.² A commercial arbitration bill drafted by

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the American Bar Association’s Committee on Commerce, Trade and Commercial Law was introduced in the United States Congress in 1923; hearings on that legislation were held in the same year, and the bill was revised by the ABA Committee in 1923 and 1924.3

In 1925, a unanimous Senate and House of Representatives adopted, with little change, the ABA-drafted bill and passed the United States Arbitration Act.4 This law, renamed the Federal Arbitration Act (FAA) in 1947,5 reversed the judiciary’s longstanding refusal to enforce arbitration agreements,6 placing such agreements on an equal level with other contracts,7 and establishing “by statute the desirability of arbitration as an alternative to the complications of litigation.”8 Consistent with the goals of its sponsors, the FAA was intended to apply to commercial transactions and benefit businesses through its provision for binding and irrevocable arbitration agreements.9

The FAA provides that written agreements to arbitrate controversies arising out of “any maritime transaction or a contract evidencing a transaction involving commerce”10 are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”11 The Act further provides for a stay of a
federal court proceeding when an issue in that proceeding is referable to arbitration. The FAA also provides for court orders mandating arbitration where a party fails, neglects, or refuses to comply with an arbitration agreement. In addition, the Act authorizes that arbitration awards can be vacated on specific grounds, including awards obtained through corruption, fraud, or arbitral partiality or misconduct.

The commercial arbitration regime of the FAA was applied in the employment arbitration context when the Supreme Court decided Gilmer v. Interstate/Johnson Lane Corp. In Gilmer, the Court addressed the question of whether an agreement between an employee and an employer, mandating the arbitration of all employment-related claims, was enforceable when the employee subsequently filed a lawsuit alleging a violation of the Age Discrimination in Employment Act of 1967 (ADEA), a statute providing the right to pursue a court action and jury trial in cases of alleged age discrimination. Holding the agreement enforceable, the Court concluded that it had not been shown "that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act," and held that agreements to arbitrate statutory age discrimination claims are enforceable under the FAA.

As we mark ten years of Gilmer’s compulsory arbitration rule, much has been written about the merits, demerits, and implications of

13. Id. § 4.
15. Employment arbitration “refers to the use of arbitration in the non-union and non-collective bargaining context” to resolve employment disputes between employers and employees. Ronald Turner, Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A’s—Access, Adjudication, and Acceptability, 31 WAKE FOREST L. REV. 231, 237 n.40 (1996). This type of arbitration differs from labor arbitration, meaning “the arbitration of claims arising under collective bargaining agreements ... must be submitted ... to a neutral third party for final and binding arbitration.” Id. at 237 n.40. See generally Martin H. Malin & Robert F. Ladenson, Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer, 44 HASTINGS L.J. 1187 (1993) (discussing both labor and employment arbitration).
17. Id. at 23 (citing 29 U.S.C. §§ 621-634 (1994)).
18. See infra notes 64-68 and accompanying text.
20. Id. at 23.
the Court's decision. This article presents an analysis that goes beyond the result reached by the Court and addresses whether the Court's decision is correct or defensible as a matter of policy. The focus here is on the institutional and functional roles of the courts and Congress on the construction and application of laws, and on the interpretive methodology employed by courts in construing and applying the FAA in the employment arbitration setting. More particularly, this article considers the lawmaking and policymaking conduct engaged in by the Gilmer Court, which took away what Congress had given to employees—the right to bring and adjudicate ADEA claims in courts.

II. CONGRESS AND THE COURT

An understanding of the institutional and functional roles of the courts in the construction and application of laws is critical to an informed evaluation of the topic discussed herein. Moreover, in this age of statutes, a consequential question arises whenever judges interpret laws enacted by legislatures: What methodology(ies) should jurists employ in discerning the meaning of, and in applying, a statutory provision to the legally relevant facts of a litigated case?

The judiciary's role and function is delineated in the separation of powers doctrine. This doctrine, applicable to the federal government, is one in which Congress legislates and passes laws through the process of bicameral enactment and presentment.


24. Prior to the founding of the United States, this doctrine was popularized by Montesquieu, who was "the first to classify the powers of government into the modern trinity of legislative, executive[,] and judicial." Jack N. Rakove, Judges: Conferring a Lifetime of Ideology, N.Y. Times, May 13, 2001, § 4 (Magazine), at 5.

25. U.S. Const. art. I. "[B]icameralism and presentment were designed to harness the influence of faction... by imposing an effective supermajority requirement for legislation." John F.
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those laws, and the judiciary (subordinate to the legislature)\(^2\) interprets and applies the laws when cases are brought to the courts for resolution and decision.\(^2\)

It has been urged that the role of the federal courts’ appointed judges is to declare what the law is. Applying that view, judges should not make law and should not “substitute their own predilections and desired policies for the rules made and the policies preferred by the elected Congress.”\(^2\) Taking a different view, others have argued that judicial lawmaking and policymaking are necessary, if not inevitable.\(^2\)

Because it is predictable that the legislature will not be able to anticipate all questions that will arise with respect to the application of a statutory provision, courts will be asked to decide issues neither expressly addressed in, nor answered by, the statutory text.\(^3\) Where, for example, Congress enacts a broad and open-ended statute (e.g., antitrust, labor, and securities regulation law),\(^3\) judicial lawmaking and policymaking may be delegated to the courts, and judges must fill in statutory gaps as they decide cases.\(^3\)

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26. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (“Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures.”).

27. U.S. CONST. art. II.


32. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1081-82 (1997) (“In the face of open-textured or minimalist legislative efforts that leave the bulk of the lawmaking function to the judiciary, courts have responded by incorporating traditionally legislative activities, such as policy analysis, into the judicial role.”); see also Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory
Three interpretive methodologies employed by courts are the focus of the following analysis. The first, textualism, asks what the reasonable person would believe the statute to mean using its words' common meaning and the popular rules of grammar and syntax. Under that approach, "the text is the law, and it is the text that must be observed." Eschewing resort to legislative history and a search for non-textual legislative purpose, the textualist either views the statute's meaning to be fixed at enactment, or is instead "concerned with how a contemporary reader would understand the language employed, in relation also to the law of the current day."

Interpretation: Implications for the Legislative History Debate and Beyond, 51 STAN. L. REV. 1, 41 (1998) ("Congress routinely delegates significant lawmaking powers to . . . courts through open-ended statutes . . .").

Another interpretive methodology not discussed in the text is set out in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and is applicable to cases involving judicial review of statutory interpretations by administrative agencies:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.


"An interpreter who believes that legislatures have authority only to pass statutes, not to form abstract 'intentions,' will describe statutory interpretation as a search for the meaning of statutory text. That interpreter can be called a 'textualist.'" Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. REV. 74, 83 (2000) (footnote omitted).


Peter L. Strauss, Essay, The Common Law and Statutes, 70 U. COLO. L. REV. 225, 228 (1999) ("[A] textualist who sees statutes to be static will be concerned with what meaning the words of the statute had at the moment of its adoption . . .").
A second approach, intentionalism,39 "seeks to discern the actual understanding of a law held by the members of the enacting legislature as set forth in the statutory text and legislative history."40 The intentionalist "seeks to understand what all of the enacting legislators actually intended by the provision."41 The legislators' intent may be found in text or in committee reports, floor debates, statements by a bill's sponsor and co-sponsors, and other legislative history.42 A judge, employing reconstructed intent analysis, may attempt to discern the way the enacting legislators would want the statute applied.43 Criticism of this methodology is based on the grounds that legislative intent is "an obvious fiction"44 and a debatable proposition because a legislature typically does not have a specific intent as to most issues of statutory application.45

A third interpretive methodology, atextual purposivism,46 calls for the interpretation of statutes via a focus on statutory purpose that is "derive[d] not only from the text simpliciter, but also from an understanding [of] what social problems the legislature was addressing

39. "An interpreter who believes . . . that the legislature’s will is the authoritative source of law will describe statutory interpretation as a search for legislative intent. That interpreter can be called an ‘intentionalist.’" Vermeule, supra note 34, at 82 (footnote omitted).
42. Eskridge & Frickey, supra note 40, at 327; see also James M. Landis, A Note on "Statutory Interpretation," 43 HARV. L. REV. 886, 888-89 (1930).
44. Eskridge, supra note 35, at 16; see also Gerald C. MacCallum, Jr., Legislative Intent, 75 YALE L.J. 754, 754 (1966) ("[T]he presence of genuine legislative intent in connection with a statute is at best a rare circumstance . . . ."); Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 870 (1930) ("A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."); David A. Strauss, Why Plain Meaning?, 72 NOTRE DAME L. REV. 1565, 1570 (1997) ("A legislator might vote for a tax reduction in order to return a favor for a colleague, help a constituent, position herself for the next election, squeeze social spending, enhance economic growth, or any combination of those reasons . . . .").
45. Atextual purposivism first "identif[ies] the purpose or objective of the statute, and then . . . determin[es] which interpretation is most consistent with that purpose or goal. Purposivism . . . allows a statute to evolve to meet new problems while ensuring legitimacy by tying interpretation to original legislative expectations." Eskridge, supra note 35, at 25-26 (footnote omitted).
and what general ends it was seeking. Courts, acting as faithful agents, have sometimes engaged in overly creative interpretations of legislative purpose. In some instances, courts have relied on statutory purpose rather than the literal words of the statute, where—in the courts’ view—an unreasonable result, inconsistent with the statute’s judicially-determined purpose, would be produced.

A textual purposivism assumes that the interpreter can determine a statute’s purpose(s). Where a statute expressly states and codifies the purpose of the legislation, this determination is a straightforward task. This approach may not be particularly helpful, however, where a statute is vague or ambiguous or has more than one stated purpose. In those circumstances, a court must determine statutory purpose in order to resolve the statutory issue. This declaration may provide and effectuate a purpose not contemplated by the legislature, and may consequently undo compromises reached by legislators and award to an oppositional faction

47. Strauss, supra note 37, at 227; see also Dickerson, supra note 40, at 88 (stating that statutory purpose “refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish”); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (advocating that interpretation should focus on statutory purpose); Popkin, supra note 44, at 131-49 (discussing purposivist analysis).

48. Manning, supra note 25, at 1648 (“[B]ecause Congress was inevitably imprecise in reducing its intentions to words, a faithful agent more accurately implement[s] Congress’s true will by reshaping a seemingly clear statute that over- or undershot the legislature’s apparent purpose.”).

49. Popkin, supra note 44, at 207.

50. See, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). Holy Trinity is a prominent example of such an approach to statutory interpretation. The Court held that an alien contract labor law prohibiting the importation of “any” foreigners under contract to perform “labor or service of any kind” did not apply to an individual who came to the United States to serve as a church rector. Id. at 457, 458, 459. “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” Id. at 459. This interpretive approach is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Id.; see also id. at 460 (“If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity; [t]he court must restrain the words.”).


53. Id.
or interest group "a benefit it had been unable to win in the legislative arena."\textsuperscript{54}

The three interpretive methodologies, described above, should be kept in mind as the discussion turns to the statutory and employment arbitration issues.

III. STATUTORY ARBITRATION

As noted earlier and discussed below, the Supreme Court's 1991 \textit{Gilmer} decision applied the FAA to an employment arbitration case, in which an employer argued that an employee's ADEA claim had to be litigated in an arbitral, and not a judicial, forum.\textsuperscript{55} The Court considered the legal effect and impact of the FAA on a statutory claim brought in a judicial forum by an individual who had also entered into a pre-dispute arbitration agreement.\textsuperscript{56}

In 1953, the Supreme Court addressed, for the first time, an issue of whether the FAA required statutory arbitration. The Court, in \textit{Wilko v. Swan},\textsuperscript{57} concluded that an arbitration agreement between a customer and a securities firm did not waive the customer's right to pursue a federal court action alleging violations of the Securities Act of 1933 (Securities Act).\textsuperscript{58} The Court wrote that the Securities Act "was drafted with an eye to the disadvantages under which buyers labor,"\textsuperscript{59} and a customer's

\begin{itemize}
  \item \textsuperscript{55} \textit{Gilmer} v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23-24 (1991); \textit{see also supra} notes 16, 19-21 and accompanying text.
  \item \textsuperscript{56} \textit{Gilmer}, 500 U.S. at 23. Pre-dispute arbitration agreements in the employment setting "require an individual, as a condition of employment, to agree in advance to arbitration of future claims alleging violation of a statute prohibiting discrimination in employment." Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 201 (2d Cir. 1998); \textit{see also supra} notes 26-27.
  \item \textsuperscript{58} \textit{Wilko}, 346 U.S. at 434-35, 438; \textit{see also} 77 U.S.C. § 77a (1944). Section 14 of the Securities Act provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [Securities and Exchange] Commission shall be void." 15 U.S.C. § 77n (1944). The Court concluded that the "arrangement to arbitrate is a 'stipulation,' and we think the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act." \textit{Wilko}, 346 U.S. at 434-35.
  \item \textsuperscript{59} \textit{Wilko}, 346 U.S. at 435.
\end{itemize}
waiver of statutory rights would be "surrender[ed]... at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary." The Court found that there were advantages to arbitration agreements, but decided that Congress's intent was best met by holding agreements to arbitrate disputes arising under the Securities Act to be invalid. Accordingly, under Wilko, the arbitration agreement could not legally waive or override a customer's pursuit of the judicial resolution of a statutory claim. Because Congress did not provide for, and did not intend to allow, such a waiver, the arbitration agreement was not enforceable under the FAA.

Fourteen years after the Court's decision in Wilko, Congress enacted the ADEA. This federal law, addressing workplace age discrimination, prohibits unfair treatment of persons who are at least forty years of age or older, and grants aggrieved individuals the right to jury trials. Prevailing plaintiffs can be granted court orders mandating legal or equitable relief, as appropriate, to effectuate the purposes of the law—including reinstatement, backpay, and liquidated damages for willful violations.

60. Id.
61. Id. at 438 ("Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."). The Court also opined that the Securities Act provisions would prove less effective in arbitration for the following reasons: 1) the statute would be "applied by the arbitrators without judicial instruction on the law[;]" 2) an examination of the arbitrator's understanding of the meaning of statutory provisions would not be possible because arbitration awards could be rendered without a complete record of the proceedings or an explanation of the reasons for the arbitrator's decision; and, 3) courts possess limited powers to vacate arbitration awards. Id. at 436; accord Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203, 203 n.4 (1956).
63. Id. at 438.
66. 29 U.S.C. § 631(a) (1994). "Originally the protected class was 40 to 65 .... The lid was raised to 70 in 1978 and removed altogether in 1986." RICHARD A. POSNER, AGING AND OLD AGE 319 (1995).
68. Id. § 626(b).
The text and legislative history of the ADEA are silent on the issue of arbitration. This is not surprising given the state of the law at the time of Congress's consideration and passage of the statute in 1967, as well as a legal backdrop which included Wilko's holding and general proposition that compulsory statutory arbitration agreements were not enforceable under the FAA. Thus, questions as to the arbitrability of ADEA claims were not on the radar screen in 1967 or for a number of years following the statute's enactment.

Sixteen years after the enactment of the ADEA, thirty years after its decision in Wilko, and approximately fifty-eight years after the passage of the FAA, the Supreme Court began to chart a different course for its FAA arbitration jurisprudence. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the Court declared that the FAA set forth a "liberal federal policy favoring arbitration agreements" and that any question as to the arbitrability of a dispute must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Two years later, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the Court found that the FAA did not justify an implication that all contracts under its scope included a presumption against arbitrating statutory claims. The FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." This conclusion, in the Court's view, was consistent with congressional intent:

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69. See id. §§ 621-634.
71. See supra notes 57-63 and accompanying text.
73. Id. at 24.
74. Id. at 24-25.
76. Id. at 625. Mitsubishi involved a statutory antitrust claim and an international arbitration agreement. Id. at 616.
77. Id. at 627.
We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.\textsuperscript{78}

The Court opined that the judiciary was no longer suspicious of the benefits of arbitration or an arbitrator’s competency.\textsuperscript{79} Cautioning that its decision should not be understood to say “that all controversies implicating statutory rights are suitable for arbitration,”\textsuperscript{80} the Court wrote that a party agreeing to arbitrate a statutory claim “does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum; it trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”\textsuperscript{81}

\textsuperscript{78.} Id. at 628 (citation omitted).

\textsuperscript{79.} Id. at 626, 627 (noting that judiciary suspicion no longer “inhibit[s] the development of arbitration as an alternative means of dispute resolution”). The Court rejected the argument that arbitration was not an appropriate forum in which to resolve statutory claims. Id. at 634, 635. Parties contesting statutory antitrust claims can opt for streamlined and expeditious procedures and can select competent arbitrators familiar with the subject matter of the dispute. Id. at 633. Those arbitrators are bound by the parties’ intentions that the dispute be decided in accordance with applicable law, the Court noted, and “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” Id. at 636, 637.

\textsuperscript{80.} Mitsubishi, 473 U.S. at 627.

\textsuperscript{81.} Id. at 628. Professor Stephen Ware has pointed out one way in which arbitration may change and adversely affect a party’s substantive rights. Stephen J. Ware, \textit{Default Rules from Mandatory Rules: Privatizing Law Through Arbitration}, 83 MINN. L. REV. 703, 725 (1999). Where an arbitrator errs in applying the law, a reviewing court may confirm the arbitrator’s award notwithstanding that error. Id. at 725. In that circumstance, substantive rights may be lost:

\textit{[A]n enforceable arbitration agreement “necessarily entails a waiver of substantive rights unless courts vacate arbitral awards when arbitrators make errors of law. That courts confirm arbitral awards even when arbitrators make errors of law shows that arbitration agreements constitute waivers of substantive rights. An uncorrected error of law, by definition, deprives a party of the substantive right that would have been vindicated by a correct application of the law. Courts do not correct errors of law, that is, deprivations of substantive rights, by arbitrators, because courts treat an agreement to arbitrate as a waiver of those substantive rights.”

In 1987, the Court decided *Shearson/American Express, Inc. v. McMahon,* concluding that arbitration was mandated in a case presenting allegations of violations of the Securities Exchange Act of 1934 (Exchange Act) and the Racketeer Influenced and Corrupt Organization Act (RICO). The Court found no congressional intent to preclude a waiver of judicial remedies in the text or legislative history of the Exchange Act, and found nothing in RICO’s text or legislative history showing a legislative intent to exclude civil actions under RICO from the arbitration requirements of the FAA. Given this result, Securities Act claims were not arbitrable under *Wilko,* while Exchange Act claims were arbitrable. Recognizing this discrepancy, the Court explained that “the mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time[,] [t]his is especially so in light of the intervening changes in the regulatory structure of the securities laws.”

*Wilko* was officially interred by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, a case involving an arbitration provision in a standard customer agreement and alleging violations of the Securities Act, the Exchange Act, and other state and federal laws. In the Court’s view, *Wilko*’s “outmoded presumption of disfavoring arbitration proceedings” was no longer tenable. “To the extent that

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83. Id. at 238 (holding agreement to arbitrate Exchange Act dispute enforceable and referring to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm (1994)).
85. Id. at 238.
86. Id. at 238, 242.
87. See supra notes 57-63 and accompanying text (discussing *Wilko*).
88. McMahon, 482 U.S. at 233. The intervening regulatory structure is the Securities and Exchange Commission (SEC) and that agency’s authority over arbitration procedures is utilized by self-regulated organizations (SROs). The Court reasoned that where the prescribed procedures are subject to the [SEC’s] . . . authority, an arbitration agreement does not effect a waiver of the protections of the Act. While *stare decisis* concerns may counsel against upsetting *Wilko*’s contrary conclusion under the Securities Act, we refuse to extend *Wilko*’s reasoning to the Exchange Act in light of these intervening regulatory developments.
89. 490 U.S. 477, 484 (1989).
90. Id. at 478-79.
91. Id. at 481.
Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.9

Accordingly, the Court concluded:

Wilko was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions. Although we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language, and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation ....93

The Court’s conclusion was reinforced by its assessment that petitioners’ substantive rights, under the Securities Act, are not inherently undermined by resorting to the arbitration process.94

Moses H. Cone, Mitsubishi, McMahon, and Rodriguez de Quijas95 sequentially and incrementally changed the law and jurisprudence of the FAA; in doing so, the Court established a strong pro-arbitration stance, replacing any anti-arbitration bias it might have held.96 The legislators who enacted the FAA expressed no intention to go beyond the statute’s pro-contract policy to a court-proclaimed pro-arbitration approach,97

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92. Id.
93. Id. at 484 (citation omitted).
94. Rodriguez de Quijas, 490 U.S. at 486.
97. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (noting the “FAA’s proarbitration purposes”); see also Kenneth R. Davis, Protected Right or Sacred Rite: The Paradox of Federal Arbitration Policy, 45 DEPAUL L. REV. 65, 98 (1995) (noting that the “liberal federal policy favoring arbitration” announced by the Court is a “creed that exalts arbitration as if it were a sacred rite[,] [t]he drafters of the FAA had no such intent” (footnote omitted)); Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. REV. 949, 1019 (2000) (observing the FAA’s policy is more accurately thought of “as procontract than as proarbitration”).
requiring those who oppose arbitration to demonstrate that a particular pertinent statute precludes waiver of the judicial forum.\textsuperscript{98}

The Court’s move away from its 1953 construction of the FAA fashioned a fictive account in which Congress always intended to allow waiver of a judicial forum. The Court, in overruling\textit{Wilko}, was simply rectifying an earlier mistake. Thus, the Court cast itself in the role of the faithful agent of Congress and enforcer of that which Congress had decreed, as opposed to a judicial lawmaker substituting its desired policies for those of the elected legislature. Acceptance of this account masks the fact that there was a change in the law and policy of statutory arbitration, a change formulated and implemented by the Court and not by Congress. This change was not grounded in the text of the statute or the expressed intention of those who enacted the FAA in 1925, but in the Court’s changing view on the attractiveness and adequacy of arbitration.\textsuperscript{99}

The Court’s acceptance of arbitration was anticipated. “One substitute for federal judicial services is arbitration, so it is not surprising that the federal courts have become increasingly hospitable to arbitration.”\textsuperscript{100} Facing an increasing federal caseload, the judiciary has approved the use of alternative dispute mechanisms, including arbitration, as a means of controlling and reducing employment law disputes and other cases on the court dockets.\textsuperscript{101} Docket-clearing
decisions are driven by a policy goal to clear court dockets and, with the same sweep, rid the court of cases considered less prestigious or worthy.102

IV. THE EMPLOYMENT ARBITRATION ISSUE

In Gilmer v. Interstate/Johnson Lane Corp.,103 the Court extended its pro-arbitration approach by holding an agreement to arbitrate statutory age discrimination claims enforceable.104 The specific question before the Court was whether a claim under the ADEA could "be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application."105 Robert Gilmer, hired by the employer in May 1981, as a manager of financial services, registered (as he was required to do) as a securities representative with the New York Stock Exchange (NYSE) and other stock exchanges.106 The application provided that Gilmer agreed to "'arbitrate any dispute, claim or controversy' arising out of his employment "'that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [he] register[ed].""107 NYSE Rule 347 provide[d] for arbitration of "'[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.'"108

Terminated by his employer in 1987, Gilmer, then 62 years of age, filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC) and sought to pursue an ADEA lawsuit in federal district court.109 The employer moved to compel arbitration; that motion was denied.110 Reversing the district court's decision and adopting a position rejected by other federal courts of appeals,111 the United States Court of Appeals for the Fourth Circuit

102. Nicolau, supra note 21, at 181-82.
104. Id. at 23.
105. Id.
106. Id.
107. Id. (quoting Joint Appendix).
109. Id. at 23-24.
110. Id. at 24.
found “no congressional intent to preclude enforcement of arbitration agreements in the ADEA’s text, its legislative history, or its underlying purposes.”

By a 7-2 vote, the Supreme Court affirmed the Fourth Circuit’s decision regarding Gilmer’s claims. Justice White’s opinion for the Court makes clear that statutory claims may be subjected to an FAA enforceable arbitration agreement. Not every statutory claim may be appropriate for arbitration. However, a party who agrees to arbitrate “should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” The burden of establishing congressional intent to preclude waiver rested with Gilmer, with that intent “discoverable in the text of the ADEA, its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes.” Further, Justice White continued, the federal policy (created and pronounced by the Court) favoring arbitration must be considered when resolving questions of arbitrability of a statutory claim.

Gilmer conceded, as he had to, that there was nothing in the text or legislative history of the ADEA indicating Congress’s intent to preclude arbitration, thereby rendering textualist and intentionalist methodologies inoperable. One could argue that this silence of statutory text or statutory history should have resolved the case in Gilmer’s favor, for Congress did not explicitly state or otherwise indicate that ADEA claims could be subject to compulsory arbitration. Such silence, viewed from Gilmer’s perspective, could have been golden. The Court, however, pressed on into the realm of atexual purposivism, and Gilmer’s case thus depended on the Court’s answer to the question of whether arbitration conflicted with the purposes of the ADEA. That determination, in turn, would depend upon the Court’s

(8th Cir. 1988); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1553 (10th Cir. 1988); Johnson v. Univ. of Wis.-Milwaukee, 783 F.2d 59, 62 (7th Cir. 1986).
113. Gilmer, 500 U.S. at 22 (listing the Justices’ votes).
114. Id. at 26.
115. Id.
116. Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
117. Id.
119. Id.
120. See supra notes 34-45 and accompanying text.
121. See supra notes 46-54 and accompanying text.
articulation and evaluation of the statute’s purposes, an enterprise providing ample opportunity for judicial lawmaking and policymaking. The Court found no inherent conflict between the ADEA’s purposes of providing for actions to address workplace grievances, furthering “important social policies,” and the enforcement of agreements to arbitrate age discrimination claims. According to the Court, the statute’s broader social purposes can be furthered in both arbitration and in the courts, and arbitration does not undermine the EEOC’s role in fighting age discrimination. Claimants subject to arbitration agreements precluding court actions can still file discrimination charges with the EEOC, as did Gilmer, and the agency can investigate claims of discrimination in the absence of an individual’s charge. Moreover, the Court continued, because discrimination claims may be settled without the agency’s participation, nothing in the ADEA requires EEOC involvement in all employment disputes. The Court opined that “the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.”

Gilmer also argued that compelling arbitration was improper because he would be deprived of the court forum provided by the ADEA. Not so, said the Court: “Congress . . . did not explicitly

122.  Gilmer, 500 U.S. at 27.
123.  Id. at 27-28.
124.  The ADEA rests enforcement authority with the EEOC. 29 U.S.C. § 626 (1994). Employee charges of age discrimination must be filed with the agency. Id. § 626(b). The EEOC “shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion.” Id. Where conciliation of a meritorious charge is not successful, the EEOC may bring suit in court, an action that terminates an individual employee’s right to file her own action. Id. § 626(c)(1). If the agency does not sue, the employee may bring her own claim in court and may ask for a jury trial. Id. § 626(c)(2). The EEOC may also issue a right-to-sue letter allowing the employee to bring a court action. Id. § 626(c); see also 42 U.S.C. § 2000e-5(f)(1) (1994 & Supp. 2000). In a recent ruling, the Supreme Court made it clear that an arbitration agreement between an employer and an employee does not bar the EEOC from seeking victim-specific relief on behalf of the employee. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).
125.  Gilmer, 500 U.S. at 28.
126.  Id. (citing supporting decisions). As amended by the Older Workers Benefit Protection Act, the ADEA provides that individuals may knowingly and voluntarily waive ADEA rights and claims that do not arise after the date the waiver is executed. 29 U.S.C. § 626(f) (1994); see also Michael C. Harper, Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act, 79 Va. L. Rev. 1271, 1294-98 (1993) (criticizing conditional age-based exit incentives as prospective waivers).
127.  Gilmer, 500 U.S. at 28-29. In support of this point, the Court noted that the SEC “is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration.” Id. at 29.
128.  Id. at 29.
preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA." Relying on the ADEA's flexible resolution of claims and the statute's conciliation requirement, the Court reasoned that "out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." This aspect of the Court's decision cannot withstand scrutiny. EEOC conciliation seeks to settle what the agency deems to be meritorious charges of discrimination. This specific out-of-court dispute resolution, in which an agreed-upon and voluntary settlement of a charge is sought in a procedure administered by the EEOC, is far different from, and should not be likened to or confused with, formal and binding compulsory arbitration.

The Court also determined that arbitration is consistent with the ADEA's grant of concurrent jurisdiction over age discrimination claims to federal and state courts. The Court in Gilmer reasoned that both arbitration agreements and the concurrent jurisdiction provision allow ADEA claimants options with respect to the forum in which a dispute will be resolved. The concurrent jurisdiction provision allows claimants to choose between two judicial fora, the state or federal courts, both providing for discovery, jury trials, and other indicia of judicial process and administration. The benefits inured with choosing between competent jurisdictions are not available in, or similar to, compulsory arbitration, which does not afford the option of a court and jury.

The Court then spent several pages rejecting Gilmer's challenges to the adequacy of arbitration as a forum for the litigation of statutory age discrimination claims. To summarize what is discussed in detail elsewhere, the Court noted its rejection of generalized attacks on

129. Id.
130. Id.
131. Id.
133. Id. at 34 (contrasting arbitrator's powers with statutory rights for Title VII claims).
139. See Ann C. McGinley, Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy, 57 OHIO ST. L.J. 1443, 1473-82 (1996) (detailing and commenting on each of the Court's findings).
arbitration;\textsuperscript{140} declined to presume that arbitrators will be biased;\textsuperscript{141} concluded that arbitral discovery was sufficient and that Gilmer would have a fair opportunity to present his claims under the NYSE discovery rules;\textsuperscript{142} and reasoned that arbitration would not hinder public knowledge of an employer’s discrimination, effective judicial review, or the development of the law.\textsuperscript{143}

Additionally, the Court concluded that the purposes of the ADEA, achievable through class actions, could be furthered in NYSE collective arbitration proceedings, as well as EEOC-initiated class actions.\textsuperscript{144} Gilmer’s argument that agreements to arbitrate ADEA claims should not be enforced because of unequal bargaining power between employers and employees was also rejected.\textsuperscript{145} “Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”\textsuperscript{146} For all of the foregoing reasons, the Court concluded that Gilmer “ha[d] not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act.”\textsuperscript{147}

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\bibitem{140} Gilmer, 500 U.S. at 30.
\bibitem{141} Id.
\bibitem{142} Id. at 31.
\bibitem{143} Id. at 31-32.
\bibitem{144} Id. at 32.
\bibitem{145} McGinley, supra note 139, at 1475-76 (finding the Court’s rejection of Gilmer’s unequal bargaining power argument “troublesome”).
\bibitem{146} Gilmer, 500 U.S. at 33 (“There is no indication in this case . . . that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application . . . [;] this claim of unequal bargaining power is best left for resolution in specific cases.”).
\bibitem{147} Id. at 35. In the wake of Gilmer, courts have generally held that employees subject to pre-dispute arbitration agreements may be compelled to submit race, sex, age, and disability discrimination claims to arbitration. See, e.g., Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 552 (4th Cir. 2001); Lyster v. Ryan’s Family Steak Houses, Inc., 239 F.3d 943, 947 (8th Cir. 2001); Haskins v. Prudential Ins. Co. of Am., 230 F.3d 231, 232 (6th Cir. 2000), cert. denied, 531 U.S. 1113 (2001); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1221 (11th Cir. 2000); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 12 (1st Cir. 1999); Kovaleskie v. SBC Capital Mkts.; Inc., 167 F.3d 361, 362, 367 (7th Cir. 1999); Seus v. John Nuveen & Co., 146 F.3d 175, 179 (3d Cir. 1998); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837, 838 (8th Cir. 1997); Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1469-70, 1488 (D.C. Cir. 1997); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1431, 1433 (N.D. Ill. 1993). The United States Court of Appeals for the Ninth Circuit has taken a contrary view, holding that employees cannot be compelled to arbitrate Title VII claims. Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1185, 1202-03 (9th Cir. 1998).
\end{thebibliography}
Given the Court’s FAA decisions and jurisprudence of the 1980s, 
*Gilmer* was predictable, if not inevitable. The Court’s move from a pro-contract to a pro-arbitration reading and application of the FAA, and its conclusion that plaintiffs’ statutory claims arising under securities and racketeering laws had to be resolved in arbitration pursuant to predispute agreements, provided the analytical framework applicable to Gilmer’s claim that he did not have to arbitrate his ADEA claim. Under that framework, the Court asked whether Congress intended to preclude arbitration of age discrimination claims and answered that query in the negative.

That answer, based on a fictive intent, not expressed in statutory text or legislative history, or considered by the Congress enacting the ADEA in 1967, is not obviously and indisputably correct. Congress could not have expressed an intent on an issue it had not contemplated. Given the state of FAA-based arbitration law in 1967, there was no reason for Congress to consider the arbitrability issue. “Thus, it is hardly surprising that Congress did not see fit, in either the language of the statute or its legislative history, to specify that courts should not compel arbitration” of ADEA claims. Placing the burden on the plaintiff to show that the ADEA-enacting Congress intended to preclude arbitration required Gilmer to find and prove a nonexistence. To rule against him, when he was unsurprisingly unable to meet that burden, is to give operative effect to the Court’s approach to, and view of, arbitration and not the congressional intent.

To conclude (as the Court did in *Gilmer*) that the ADEA does not preclude arbitration flows not from the intent of Congress, but from the Court’s own policy preferences and broad reading of the FAA. While those preferences and readings may lead to desired policy outcomes, observers interested in statutory interpretations and methodologies should be concerned with the methodology employed by the Court in identifying and evaluating the ADEA’s purposes. The search for legislative purpose in a statute that is silent, vague, or ambiguous on a specific issue allows a court to construct or reconstruct and determine—in its view—congressional purpose, congressional intent, and how

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148. See Nicolau, *supra* note 21, at 182 (“Against this backdrop, the result in *Gilmer*, at least to those who closely followed the Court, should have come as no surprise in 1991.”).


151. Sternlight, *supra* note 70, at 322 (applying this point to the Civil Rights Act of 1866); see also Carrington & Haagen, *supra* note 70, at 370 (“[T]he ADEA ... was written at a time when it would have been almost unthinkable that any federal court would have enforced an agreement subjecting otherwise justiciable civil rights claims to arbitral jurisdiction.”).
Congress would answer the statutory question. While that determination could yield plausible, defensible, and purposive constructions of statutes, we should not lose sight of the fact that what might be left is a judicially imagined view of statutory purpose and not the actual view and intent of those who enacted the law.

To say this is not to say that the Court necessarily erred, as a matter of policy, in requiring Gilmer to arbitrate his age discrimination lawsuit. Enforcing agreements to arbitrate ADEA and other statutory employment claims may or may not be advantageous and beneficial to employers, employees, and the courts. Arbitration may or may not provide more protection to employees than does court litigation of such claims. These are debatable matters calling for scholarly examination and empirical analysis. One can agree with the policy approach and result reached in a case however, and still question the methodology employed by the Court in reaching that result. For those who proclaim that what counts is the enacting legislature’s intent and command, and not a court’s preferences and desired policies, Gilmer’s “imaginative elaboration of legislative purpose” is problematic because it certainly provides more room for judicial lawmaking and policymaking, than does statutory interpretation tethered to text and legislative history.

V. CONCLUSION

Gilmer’s conclusion that Congress did not intend to preclude the arbitration of ADEA claims is based on a fictive and judicially-created


153. Some commentators agree with the results reached by the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954), and Roe v. Wade, 410 U.S. 113 (1973), but disagree with the Court’s analysis. See, e.g., Barry Friedman & Scott B. Smith, The Sedimentary Constitution, 147 U. PA. L. REV. 1, 67 (1998) (“Brown is an example of a decision that likely was correct the day it was decided, but failed to make a proper historical case.”); Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. REV. 1185, 1200 (1992) (“Roe . . . might have been less of a storm center had it both homed in more precisely on the women’s equality dimension of the issue and, correspondingly, attempted nothing more bold at that time than the mode of decisionmaking the Court employed in the 1970s gender classification cases.”)(footnote omitted)); Calvin R. Massey, The Natural Law Component of the Ninth Amendment, 61 U. CIN. L. REV. 49, 102 n.265 (1992) (arguing that Roe was not decided wrongly as a matter of constitutional law, but that the Court erred by treating the putative right as an unenumerated natural right).

154. POPKIN, supra note 44, at 207.
and judicially-imposed statutory "intent" grounded in the Court's own preference for arbitration. Significantly, this decision serves as an illustration of the way in which the Court goes outside of statutory text and legislative history to engage in lawmaking and policymaking.

For subscribers to the view that the Court should only interpret and enforce legislative commands and must never make law, *Gilmer* presents important and interesting questions concerning the legitimacy of the Court's approach. These questions include whether the Court substituted its policy preferences for the policies and rules of law set out by Congress, and whether it is possible for the Court and lower courts to avoid some level of lawmaking and policymaking as part of the adjudicative enterprise under circumstances like those presented in *Gilmer*. Subscribers to the belief that judicial lawmaking and policymaking are legitimate and necessary must consider how far beyond text and legislative history courts can or should go in determining statutory purposes and dictates. These believers should be cognizant of the fact that judges and lawyers, skilled in rhetoric and persuasive argumentation, will be able to construct or reconstruct legislative "intent" when explaining why one interpretation of a statutory provision is favored over another. These questions, and plausible, persuasive answers thereto, deserve the attention of all interested in law and affected by statutory interpretation and application.