COMPULSORY ARBITRATION OF STATUTORY EMPLOYMENT DISPUTES: JUDICIAL REVIEW WITHOUT JUDICIAL REFORMATION

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INTRODUCTION

In the past decade, increasing numbers of employers, beleaguered by employment-related litigation, have sought refuge in mandatory arbitration clauses.[1] Such clauses, embedded in employment contracts, stand-alone agreements, or employee handbooks,[2] typically consist of an obligation to submit any and all employee claims to binding arbitration.[3] In light of the dramatic increase in em-

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[1] See Jennifer N. Manuszak, Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages, 12 Ohio St. J. on Disp. Resol. 387, 388-89 (1997) (explaining that employers increasingly are resolving disputes through extrajudicial channels). Recent changes in federal employment law, such as the Americans with Disabilities Act of 1990 (ADA) and the Civil Rights Act of 1991, have fueled a dramatic increase in employment-related litigation, particularly discrimination and wrongful discharge claims. See Developments in the Law—Employment Discrimination, 109 Harv. L. Rev. 1568, 1672 n.20 (1996) [hereinafter Employment Discrimination] (noting that "[t]he number of employment disputes in federal courts increased twenty fold between 1971 and 1991, an increase that is 1000% greater than that of all other types of civil litigation combined" (citing Hope B. Eastman & David M. Rothenstein, The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground, 20 Employee Rel. L.J. 595, 595 (1995))).

[2] See Employment Discrimination, supra note 1, at 1671 (describing various forms of mandatory arbitration).

[3] For example, one "Pre-Dispute Resolution Agreement" provided:

> [I]n the event either party . . . brings an action . . . relating to your recruitment, employment with, or termination of employment . . . the plaintiff . . . agrees to waive his . . . right to a trial by jury, and further agrees that no demand, request or motion will be made for trial by jury.
>
> . . . [Y]ou further agree that, in the event that you seek relief in a court . . . for a dispute covered by this Agreement, the Company may . . . require all or part of the dispute to be arbitrated . . . .
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> This pre-dispute resolution agreement will cover all matters directly or indirectly related to your recruitment, employment or termination of employment . . . including, but not limited to, claims involving laws against discrimination whether brought under federal and/or state law, and/or claims involving co-employees but excluding Worker's Compensation Claims.

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1469 (D.C. Cir. 1997).

ployment-related litigation[4] and the deference the Supreme Court historically has given to arbitration,[5] the inclusion of a mandatory arbitration clause into an employment contract may seem justified by its sheer expediency. Yet the practical effect of compulsory arbitration is not always benign. Indeed, it can be quite insidious in the context of employment disputes involving discrimination claims.

Though arguably more efficient and cost effective than litigation,[6] arbitral fora lack the procedural safeguards of civil trials,[7] such as the right to discovery[8] and reasoned opinions.[9] Furthermore, since arbi-

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[4] More than 200,000 discrimination cases are filed each year, overwhelming government agencies and overloading court dockets. See Joshua M. Javits & Francis T. Coleman, High Court to Revisit Issue of Mandatory Arbitration, Nat'l L.J., Oct. 5, 1998, at B5. Discrimination filings are increasing at a rate of about 23% a year. See id.

[5] See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (holding that employees could enter into binding predispute arbitration agreements encompassing claims they have against their employers under Age Discrimination in Employment Act of 1967 (ADEA)); see also United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (sanctioning use of arbitration in collective bargaining cases in one of famous Steelworker Trilogy cases); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (same); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (same). In *Warrior & Gulf Navigation Co.*, the Court stated that the "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." 363 U.S. at 578.

[6] See Patrick A. Lynd, Comment, Recent Developments Regarding Mandatory Arbitration of Statutory Employment Disputes, 77 Or. L. Rev. 287, 288 (1998) (explaining that arbitration expedites resolution of disputes by circumventing backlogged court system, and that arbitration "rarely results in the excessive attorney fees, discovery costs, or damage awards associated with a court trial"); Lewis Maltby, Paradise Lost—How the *Gilmer* Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights, 12 N.Y.L. Sch. J. Hum. Rts. 1, 25 (1994) (explaining that arbitration offers affordable alternative to litigation).

[7] See Katherine Van Wezel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 Denv. U. L. Rev. 1017, 1046 (1996) (noting that arbitration procedures rarely allow for extensive discovery, cross-examination, or other due process protections); see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 ("The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.").

[8] See *Gilmer*, 500 U.S. at 31 (noting petitioner's complaint that discovery is more limited in arbitration than in federal courts but observing that "an important counterweight to the reduced discovery . . . is that arbitrators are not bound by the rules of evidence").

[9] The Securities Industry Conference on Arbitration (SICA) Arbitrators Manual, for example, states that "[u]nder present law, an arbitrator is not required to give a reason for the decision." Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 198 (D. Mass. 1998) (quoting SICA, Arbitrators Manual 31 (1996)); see also *Enterprise Wheel & Car Corp.*, 363 U.S. at 598 (noting that arbitrators have no obligation to court to give reasons for award). In National Association of Securities Dealers (NASD) training sessions, arbitrators are taught that "'awards that do not contain the panel's reasons are more appropriate.'" *Rosenberg*, 995 F. Supp. at 198 (quoting Terry R. Weiss, If We Wanted Your Opinion, We Would Have Asked for It: Why Arbitrators Need Not State the Reasons for Their Award (May 18, 1994) (presented for NASD Arbitration Training).

tration occurs in a private forum, the arbitrator's decision generally is insulated from meaningful judicial review.[10] Such a private, "do-it-yourself tribunal"[11] may be efficacious when two parties of equal bargaining power negotiate for mutually acceptable arbitration rules and procedures. More controversial, however, is arbitration arising out of a contract of adhesion, where the party of superior bargaining power presents a standardized form to the weaker party on a take-it-or-leave-it basis.[12] Though adhesion contracts have been upheld in courts of law,[13] there is growing discomfort among courts and legal commentators regarding the enforcement of arbitration clauses signed in agreements ancillary to employment contracts.[14] At best, the boilerplate arbitration agreement may be an inadequate protection of rights against employment discrimination. At worst, it may be a significant erosion of the protections that Congress has put in place against such employment discrimination.[15]

The above concerns do not presage the retreat of arbitration as a mechanism for resolving statutory disputes, nor that of the compulsory arbitration of employee civil rights claims. They do, however, inform recent appellate court decisions expanding the scope of judicial scrutiny in arbitrations involving statutory rights.[16] Lacking guidance from the Supreme Court on an appropriate benchmark or analytical approach to review such cases,[17] some appellate courts have carved

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Written opinions are considered "burdensome, time-consuming, and invitations to judicial review." Id.

10 See Stone, supra note 7, at 1048 (noting that judicial review is limited in arbitrations); Paul H. Haagen, New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration, 40 Ariz. L. Rev. 1039, 1053 (1998) (noting that arbitrators' judgments generally are immune from review even though arbitrators may be unqualified to handle matters submitted to them).

11 Stone, supra note 7, at 1046.

12 See Lisa B. Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, 29 McGeorge L. Rev. 223, 225-27 (1998) (observing that enforcement of predispute arbitration agreements allows employers to structure arbitration process to their advantage).

13 See, e.g., Paulsen v. Bureau of State Lottery, 421 N.W.2d 678, 682 (Mich. Ct. App. 1988) (finding that adhesion contract is enforceable if challenged provision is "substantially reasonable and not oppressive or unconscionable").

14 See Stone, supra note 7, at 1046-47 (describing various criticisms raised by members of legal community).

15 See Heidi M. Hellekson, Note, Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts, 70 N.D. L. Rev. 437 (1994) (commenting that compulsory arbitration could "impoverish the congressionally-created protections against employment discrimination, such as the ADEA and the Americans with Disabilities Act").

16 This Note focuses primarily on judicial review by the federal courts.

17 The Supreme Court did not articulate guidelines for the review of cases involving statutory discrimination in either Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20

out exceptions to the seemingly narrow limits of review articulated in the statutory and common law.[18] Consequently, the decisions of these courts have been criticized as result-oriented instances of judicial reformation.[19] Though a compelling argument can be made for heightened review of arbitral awards that implicate civil rights, judicial review that appears ad hoc may undermine the predictability and finality of the arbitration, thereby making it less attractive as an alternative form of dispute resolution.

This Note examines recent appellate cases and the policy rationale supporting increased judicial scrutiny of an arbitral decision. It contends that judicial review of an arbitral decision in a statutory employment dispute should be more rigorous than either statutory or common law currently permits.[20] It further maintains that when broader judicial review proceeds within a clearly articulated framework, it may foster increased recourse to arbitration by ensuring an impartial forum for the vindication of statutory rights.

Part I of this Note begins with an overview of the statutory and common law grounds for vacating arbitral awards. It continues with a

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(1991), which involved the arbitration of claims pursuant to employment, or the more recent Wright v. Universal Maritime Serv. Corp., No. 97-889, 1998 U.S. Lexis 7270 (Nov. 16, 1998), which involved a labor contract. Though both *Gilmer* and *Wright* stand for the proposition that individual statutory rights may be subject to mandatory arbitration under certain circumstances, the Court has yet to adopt an analytical approach to guide courts in determining whether such circumstances exist. See Bruce J. Kasten & Patrick W. Coady, Court Leaves Arbitration Issue Open, Nat'l L.J., Jan. 11, 1999, at B5 (observing that Supreme Court has not yet adopted systematic approach to mandatory arbitration cases involving statutory discrimination claims).

[18] A similar trend has been observed in the judicial review of labor, as opposed to employment, arbitration awards. For a discussion of this phenomenon, see generally Susan A. Fitzgibbon, The Judicial Itch, 34 St. Louis U. L.J. 485 (1990) (discussing instances in which federal judges have decided labor disputes involving arbitral awards "without regard to current trends in employment law").

[19] See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1491 (D.C. Cir. 1997) (Henderson, J., concurring in part and dissenting in part) (criticizing holding of majority modifying predispute arbitration agreement and stating that "if the majority truly believes the agreement is enforceable, as it maintains, it should enforce the agreement as written without judicial reformation"). For a discussion of *Cole*, see infra Part II.B.3.

[20] This Note does not contest that employee statutory claims may be subject to mandatory arbitration. However, a number of courts and commentators have refuted this assumption. See, e.g., Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1188-92 (9th Cir. 1998) (refusing to compel arbitration of Title VII claims on ground that Congress, in enacting Civil Rights Act of 1991, intended to codify its position that compulsory arbitration of Title VII claims was not "authorized by law," and therefore compelling employees to forego their rights to litigate future Title VII claims as condition of employment would be inappropriate); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 210-11 (D. Mass. 1998) (refusing to compel arbitration of plaintiff's ADEA and Title VII claims because New York Stock Exchange (NYSE) rules and procedures did not meet minimal standards of arbitral independence), aff'd on other grounds, 163 F.3d 53, 72-73 (1st Cir. 1998).

discussion of the benefits and consequences of limited review in light of the goals of arbitration and the necessity of protecting statutory rights. Part II explores the legislative history of the Civil Rights Act of 1991[21] for guidance as to how Congress has balanced the issues addressed in Part I. It next examines recent appellate decisions concerning mandatory arbitration of statutory employment disputes and explores the shifting boundaries of judicial review. Part III begins with an assessment of the type of judicial scrutiny most likely to promote the objectives of arbitration while safeguarding statutory rights. Distilling principles from cases discussed in Part II, Part III suggests guidelines for when and how courts might apply heightened review. Part III concludes with a discussion of why the recommended guidelines are likely to require legislative amendment.

I
JUDICIAL REVIEW OF EMPLOYMENT ARBITRATION DECISIONS: STATUTORY GROUNDS AND THE MODERN COMMON LAW STANDARD

Statutory and common law grounds for reviewing and vacating arbitral awards reflect a "liberal federal policy favoring arbitration agreements."[22] Such grounds prescribe considerable judicial deference to arbitral awards, even when statutory rights are paramount.[23] The next section describes the Federal Arbitration Act (FAA), the statutory basis for review of employment arbitration decisions. A discussion of the common law standard of "manifest disregard" follows. The third section contemplates the implications of limited judicial review.

A. Judicial Review Under the Federal Arbitration Act

It is not a historical accident that the FAA exhibits limited tolerance for judicial review. Congress enacted the FAA against a backdrop of judicial hostility to arbitration.[24] Such hostility was manifest

[21] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, 42 U.S.C.).

[22] *Gilmer*, 500 U.S. at 25 (internal quotation marks omitted) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[23] See Employment Discrimination, supra note 1 , at 1682-83 (discussing judicial review pursuant to Federal Arbitration Act (FAA) and "manifest disregard" standard).

[24] See Tom Cullinan, Note, Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements, 51 Vand. L. Rev. 395, 408-09 (1998) (describing early American arbitration law and judicial hostility to arbitration). The roots of this anathema lie in English common law. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (stating that origins of American courts' refusal to enforce agreements to arbitrate lie in "'ancient times,'" when English courts opposed anything that would deprive them of juris-

in the widespread refusal of courts to enforce executory agreements to arbitrate.[25] While courts were likely to enforce arbitration awards, they frequently subjected such decisions to virtually unlimited review.[26]

Increased commercial transactions at the turn of the century led to a reconsideration of the merits of arbitration and a recognition of the need for judicial enforcement of executory arbitration agreements and arbitral awards.[27] Yet there was no consensus on courts' ability to enforce these agreements and decisions. Moreover, some courts balked at the idea of enforcing arbitral agreements without guidance from the legislature.[28] Congress responded to the legal quagmire by enacting a number of statutes that reversed the historically negative treatment of arbitration.[29] The most noteworthy of these statutes, the FAA, was signed into law on February 12, 1925.[30]

The FAA was designed by commercial lawyers principally for the enforcement of arbitration promises contained in commercial contracts.[31] According to the Supreme Court, its purpose was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law . . . and to place arbitration agreements upon the same footing as other contracts."[32] In addition to providing procedural mechanisms to facilitate the arbitral process,[33] the FAA set forth two significant legal changes. First, executory agreements to arbitrate were legally valid, irrevocable, and enforceable.[34]

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diction (quoting Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring))).

25 See Cullinan, supra note 24, at 409.

26 See id.

27 See id. at 409-10.

28 See id. at 410.

29 See *Allied-Bruce Terminix Cos.*, 513 U.S. at 270-71 (observing that "when Congress passed the Arbitration Act in 1925, it was 'motivated, first and foremost, by a . . . desire' to change [the] antiarbitration rule" (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985))).

30 See Pub. L. No. 68-400, 43 Stat. 883 (codified at 9 U.S.C. §§ 1-16, 201-208, 301-307 (1994)).

31 See Robert A. Gorman, The *Gilmer* Decision and the Private Arbitration of Public-Law Disputes, 1995 U. Ill. L. Rev. 635, 636 (discussing history of enactment of FAA).

32 See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (discussing historical purpose of FAA).

33 For example, sections of the FAA allow the court, if the arbitrator selection process fails, to designate the arbitrator and give arbitrators the power to summon witnesses and subpoena documents. See 9 U.S.C. §§ 5, 7 (1994).

34 Section 2 of the Act states that a "written provision in any maritime transaction or a contract . . . involving commerce [that requires parties] to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id. § 2 (1994). States are bound by the substantive command of section 2 of the FAA; state law inconsistent with the

Second, the FAA provided extremely narrow grounds for vacating or modifying an arbitral award. These instances are:

(1) Where the award was procured by corruption, fraud, or undue means.
(2) Where there was evident partiality or corruption in the arbitrators, or either of them.
(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.[35]

The limited bases for vacatur of arbitral awards reflect the FAA's bias towards upholding arbitrations. The FAA does not contemplate judicial review when an arbitrator encounters a dispute presenting a novel legal question.[36] Nor may a court intervene when an arbitrator fails to follow precedent or misinterprets the law.[37] Under these cir-

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FAA, whether procedural or substantive, is preempted. See *Allied-Bruce Terminix Cos.*, 513 U.S. at 272-73 (holding that FAA preempts state law); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."). As a result, lower courts, reasoning that arbitration agreements fall within the purview of the FAA, usually compel arbitration of statutory claims. See Bender v. A.G. Edwards & Sons, 971 F.2d 698, 700 (11th Cir. 1992) (holding that Title VII claim is subject to arbitration under FAA); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (same); Meyer v. Dans un Jardin, S.A., 816 F.2d 533, 537 (10th Cir. 1987) (holding that FAA preempted Oklahoma nonwaiver statute); Kroog v. Mait, 712 F.2d 1148, 1152 (7th Cir. 1983) (holding that FAA preempted Wisconsin securities law provision making arbitration agreements unenforceable); Securities Indus. Ass'n v. Connolly, 703 F. Supp. 146, 153 (D. Mass. 1988) (finding that FAA preempted Massachusetts securities law concerning non-negotiable clauses between broker and client), aff'd, 883 F.2d 1114, 1115 (1st Cir. 1989). The preemption of state law prevents state courts from expanding judicial review. See Cullinan, supra note 24, at 416.

35 9 U.S.C. § 10(a) (1994).

36 See Michael A. Scodro, Arbitrating Novel Legal Questions: A Recommendation for Reform, 105 Yale L.J. 1927, 1943 (1996) (discussing problems arising when arbitrators face legal questions that courts have yet to address); Anthony J. Jacob, Comment, Expanding Judicial Review to Encourage Employers and Employees to Enter the Arbitration Arena, 30 J. Marshall L. Rev. 1099, 1121-22, 1124 (1997) (same).

37 See Scodro, supra note 36, at 1943 (discussing limited basis for overturning arbitral award); Jacob, supra note 36, at 1124 (same). Commentators also have noted that the FAA uses terms such as "undue means" and "rights" in lieu of language that more explicitly defines abuses of procedural due process. See Maltby, supra note 6, at 16-17 (stating that

cumstances, an arbitrator has little incentive to keep abreast of judicial decisions that would be controlling but for the private nature of the forum.[38]

Defending limited grounds for vacatur, the Supreme Court recently stated that parties seeking the "simplicity, informality, and expedition of arbitration" may forego the opportunity for judicial review.[39] While this rationale may be appropriate in the commercial setting, it is less apropos of arbitration agreements implicating civil rights.

Based on the legislative history of the FAA and the "plain meaning" of section 1,[40] some courts and commentators maintain that the FAA does not apply to most contracts of employment.[41] Section 1 exempts from the application of the FAA "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[42] A few courts have construed this provision to apply to all workers engaged in interstate commerce.[43] These courts maintain that the references to seamen and

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vagueness of terms used in FAA "makes them forever adaptable to contemporary notions of fairness and predictability, which are the touchstones of procedural due process").

[38] See, e.g., Jacob, supra note 36, at 1124 (advocating for broader judicial review to ensure uniformity and fair play).

[39] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (internal quotation marks omitted) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[40] According to Professor Malin, section 1 was drafted in response to concerns articulated by the president of the Seaman's Union that its contracts be enforced pursuant to the common law and not "employer-controlled arbitration systems." See Martin H. Malin, Arbitrating Statutory Employment Claims in the Aftermath of *Gilmer*, 40 St. Louis U. L.J. 77, 88 (1996). As the Chair of the American Bar Association's (ABA) Committee on Commerce, which had proposed the FAA, commented: "It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary, 67th Cong. 9 (1923) (statement of W. H. H. Piatt, Chairman of the Committee of Commerce, Trade and Commercial Law, ABA).

[41] See Craft v. Campbell Soup Co., 161 F.3d 1199, 1203 (9th Cir. 1998) (holding that arbitration could not be compelled because FAA did not apply to labor or employment contracts); see also Richard A. Bales, Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements, 47 Baylor L. Rev. 591, 603-04 (1995) (observing debate over "contracts of employment" exclusion and noting that even if courts ultimately exclude all employment contracts, compulsory arbitration agreements may be enforceable through those state arbitration statutes that do not exclude contracts of employment).

[42] 9 U.S.C. § 1 (1994).

[43] See Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117, 123 (N.D. Miss. 1995) (interpreting exemption broadly and excluding arbitration clause from enforcement under FAA); Mittendorf v. Stone Lumber Co., 874 F. Supp. 292, 295 (D. Or. 1994) (interpreting exemption broadly).

railroad employees merely reflect the narrow reach of the Commerce Clause in 1925, when Congress enacted the FAA, and not an attempt to modify the language "any other class of workers."[44] Accordingly, a broader interpretation of the contracts of employment exclusion comes closer to effectuating congressional intent.[45]

The Supreme Court has yet to rule on the section 1 exclusion.[46] The issue was raised in *Gilmer v. Interstate/Johnson Lane Corp.*,[47] which involved the mandatory arbitration of a statutory employment dispute.[48] In addition to Mr. Gilmer's arguments, the Court received briefs from several amici curiae contending that section 1 rendered the FAA—and its presumption of arbitrability—inapplicable to the case.[49] The Court, however, avoided the question by holding that the arbitration clause was contained in Mr. Gilmer's registration application with the New York Stock Exchange and therefore was not part of his employment contract with Interstate.[50]

Though debate continues on the exclusionary effect of section 1, most federal circuit courts have adopted a narrow reading, exempting only workers directly involved in interstate commerce, such as truck

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[44] See *Arce*, 883 F. Supp. at 123 ("[I]nterstate commerce at the time the FAA was enacted was generally understood to be limited to maritime and railroad transactions.").

[45] See id. at 123.

[46] It has been suggested that the narrow interpretation of section 1 is supported by the Supreme Court's holding in Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995). See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471-72 (D.C. Cir. 1997) (stating that Court in *Allied-Bruce Terminix Cos.* interpreted words "in commerce" to mean "only those workers actually involved in the 'flow' of commerce").

[47] 500 U.S. 20 (1991).

[48] In *Gilmer*, the Supreme Court affirmed that an employee could be compelled to arbitrate his claims under ADEA pursuant to a predispute arbitration agreement. Mr. Gilmer had signed a uniform securities registration statement requiring him to arbitrate "'any dispute, claim or controversy . . . required to be arbitrated under the rules . . . of the organizations with which I register.'" Id. at 23 (quoting registration application). The Court acknowledged that the ADEA fostered important public policies, but found that since Mr. Gilmer could still vindicate his statutory rights, these policies were not antagonistic to the arbitral forum. See id. at 27-28.

[49] See id. at 25 n.2.

[50] See id.

drivers.[51] Thus, mandatory arbitration clauses in employment contracts generally are subject to the FAA standards.[52]

B. *Manifest Disregard: The Common Law Standard*

Twenty-seven years after Congress passed the FAA, the Supreme Court created a new basis for vacating arbitration awards: manifest disregard of the law.[53] The standard originated from dicta in *Wilko v.*

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[51] To date, every circuit to consider section 1 has found that it exempts only the employment contracts of workers actually engaged in the movement of goods in interstate commerce. See *Cole*, 105 F.3d at 1471 (holding that canons of statutory construction support conclusion that section 1 applies only to those workers "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it"); Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996) (stating that section 1 exempts only employment contracts of workers engaged in movement of goods in interstate commerce); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 600-01 (6th Cir. 1995) (stating that section 1 "should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce"); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984) (stating that section 1 applies only "to workers employed in the transportation industries"); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (stating that section 1 applies "only to those actually in the transportation industry"); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971) (same); Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450, 452 (3d Cir. 1953) (stating that section 1 applies only to workers "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it"). But see United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954) (questioning in dicta narrow interpretation of section 1).

[52] See Bales, supra note 41, at 603-04.

[53] This Note focuses on the common law standard of manifest disregard, the only nonstatutory ground recognized by the Supreme Court. However, lower courts have fashioned additional grounds for vacating arbitration awards. See generally Stephen L. Hayford, Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards, 30 Ga. L. Rev. 731 (1996) (discussing five nonstatutory grounds for vacatur of commercial arbitration awards); Gerald F. Rath & Richelle S. Kennedy, Judicial Review of Arbitration Awards, in Securities Arbitration 1998, at 513, 522-28 (PLI Corporate Law and Practice Course Handbook Series No. B-1062, 1998) (describing five "judicially crafted" grounds for vacatur). In addition to the manifest disregard standard, the other common law grounds include: a conflict between the award and a clear and well-established public policy, see PaineWebber, Inc. v. Agron, 49 F.3d 347, 350 (8th Cir. 1995); an award that is "arbitrary and capricious," see Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992); an award that is "irrational," see Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131, 1134 (3rd Cir. 1972); and fundamental unfairness in the arbitral process, see Bowles Fin. Group v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1012-13 (10th Cir. 1994). The manifest disregard standard is "perhaps the most widely recognized and frequently argued grounds for vacatur." Rath & Kennedy, supra, at 523. However, all of the grounds are narrowly interpreted and sparingly applied. See id.

Swan,[54] which held that a court may vacate an arbitration award revealing a manifest disregard for controlling legal principles.[55]

Wilko involved a suit brought under the Securities Act of 1933[56] against a securities brokerage firm, alleging losses caused by the firm's misrepresentations and omissions.[57] The firm moved to stay the suit on the ground that a prior agreement between the two parties contained a clause requiring the parties to bring all disputes to arbitration.[58] This clause, however, conflicted with sections of the 1933 Act providing that plaintiffs could sue in federal court and voiding any stipulation waiving compliance with any provision of the statute.[59]

The Court refused to compel arbitration on the ground that it would preempt the judicial role in protecting the public values underlying the statute.[60] It expressed concern that arbitrators would render decisions without judicial instruction on the law and "without [keeping] a complete record of their proceedings."[61] Stating that an arbitrator's interpretations of law were not subject to vacatur under the FAA unless they displayed a manifest disregard for the law,[62] the Court expressed concern that an award might prevail without judicial review for error.[63] While recognizing that arbitration was often faster and more economical than litigation, the Court found that Congress's intent "concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."[64]

During the 1980s, the Court abandoned the concerns it expressed in *Wilko* regarding the absence of arbitrator accountability,[65] and

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54 346 U.S. 427 (1953), overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

55 See id. at 436-37.

56 15 U.S.C. §§ 77a-77aa (1994).

57 *Wilko*, 346 U.S. at 429.

58 See id. The margin agreement stated, in pertinent part:

> Any controversy arising between us under this contract shall be determined by arbitration pursuant to the Arbitration Law of the State of New York, and under the rules of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or of the American Arbitration Association, or of the Arbitration Committee of the New York Stock Exchange or such other Exchange as may have jurisdiction over the matter in dispute . . . .

Id. at 432 n.15.

59 See 15 U.S.C. § 77n (1994).

60 See *Wilko*, 346 U.S. at 438.

61 Id. at 436.

62 See id. at 436-37.

63 See id.

64 Id. at 438.

65 See Hellekson, supra note 15, at 435-37 (tracing Supreme Court's development of presumption of arbitrability for commercial contracts).

eventually overruled *Wilko* on other grounds.[66] However, the Court has never questioned the manifest disregard standard articulated in *Wilko* and subsequent appellate court cases have assumed that it continues to be valid.[67]

Nevertheless, debate continues in the federal courts on the scope of the judicial standard. While the Court in *Wilko* did not define "manifest disregard" in its opinion, subsequent appellate decisions have interpreted it to characterize instances in which, for example, (1) the arbitrator knew of the governing legal principle but deliberately disregarded or ignored it; or (2) the law that the arbitrator ignored was well defined, explicit, and clearly applicable to the case.[68] A reviewing court must tolerate even glaring errors and misinterpretations of law.[69]

C. *The Implications of Limited Judicial Review in Statutory Employment Disputes*

This section considers whether to expand or circumscribe judicial review of mandatory arbitration in the context of statutory employment discrimination cases. Such considerations have shaped the debate over mandatory arbitration in both Congress and the courts.

1. *The Case for Limited Review*

Compelling arguments for preserving limited judicial review stem from considerations of the goals of arbitration and alternative dispute resolution (ADR) mechanisms generally. Proponents of arbitration

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[66] See Rodriguez de Quijas v. Shearson/Am. Express, Inc. 490 U.S. 477, 484 (1989) (overruling *Wilko* and holding that predispute agreement to arbitrate claims under Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1994), is enforceable).

[67] Some courts are reviving the manifest disregard standard. The Eleventh Circuit, after years of rejecting the standard, see, e.g., Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990) ("This court has never adopted the manifest-disregard-of-the-law standard . . . ."), has reestablished the standard as a basis for vacating arbitration awards. See Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1461-62 (11th Cir. 1997) (applying manifest disregard standard to claim under Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994)).

[68] See DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997) (quoting Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 112 (2d Cir. 1993)); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933-34 (2d Cir. 1986).

[69] See Maltby, supra note 6, at 14 (noting that under manifest disregard standard, clear errors of law may be immune from judicial review); Gorman, supra note 31, at 670 (same). One court refused to overturn an arbitral panel's decision even though the panel failed to follow its own rules. See id. at 14 (citing Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410 (5th Cir. 1990)). But see Government of India v. Cargill Inc., 867 F.2d 130, 133-34 (2d Cir. 1989) (refusing to find manifest disregard when arbitrator permitted arbitration to commence after contractual deadline); *Bobker*, 808 F.2d at 933 (noting that standard "clearly means more than error or misunderstanding with respect to the law").

for employee grievances point out that ADR offers an efficient, cost-saving, and equitable alternative to trial litigation.[70] Arbitrations, in fact, are usually more expeditious than trials.[71] Once the parties select the arbitrator and hearing date, the hearing follows promptly; there are no prehearing briefs or motions and only limited discovery.[72] In the absence of motions and cross-motions, evidentiary objections, sidebar conferences, and jury instructions, the actual hearing is quick.[73] The arbitrator usually files the award within thirty days of the commencement of the arbitration.[74]

The shorter, leaner framework of arbitration has cost-saving benefits.[75] A jury trial, even for the successful litigant, may cost more than $100,000.[76] Arbitration may be less expensive because attorneys invest less time and the arbitrator's fees are relatively modest and often shared by the parties.[77]

The efficient and confidential[78] framework of the arbitral proceeding benefits both employers and employees. For employers, arbitration offers a buffer between losing a case and paying excessive damage awards. The professional arbitrator is less likely to award exorbitant damages than a jury in an emotionally charged trial.[79] Plain-

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70 See Theodore J. St. Antoine, Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?, 15 T.M. Cooley L. Rev. 1, 7 (1998) (noting opinions of federal appellate judges who tout "speed, cost savings, and relative informality" of arbitration).

71 See Gorman, supra note 31, at 646.

72 See id.; Employment Discrimination, supra note 1, at 1673 n.28 (noting that "limited discovery [during arbitration] does not drain employers' time and resources as rapidly as . . . discovery during litigation").

73 See Gorman, supra note 31, at 646.

74 See id.

75 See id.

76 See St. Antoine, supra note 70, at 8 (comparing costs of arbitration and litigation); see also Javits & Coleman, supra note 4, at B5 (noting that legal costs of employment lawsuits average $100,000 for each side).

77 See Gorman, supra note 31, at 646. Arbitrator's fees average from $500 to $1000 per day. See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997) (noting that American Arbitration Association lists $700 per day as average fee, JAMS/Endispute arbitrators charge average fee of $400 per hour, and CPR Institute for Dispute Resolution estimates total arbitrator's fees of $3750 to $14,000 in "average" employment case).

78 Arbitration rules commonly require that both parties consent to any publication of the arbitral decision. See Employment Discrimination, supra note 1, at 1673 n.29. Thus employers may evade negative publicity by routinely refusing to consent to publication. See id. Confidentiality may hinder some employees in their attempts to establish patterns of discriminatory conduct on the part of the employer. See infra notes 122-26 and accompanying text.

79 See Stuart H. Bompey & Michael P. Pappas, Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims after *Gilmer*, 19 Employee Rel. L.J. 197, 208 (1993-94) (noting that arbitration awards are, on average, lower than jury awards); St. Antoine, supra note 70, at 8 (discussing arbitrators' tendencies to grant lower awards). Nevertheless, arbitrators have made large damage awards. See, e.g., NYSE Awards For-

tiff-employees, on the other hand, may opt for arbitration if they are uncertain of their chances in court, unable to find attorneys to take their cases, or reluctant to endure substantial court delays.[80] Given the number of cases filed each year, it is unlikely that an employee's case will be heard in court in any timely fashion. Furthermore, it is quite possible that a judge could grant summary judgment or judgment as a matter of law, thereby removing the case from the jury.[81] Hence, it seems unlikely that individual litigants would fare better in court than in arbitration.[82]

For claimants seeking vindication through the Equal Employment Opportunity Commission (EEOC), the administrative gridlock rivals the delay in civil trials.[83] Not long ago, the overwhelmed agency faced a backlog of 100,000 cases with nearly 100,000 new charges filed annually.[84] In response, the EEOC instituted a new procedure, prioritizing cases as "A," "B," or "C" depending on merit and importance.[85]

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mer Shearson Executive $765,000 for Age Discrimination Claim, Daily Lab. Rep. (BNA) (Dec. 23, 1994), available in Lexis, BNA Library, Dlabrt File).

[80] See St. Antoine, supra note 70, at 7-8 (observing that, because plaintiffs' attorneys take very few discrimination cases, for many "individuals, the cheaper, simpler process of arbitration is the most feasible recourse"); Maltby, supra note 6, at 2-3 (noting that most cases do not have potential recovery large enough for attorneys to take risk).

[81] See St. Antoine, supra note 70, at 9. Many courts have expressed frustration in policing workplace disputes. For example, the Seventh Circuit protested that courts are now "almost a super-personnel department, examining the employment history of various workers [and] reading about the risqué jokes they tell one another." Skouby v. Prudential Ins. Co. of Am., 130 F.3d 794, 795 (7th Cir. 1997). Judge Sporkin of the D.C. District Court noted in a recent opinion, "It would be hoped that at some point Congress would review the law in this area and make the necessary adjustments to eliminate these meritless, lottery-type cases." King v. Georgetown Univ. Hosp., 9 F. Supp. 2d. 4, 8 (D.D.C. 1998).

[82] See St. Antoine, supra note 70, at 9. St. Antoine explains that "[w]ithout more empirical evidence about the actual experience of discrimination victims, we could be mistaken in condemning mandatory arbitration out of hand. It may well be the most realistic hope of the ordinary claimant." Id.

[83] See id. at 2 (describing Equal Employment Opportunity Commission (EEOC) as "overworked" and "underfunded"). Whether or not statutory disputes are arbitrated, an individual claimant still has recourse to the EEOC. In *Gilmer*, the Supreme Court stated that, with regard to claims pursuant to ADEA, arbitration will not

> undermine the EEOC's role in ADEA enforcement, since an ADEA claimant is free to file an EEOC charge even if he is precluded from instituting suit; since the EEOC has independent authority to investigate age discrimination; since the ADEA does not indicate that Congress intended that the EEOC be involved in all disputes; and since an administrative agency's mere involvement in a statute's enforcement is insufficient to preclude arbitration.

Gilmer, 500 U.S. at 21. For a discussion of *Gilmer*, see infra notes 103-31 and accompanying text.

[84] See St. Antoine, supra note 70, at 8-9 ("The situation is so bleak that Professor Maurice Munroe of the Thomas M. Cooley Law School has recommended, quite understandably, that the EEOC get out of the business of handling individual charges and husband its limited resources for routing out systemic unlawful practices.").

[85] See id. at 8.

Charges are sometimes dropped after minimal investigations.[86] Notably, however, the EEOC has taken a firm stand against mandatory arbitration agreements that are ancillary to employment contracts.[87]

Aside from the monetary and temporal advantages of arbitration, some of its proponents argue that it offers an opportunity for more amicable results.[88] These advocates contend that the informality of an arbitration proceeding allows a claimant to participate more meaningfully in determining the outcome of the case.[89] In contrast to civil trials where the parties are assigned to a generalist judge, parties in some arbitrations choose an arbitrator with expertise in the area of dispute, which enhances the credibility of the award.[90] Arbitrators skilled in mediation may introduce equitable, rather than strictly legal, considerations to encourage settlement and restore amicable relationships.[91] Arbitrators who prefer the more judicial or evaluative model of arbitration[92] may nevertheless reject a zero-sum determination in favor of one that provides redress for both sides.[93] These opportunities for consensus in the type and extent of relief may make the proceeding less adversarial.[94]

Advocates of arbitration argue that to retain its advantages, arbitrators' judgments must be final and binding.[95] Only in extremely narrow circumstances should courts vacate or modify an arbitral award.[96] Judicial restraint is essential so that arbitration does not become a

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[86] See id.

[87] See Duffield v. Robertson, Stephens & Co., 144 F.3d 1182, 1190 (9th Cir. 1998) (noting that EEOC filed amicus brief distinguishing "post-1991 Title VII claims from the pre-1990 ADEA claim that the Supreme Court found arbitrable in *Gilmer*")

[88] See Gorman, supra note 31, at 646 (commenting on "therapeutic dimension of arbitration").

[89] See id.

[90] See id. at 647. But see Harry T. Edwards, Arbitration of Employment Discrimination Cases: An Empirical Study, 1975 Proc. of the 28th Ann. Meeting of the Nat'l Acad. of Arb. 59, 71 (noting that 16% of arbitrators in study did not read any judicial opinions on Title VII and 40% did not read labor advance sheets for updates on developments in Title VII).

[91] See Gorman, supra note 31, at 647 (noting that concern is less for "interpretive correctness" than for mutually acceptable resolution).

[92] The judicial model of arbitration, which focuses on evaluating a party's case, has been increasingly replacing the facilitative model that focuses on problem solving and consensus among the parties. See id.

[93] See id. (stating that pie splitting could be interpreted either as attempt by arbitrator to avoid offending either party or as attempt to address contentions of both parties).

[94] See Cullinan, supra note 24, at 396-98. Moreover, because arbitration reduces hostility, it is less disruptive of current and future dealings between the parties. See id. at 397.

[95] See id.; Shalu Tandon Buckley, Comment, Practical Concerns Regarding the Arbitration of Statutory Employment Claims: Questions that Remain Unanswered After *Gilmer* and Some Suggested Answers, 11 Ohio St. J. on Disp. Resol. 149, 183 (1996) (stating that arbitral decisions should be given "fullest weight permitted by law").

[96] See Cullinan, supra note 24, at 397.

meaningless exercise. If a party unhappy with an arbitral award could overturn it as a matter of course, parties would lose their incentive to participate fervently.[97] In addition, were the potential litigant always to have "a second bite at the apple," arbitration would become significantly more time consuming.[98] In short, more expansive judicial review could whittle away arbitration's greatest benefits.

2. *The Case for Expanded Review*

Advocates of expanded review criticize either "inherent faults in arbitration" or "how arbitration operates in practice."[99] The former critics maintain that arbitration's efficiency does not justify its use in the context of civil rights. The latter find the summary procedures of arbitration to be problematic. This section focuses mainly on considerations of procedural fairness.

Minimum procedural protections are essential to effectuate the policies of civil rights legislation. Yet, as Justice Black observed in his dissent in *Republic Steel Corp. v. Maddox*,[100]

> arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review . . . is extremely limited.[101]

Despite the lack of procedural safeguards available in the arbitral forum, the Supreme Court in *Gilmer* upheld the mandatory enforcement of predispute arbitration agreements involving statutory civil

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[97] See id. at 397.

[98] Id. at 397-98.

[99] Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 163 F.3d 53, 60 n.4 (1st Cir. 1998) (noting that more critics find fault with how arbitration is practiced than think arbitration is inherently flawed).

[100] 379 U.S. 650 (1965). *Republic Steel Corp.* involved a suit by a former employee against his employer for severance pay allegedly owed to the employee under a collective bargaining agreement. See id. at 650. The majority held that the general federal rule that individual employees wishing to assert contract grievances must attempt to use contract grievance procedure and binding arbitration agreed upon by employer and union applied to severance pay grievances. See id. at 656-57. Thus, it precluded the employee who had not resorted to grievance procedures established by agreement from instituting a state court suit to recover severance pay under a contract subject to the Labor Management Relations Act. See id. at 658-59. Justice Black dissented from the holding on the grounds that the case involved a contract action and that Congress had not passed any law preventing workers from bringing such actions in court. See id. at 663 (Black, J., dissenting). While noting the Court's preference for arbitration in disputes between employers and unions, he disputed the extension of this logic "to require a worker to arbitrate his wage claim or to surrender his right to bring his own suit to enforce that claim in court." Id. at 666 (Black, J., dissenting).

[101] Id. at 664 (Black, J., dissenting).

rights.[102] However, its careful consideration of Mr. Gilmer's arguments regarding the sufficiency of the arbitral process, including such matters as arbitral competence, discovery, and evidentiary rules, may have sanctioned implicitly similar review by the lower courts.[103] Nevertheless, in the absence of clear language to this effect, it is questionable whether such principles serve as prerequisites to the enforcement of predispute arbitration agreements.[104]

Proponents of expanded review in employment contract cases painstakingly distinguish these cases from collective bargaining situations.[105] In collective bargaining cases, the Supreme Court has held that the unique nature of the process merits only limited review.[106] However, this level of deference is less justified in individual contract cases. An arbitrator to a collective bargaining agreement, when resolving statutory disputes, serves as the "alter ego" of the union and employer.[107] Under these circumstances, the contractual expectations of both parties provide some guarantees of fairness.[108] In contrast, the predispute arbitration clause ancillary to the employment contract does not embody the interests and expectations of the employee.

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[102] See *Gilmer*, 500 U.S. at 35.

[103] See id. at 30-33 (discussing Mr. Gilmer's arguments as to bias, adequate discovery, written opinions, availability of equitable relief, class actions, and unequal bargaining power); see also Gorman, supra note 31, at 645-46 (noting that Court went beyond limited grounds of FAA when it referred to arbitrators who are competent and conscientious, NYSE discovery provisions, written awards, arbitral power to fashion equitable remedies, and judicial review that "'is sufficient to ensure that arbitrators comply with the requirements'" of ADEA (quotation marks omitted in original) (quoting *Gilmer*, 500 U.S. at 32 n.4 (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987))).

[104] See Gorman, supra note 31, at 646.

[105] See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1475 (D.C. Cir. 1997) (noting that many commentators have questioned logic and desirability of extending arbitral jurisprudence developed in labor cases outside collective bargaining context).

[106] In United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), the Court stated:

> It is particularly underscored that the arbitral process in collective bargaining presupposes that the parties wanted the informed judgment of an arbitrator, precisely for the reason that judges cannot provide it. Therefore, a court asked to enforce a promise to arbitrate should ordinarily refrain from involving itself in the interpretation of the substantive provisions of the contract.

Id. at 570.

[107] See *Cole*, 105 F.3d at 1476 (stating that arbitrator who resolves statutory claims pursuant to collective bargaining agreement serves as agent, "alter ego," and private judge).

[108] See Malin, supra note 40, at 84 (observing that grievance arbitration is more of substitute for industrial strife than for litigation). Professor Malin notes:

> In carrying out their role, grievance arbitrators have discretion to decide whether to employ public law principles. If they do resort to public law, they do so in the guise of interpreting the private contract. Errors of law which they may make are not the basis for judicial review; those errors are merged with the contract and become part of the private law of that shop.

Id. at 85.

An additional problem unique to individual contract cases is the possibility that employers will benefit from familiarity with or control over the process to the detriment of the employee who is generally a one-time customer.[109] A recent study comparing employee outcomes when the employer is a repeat player with employee outcomes when the employer is a one-time player revealed that repeat-player employers fare better in arbitration than one-shot employees.[110] The study also found that the damages awarded were lower when the employer was a repeat player.[111] It also suggested that the employer is more likely to prevail when making repeat use of an arbitrator.[112]

The repeat-player problem is manifested in three ways. First, because employers generally draft employment contracts, they have the ability to shape the arbitral framework to their advantage. For example, to the extent possible, they may limit their liability in the event of an unfavorable decision[113] or impose unreasonable arbitration fees on the employee.[114] Mandatory arbitration agreements are usually presented on a take-it-or-leave-it basis, leaving no room for negotiation about the structure of the arbitration.[115]

Another variant of the repeat-player problem is that the employer is likely to develop superior information about the arbitral process as well as individual arbitrators.[116] Through knowledge of the

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109 See Stone, supra note 7, at 1047 (noting that employers are advantaged in alternative dispute systems because they are "repeat player[s] in the world of ADR [alternative dispute resolution] professionals"); Lynd, supra note 6, at 303 ("[E]mployers are more likely to be repeat customers of an arbitrator, while an employee is generally a one-time customer.").

110 See Bingham, supra note 12, at 234. The study found that when one-time-player employees face arbitration with one-time-player employers, the employees win more than 70% of the time. When employees face arbitration with repeat-player employers, they win about 16% of the time. See id.

111 See id. (noting that employees have lower outcomes in arbitrations involving repeat-player employers). In repeat-player cases, employees recover on average about 11% of what they demand. In cases involving one-time-player employers, employees recover an average of 48%. See id.

112 See id. at 242 (stating that employers are advantaged by repeat use of arbitrators).

113 See Employment Discrimination, supra note 1, at 1681 (explaining that arbitration agreements can eliminate punitive damages by limiting remedial power of arbitrator or by including choice-of-law provision that adopts law of state prohibiting punitive damages in arbitration); Lynd, supra note 6, at 304 (noting that employers can limit liability in arbitration agreements). The Supreme Court has declared in dicta that it would enforce an arbitration agreement that expressly proscribed punitive damages. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59-60 (1995).

114 See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997) (stating that company might impose requirement that employee pay arbitrator's fee in order to discourage claims).

115 See id.

116 See Reginald Alleyne, Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum, 13 Hofstra Lab. L.J. 381, 403 (1996) (stating that repeat-player

arbitral process in general, the employer will become more adept at distinguishing between losing cases, which merit settlement, and winning cases.[117] Through prior dealings or reputation, an employer also will acquire information about the decisional history of a potential arbitrator.[118] Since decisions are not commonly published, the employee usually will lack comparable access to this information.[119]

A third aspect of the repeat-player problem is the possibility that arbitrators seeking to secure future business might be biased in favor of the repeat-player employer.[120] The employer is the only party with institutional memory and quite likely the only party to be involved in arbitrations in the near future.[121]

Further arguments for broader judicial review relate to the level of secrecy and confidentiality surrounding the arbitration.[122] Since most arbitral awards are not published, there is little to deter bias and ineptitude among arbitrators.[123] The inexperienced arbitrator, shielded by the possibility of presenting a spartan record, is less likely to ensure that her decision comports with standards of fairness.[124] This possibility is particularly troubling in antidiscrimination suits that

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employer is able to make more informed decisions about arbitrators than one-shot employee); Gorman, supra note 31, at 656 (same). It should be noted that, like employers involved in repeat arbitrations, employers involved in repeat litigation of statutory claims may also develop superior information. It is also possible that plaintiff attorneys involved in frequent arbitrations can help level the playing field between repeat-player employers and one-shot employees.

117 See Bingham, supra note 12, at 241 (relating employer success in arbitration to expertise, economies of scale, and special advocates).

118 See Gorman, supra note 31, at 656.

119 See id. at 656; Maltby, supra note 6, at 5 (observing that employees are handicapped in evaluating arbitrations because they do not receive arbitrations' decisional histories, while employers can afford expensive research to obtain this information). Once again, it is possible that plaintiff lawyers may develop superior information through their representation of clients in individual contract disputes.

120 See Lynd, supra note 6, at 303 (noting that arbitrator may see employer as future source of business and therefore may be biased toward employer).

121 See Mark Berger, Can Employment Law Arbitration Work?, 61 UMKC L. Rev. 693, 714 (1993) (stating that arbitrators are more likely to decide in favor of employers than employees in order to increase chances of being selected in future); Gorman, supra note 31, at 656 (same).

122 See, e.g., American Arbitration Association National Rules for Resolution of Employment Disputes: Arbitration and Mediation Rules Effective June 1, 1996, Daily Lab. Rep. (BNA) (May 28, 1996), available in Lexis, BNA Library, Dlabrt File ("The arbitrator shall maintain the confidentiality of the hearings and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the law provides otherwise.").

123 See Malin, supra note 40, at 100-01 (observing that while decisions of judges are subject to review in higher courts, arbitrators' decisions do not form part of unified public justice system).

124 The court in Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997), was persuaded by a description of the arbitral process that Richard Block and Elizabeth Barasch have offered:

require the arbitrator to parse complex areas of federal civil rights law.[125] The lack of public disclosure of an arbitration award may also prevent an employee from obtaining the information necessary to establish a pattern or practice of discriminatory conduct.[126] In this context, an employee's rights are in peril.

A final criticism of limited review arises when the statutory claim to be decided in the arbitration presents novel or difficult legal issues.[127] Most employment disputes are fact based and thus judicial review of the legal basis would not likely affect the arbitral award.[128] However, the potential that even a few cases will require judicial judgment lends support for broader review under certain circumstances.

While the case for limited judicial review centers on the cost and efficiency goals of arbitration, the argument for expanded judicial review focuses on considerations of fairness and the federal interest in protecting public rights. Over the years, Congress has carefully crafted a framework of civil rights legislation to protect workers from discriminatory employment practices.[129] Leaving the enforcement of these laws to a private forum without adequate review could limit or deny employees the protections Congress sought to extend to them.[130] The next Part explores how Congress and courts have responded to the tension between efficient dispute resolution and effective judicial oversight in the area of mandatory arbitration of statutory employment disputes.

> [A]rbitrators often cite to and rely extensively on treatises.... Similarly, arbitrators frequently rely on leading cases ... without citing to subsequent lower courts or less publicized cases. This means that an arbitrator's decision may be based on broad stroke principles to the exclusion of cases more analogous to the claim being decided.

Richard H. Block & Elizabeth A. Barasch, Practical Ramifications of Arbitration of Employment Discrimination Claims, 1991 Proc. of N.Y.U. 44th Ann. Conf. on Lab. 281, 294 (footnotes omitted).

125 See Lynd, supra note 6, at 303-04 (arguing that employees' rights are jeopardized when inexpert arbitrators are forced to analyze complex areas of federal civil rights law).

126 See *Cole*, 105 F.3d. at 1477 (noting that problem is not present in collective bargaining context because both employers and unions monitor decisions).

127 See id. at 1487. In *Gilmer*, one argument against compelling arbitration of the ADEA claim was that permitting arbitrators to decide statutory claims would impede the development of the law. The Court dismissed this notion on the ground that some ADEA claims would continue to be litigated. See *Gilmer*, 500 U.S. at 31-32.

128 See Malin, supra note 40, at 104 (noting that fact-based employment disputes generally do not warrant significant judicial review).

129 See Lynd, supra note 6, at 303-04 (discussing protection of nonunion employee civil rights).

130 See id. (arguing that employees may be denied full protection of civil rights laws if inexpert arbitrators are left to interpret laws without judicial review).

II
THE SHIFTING BOUNDARIES OF REVIEW: MIXED SIGNALS FROM CONGRESS, MIXED EMOTIONS IN THE COURTS

As noted in Part I, the Supreme Court in *Gilmer* upheld the enforceability of arbitration agreements in the context of statutory claims of age discrimination.[131] Shortly thereafter, Congress passed the Civil Rights Act of 1991,[132] which provides for jury trials in discrimination cases under the Civil Rights Act of 1964[133] or the Americans with Disabilities Act of 1990.[134] At the same time, section 118 of the Act encourages arbitration of discrimination claims.[135] This Part explores how the competing interests of statutory protection and arbitral efficiency have played out in Congress and the courts. It begins by examining the text and legislative history of the 1991 amendments to the Civil Rights Act. It then explores the shifting boundaries of judicial review, referring to four cases decided after *Gilmer*.

A. The Civil Rights Act of 1991

After considerable debate and effort, Congress in 1991 amended the Civil Rights Act of 1964.[136] One of Congress's goals was to provide victims of gender and religious discrimination with the same compensatory and punitive damages provided to victims of race discrimination under 42 U.S.C. § 1981.[137] The House Education and

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131 Noting the development of arbitration as an alternative means of dispute resolution, the Court observed that, in signing an agreement to arbitrate a statutory claim, the claimant is not foregoing a substantive right. Rather, the party is substituting the procedural forum—arbitral for judicial. See *Gilmer*, 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). In the presence of certain procedural safeguards and in the absence of contrary congressional intent, such agreements are enforceable. See id. at 30-35.

132 Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, 42 U.S.C. (1994)).

133 See 42 U.S.C. §§ 2000a-2000h (1994).

134 See 42 U.S.C. § 1981a(a)-(c) (1994).

135 Section 118 of the Civil Rights Act of 1991 states:

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

42 U.S.C. § 1981 note (1994). The ADA contains almost identical language. Title I of the ADA, containing employment provisions, is codified at id. §§ 12111-12117 (1994).

136 See generally Roger Clegg, Introduction: A Brief Legislative History of the Civil Rights Act of 1991, 54 La. L. Rev. 1459 (1994) (describing negotiations on Civil Rights Act of 1991).

137 See H.R. Rep. No. 102-40(I), at 15, 18, 64-65 (1991), reprinted in 1991 U.S.C.C.A.N. 553, 556, 602-03, 612 (report of House Committee on Education and Labor) (stating that in

Labor Committee report reveals that Congress felt the remedies were necessary to deter discrimination by encouraging victims to act as "private attorneys general" and enforce the statute "for the benefit of all Americans."[138] The House Judiciary Committee echoed the need for more effective enforcement remedies such as those available when discrimination is based on race.[139] Congress contemporaneously amended Title VII to provide for the right to a jury trial in discrimination suits based on race, religion, or gender.[140] Access to a jury was intended to enhance the fact-finding process and thus the fairness of civil antidiscrimination cases.[141]

Somewhat paradoxically, Congress included in its amendments provisions supporting the use of ADR techniques, including arbitration, to decide claims arising out of federal antidiscrimination laws.[142] Section 118, which authorizes the arbitration of discrimination claims, must be read in light of the above and other congressional debates. The simultaneous introduction of the jury right belies assertions of Congress's wholesale endorsement of arbitration as an alternative to civil litigation. In their discussions of section 118, both House committees explained unequivocally that ADR mechanisms were intended to supplement—not preclude—the remedies available under Title VII.[143] Interestingly, neither the Judiciary nor the Education and Labor Committee reports mentioned *Gilmer*. However, the committees maintained that their views were consistent with the Supreme Court's holding in *Alexander v. Gardner-Denver Co.*,[144] in which the Court refused to compel the arbitration of an individual's statutory claims pursuant to a collective bargaining agreement.[145]

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providing for damages, House of Representatives applied same standards courts apply under Section 1981).

138 Civil Rights Act of 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat. 1071) 617.

139 See H.R. Rep. No. 102-40(II), reprinted in 1991 U.S.C.C.A.N. 694 (report of House Committee on Judiciary).

140 See Gorman, supra note 31, at 659.

141 See id.

142 See id.

143 See H.R. Rep. No. 102-40(I), reprinted in 1991 U.S.C.C.A.N. 635 (report of House Committee on Education and Labor) (stating that "[t]he Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available"); H.R. Rep. No. 102-40(II), reprinted in 1991 U.S.C.C.A.N. 735 (report of House Committee on Judiciary) ("The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII.")

144 415 U.S. 36 (1974).

145 See H.R. Rep. No. 102-40(I), reprinted in 1991 U.S.C.C.A.N. 635 (report of House Committee on Education and Labor). For a discussion of the differences between employ-

The Education and Labor Committee's response to a proposal for substitute legislation provides evidence that Congress did not intend the arbitration of Title VII claims to supplant judicial remedies. The Committee stated:

> The Republican substitute . . . encourages the use of [ADR] mechanisms "in place of judicial resolution." Thus, under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. American workers should not be forced to choose between their jobs and their civil rights.[146]

The legislative history of the Civil Rights Act of 1991 clearly supports the view that Congress considered arbitrators competent to interpret and apply antidiscrimination laws. Yet, even if Congress intended to encourage arbitration in discrimination suits, it was equally if not more concerned about providing employees with a fair and reliable forum for protection of their statutory rights. Thus, courts are charged with the task of safeguarding statutory rights while promoting the benefits of arbitration.

B. Novel Grounds for Pre- and Post-Arbitration Review in the Federal Courts

Since 1991, the vast majority of courts have interpreted *Gilmer* expansively,[147] upholding the arbitration of statutory discrimination

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ment cases and collective bargaining situations, see supra notes 105-09 and accompanying text.

146 Id., reprinted in 1991 U.S.C.C.A.N. 642 (citations omitted) (report of House Committee on Education and Labor).

147 For example, the courts of appeals for every circuit except the Ninth Circuit have applied the Supreme Court's rationale in *Gilmer*, which involved the ADEA, to Title VII claims. See, e.g., Seus v. John Nuveen & Co., 146 F.3d 175, 179, 182-83 (3d Cir. 1998) (finding predispute agreement to arbitrate Title VII claim permissible), petition for cert. filed, 67 U.S.L.W. 3323 (U.S. Oct. 19, 1998) (No. 98-719); Paladino v. Avnet Computer Techs., Inc. 134 F.3d 1054, 1062 (11th Cir. 1998) (same); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997) (same); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997) (same); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1467-68 (D.C. Cir. 1997) (same); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 882 (4th Cir. 1996) (same); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994) (same); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 308, 312 (6th Cir. 1991) (same); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (same). But see Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1199 (9th Cir. 1998) (holding that legislative history, context, and text of Civil Rights Act of 1991 demonstrate that "Congress intended to preclude compulsory arbitration of Title VII claims").

claims based on race,[148] gender,[149] religion,[150] and national origin,[151] as well as claims arising under the Employee Retirement Income Security Act of 1974[152] and the Federal Employee Polygraph Protection Act of 1988.[153] Concomitantly, a number of federal courts have begun to police more vigorously procedural defects in arbitrations involving civil rights claims.[154] Some courts have introduced procedural safeguards,[155] while others have struck down arbitral decisions entirely.[156] Some courts have based their decisions on a broader reading of the FAA standards,[157] while others interpret the manifest disregard of the law standard to be "sufficiently rigorous" so as to include examination of the legal as well as *factual* basis of the arbitral decision.[158]

This section examines five instances in which judicial review is broader than the common or statutory grounds outlined in Part I. The courts in these instances may be lauded for their efforts to safeguard employee civil rights. However, the somewhat ad hoc approach of their opinions exposes them to criticism. In light of Congress's support for arbitration and the need for arbitral finality, such review should proceed on a more principled basis.

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148 See, e.g., Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (compelling arbitration of race discrimination claim).

149 See, e.g., Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76 (D. Mass. 1993) (compelling arbitration of discrimination claim based on sex, marital status, and pregnancy).

150 See, e.g., Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993) (granting motion to stay action and compel arbitration in race, sex, and religious discrimination suit).

151 See, e.g., Albert v. National Cash Register Co., 874 F. Supp. 1328 (S.D. Fla. 1994) (compelling arbitration of sex, gender, and national origin discrimination claims).

152 29 U.S.C. §§ 1001-1461 (1994); see Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 7 F.3d 1110, 1121 (3d Cir. 1993) (finding no reason to distinguish Employment Retirement Income Security Act claims from ADEA claims at issue in *Gilmer*).

153 29 U.S.C. §§ 2001-2009 (1994); see Bender v. Smith Barney, Harris, Upham & Co., 789 F. Supp. 155, 158 (D.N.J. 1992) (granting motion to compel arbitration). For a discussion of the cases in supra notes 147-51, see Stone, supra note 7, at 1033 n.120 (noting extension of *Gilmer* to various areas of discrimination); Samuel Estreicher, Predispute Agreements to Arbitrate Statutory Employment Claims, 72 N.Y.U. L. Rev. 1344, 1346 (1997) (noting extension of *Gilmer* to ADA).

154 See discussion infra Part II.B.1-4. But see Manuszak, supra note 1, at 399-402 (noting that courts generally have not used their powers of review to correct inequitable arbitration awards involving civil rights claims).

155 See, e.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1486 (D.C. Cir. 1997) (allocating costs of arbitration to employer); see also discussion of *Cole* infra Part II.B.3.

156 See, e.g., Halligan v. Piper Jaffray, Inc. 148 F.3d 197 (2d Cir. 1998); see also discussion of *Halligan* infra Part II.B.4.

157 See, e.g., Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995); see also discussion of *Olson* infra Part II.B.1.

158 See, e.g., *Cole*, 105 F.3d at 1486-87; see also discussion of *Cole* infra Part II.B.3.

1. Arbitrator Partiality

As noted in Part I.A, the FAA provides for vacatur of arbitral awards "[w]here there was evident partiality or corruption in the arbitrators."[159] However, the standard seems to imply overt bias stemming from direct relationships. In *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[160] the Eighth Circuit interpreted this provision as requiring an arbitrator to disclose any relationships between the arbitrator and either of the parties, particularly if the arbitrator has a "substantial interest" in the business of the party.[161] Further, it found the failure to disclose such a relationship to constitute partiality.[162]

Olson involved an age discrimination suit filed by an employee against his former employer, Merrill Lynch.[163] The parties submitted the case to arbitration, and a panel of three arbitrators decided in favor of Merrill Lynch.[164] Subsequently, Mr. Olson discovered that two of the arbitrators had failed to disclose ongoing business relationships with the employer.[165] The district court denied his motion to vacate the award.[166] In reversing, the Eighth Circuit took careful note of the Supreme Court's holding in *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[167] in which the majority stated that arbitrators should "'avoid even the appearance of bias.'"[168] Despite the uncertainty about which standard to apply, the Eighth Circuit found that the award could be vacated under either standard.[169]

The Eighth Circuit's reversal in *Olson* does not necessarily indicate renewed concern for partiality in the arbitral forum. Other federal courts faced with similar types of bias, albeit in cases not involving civil rights claims, have chosen not to vacate the arbitral decision.[170] One problem with *Olson* is that the court did not specify

159 9 U.S.C. § 10(a)(2) (1994).

160 51 F.3d 157 (8th Cir. 1995).

161 Id. at 159.

162 See id. at 159-60. The court reasoned that if the information had been disclosed, the arbitrator would have been removed from the panel. See id. at 159.

163 See id. at 158.

164 See id.

165 See id. One of the arbitrators was Vice-President, Chief Financial Officer, and Compliance Officer for Miller & Schroeder Financial, Inc., a company that entered into underwriting syndicates with Merrill Lynch for the purchase and marketing of bonds. See id. at 159. Merrill Lynch served as joint underwriter for 26% of the total face value of the bonds managed or comanaged by Miller & Schroeder. See id.

166 See id. at 158.

167 393 U.S. 145 (1968).

168 *Olson*, 51 F.3d at 159 (quoting *Commonwealth Coatings Corp.*, 393 U.S. at 150).

169 See id. at 159.

170 See, e.g., Remmey v. PaineWebber, Inc., 32 F.3d 143 (4th Cir. 1994) (denying motion to vacate award based on claims of arbitrator's bias); Hayne, Miller & Farni, Inc. v. Flume,

whether the nature of the claim—statutory or otherwise—influenced its decision.[171] Thus, while the holding signals that federal courts in future civil rights cases may be more attuned to the potential for bias, it provides weak precedent for continued progress in this area.

2. *Absence of "Knowing and Voluntary" Waiver*

While the Eighth Circuit showed concern for fairness in the arbitral process, the First and Ninth Circuits have focused on fairness in the contracting stage of the mandatory arbitration. In *Prudential Insurance Co. of America v. Lai*,[172] the Ninth Circuit reversed a district court order compelling arbitration in a Title VII claim, reasoning that the arbitral agreement was not a knowing waiver of statutory rights.[173] In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[174] the First Circuit refused to resolve the issue of whether the knowing and voluntary standard applied to waivers of a judicial forum.[175] However, by invoking "standard principles of contract law and . . . general state common-law principles," the court determined that the waiver of employee rights to a judicial forum was not "clear and unmistakable."[176] The court therefore found that it was not appropriate to compel arbitration.[177] Juxtaposing the rationales of the First and Ninth Circuit opinions further evinces the need for a systematic approach to the review of compulsory arbitration cases.

In *Lai*, the plaintiff-appellants, two former Prudential sales representatives, sued Prudential in state court alleging sexual harassment and discrimination.[178] Prudential then filed an action in district court staying litigation in the state court and compelling arbitration based on a pre-dispute arbitration agreement contained in a U-4 form signed by the plaintiffs when they applied for their positions.[179] The arbitration agreement was the fifth item on the fourth page of the form.[180]

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888 F. Supp. 949 (E.D. Wis. 1995) (same); Smith v. Prudential Sec., Inc., 846 F. Supp. 978 (M.D. Fla. 1994) (same).

171 See Manuszak, supra note 1, at 402 (noting that "[the] court did not indicate that its decision was colored by the type of claim brought by the plaintiff").

172 42 F.3d 1299 (9th Cir. 1994).

173 See id. at 1301.

174 163 F.3d 53 (1st Cir. 1998).

175 See id. at 70.

176 Id. at 71-72.

177 See id. at 72.

178 See *Lai*, 42 F.3d at 1301.

179 See id.

180 See id. at 1302. The provision stated: "I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm . . . that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." Id. The disputes which must be arbitrated were found in the cross-referenced rules of the

The plaintiffs maintained that they did not know of the arbitration clause because they were not given the opportunity to read the form.[181]

The Ninth Circuit noted that, under *Gilmer*, individuals may waive statutory rights to which they otherwise are entitled.[182] However, the court focused its inquiry on whether the plaintiffs had knowingly waived their statutory court remedies.[183]

The court found that the plaintiffs could not have understood that they were agreeing to arbitrate sexual discrimination suits when they signed the U-4 form since the securities application forms they signed did not refer to employment disputes or specify the types of suits to be arbitrated.[184] According to the court, adequate notice would entail explicit contractual language informing employees that, by signing the form, they were waiving their rights to a judicial forum for employment disputes.[185]

The *Lai* decision marked the first time since *Gilmer* that a federal court had struck down an arbitration agreement in the private nonunion sector because of unfairness at the contracting stage.[186] However, *Lai*'s holding is undermined by its somewhat superficial treatment of the legislative history of the Civil Rights Act of 1991 and its failure to reconcile this interpretation with *Gilmer*.[187] It was perhaps for this

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NASD, the securities organization the plaintiffs joined. The NASD manual's arbitration requirements, in turn, provided: "Any dispute, claim or controversy . . . between or among members . . . arising in connection with the business of such member(s) . . . shall be arbitrated." Id.

181 See id. The two plaintiffs in *Lai* alleged that during the job application process, the employer, Prudential, gave them a form to sign and told them it was an application to take a required test. See id.

182 See id. at 1303 (noting *Gilmer* holding).

183 See id. at 1304. Examining the legislative debates on the Civil Rights Act of 1991, the court took particular note of a statement by then Senate Minority Leader Robert Dole who stated that arbitration of civil rights claims was proper only "'where the parties knowingly and voluntarily elect to use these methods.'" Id. at 1305 (quoting 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)). According to the court, Congress's concern that Title VII disputes be "arbitrated only 'where appropriate'" resonated with the public policy supporting the statute. Id. (quoting 42 U.S.C. § 1981 note (1994) (Alternative Means of Dispute Resolution)). Procedural protections, such as knowing waiver, were therefore essential. See id. (citing essential nature of procedural protections in sexual harassment context as justification for knowing standard).

184 See id.

185 See id.

186 See Lynd, supra note 6, at 299 (noting court's emphasis on fairness and knowledge at contracting stage). In a subsequent case, the Ninth Circuit reaffirmed its position on knowing waiver. See Renteria v. Prudential Ins. Co. of Am., 113 F.3d 1104, 1108 (9th Cir. 1997) (holding that employer cannot have employees sign away statutory rights without informing them of their waiver).

187 See, e.g., Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091, 1095-96 (E.D. Mich. 1996). Disagreeing with *Lai*, the court stated:

reason that the First Circuit in *Rosenberg* refused to apply *Lai*'s rationale even while reaching the same conclusion.

The facts of *Rosenberg* are similar to those in *Lai*. In *Rosenberg*, Merrill Lynch moved to compel the arbitration of the age and gender discrimination claims of the plaintiff after she filed suit in district court. In reviewing the district court's denial of the motion to compel,[188] the First Circuit focused on the validity of the agreement to arbitrate.[189]

The First Circuit noted the decision of the *Lai* court with respect to the knowing and voluntary standard but refused to apply it.[190] The court acknowledged that circuits were split on whether the knowing and voluntary standard might be applied in this context,[191] that the Supreme Court had yet to decide the issue, and that the words knowing and voluntary did not appear in the Civil Rights Act of 1991.[192] However, noting that arbitration agreements are enforceable under the FAA, "'save upon such grounds as exist at law or in equity for the revocation of any contract,'" the First Circuit looked to principles of

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> The portions of the legislative history relied upon by the Ninth Circuit are slender reeds upon which to rest the weighty and novel conclusion that an arbitration clause is only binding when the claimant has actual knowledge that his particular employment discrimination claims will be covered by the agreement. This conclusion flies in the face of the language of the Civil Rights Act of 1991, the Supreme Court's opinion in *Gilmer*, and fundamental principles of contract law.

Id. at 1096; see also Maye v. Smith Barney Inc., 897 F. Supp. 100, 107 (S.D.N.Y. 1995) (criticizing *Lai* as contrary to Supreme Court precedent and based on inadequate legislative history); Hall v. MetLife Resources, No. 94 Civ. 0358 (JFK), 1995 WL 258061, at *4 (S.D.N.Y. May 3, 1995) (same).

188 The First Circuit affirmed a district court's denial of a motion to compel arbitration in an ADEA claim, though not on the grounds advanced by the district court. See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 163 F.3d 53, 56 (1st Cir. 1998). In declining to compel arbitration, the lower court focused on issues of structural bias and the applicability of predispute arbitration agreements to federal claims arising under Title VII. See id.; see also Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 212 (D. Mass. 1998) (finding arbitral process "inadequate to vindicate [plaintiff's] ADEA and Title VII rights"). Although it noted the "perceived tension between the federal policies favoring vindication of civil rights and those favoring arbitration," the First Circuit found no evidence sufficient to overcome the presumption favoring arbitration. See *Rosenberg*, 163 F.3d at 56, 62. With respect to allegations of "structural infirmities" in the arbitral process, the appellate court found no basis to invalidate the arbitral scheme. See id. at 66, 68.

189 See *Rosenberg*, 163 F.3d at 70-73.

190 See id. at 70.

191 The court compared the holdings of the Ninth Circuit in *Lai*, see id. at 70, with those of the Third and Eighth Circuits which seem to have rejected the "knowing and voluntary" standard, see, e.g., Seus v. John Nuveen & Co., 146 F.3d 175, 183 (3d Cir. 1998) (disagreeing with *Lai* decision); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837-38 (8th Cir. 1997) (same).

192 See *Rosenberg*, 163 F.3d at 70.

contract law to assess the arbitral contract.[193] Using general common law principles, the court found that the arbitration agreement was incomplete because it failed to "define the range of claims subject to arbitration."[194]

Though the First Circuit hastened to distinguish itself from the *Lai* court and to characterize its holding as "limited,"[195] its decision in *Rosenberg* suffered from similar criticisms. Seemingly driven by the need to avoid adding an additional layer of employee protection[196] via the knowing and voluntary standard, the *Rosenberg* court sanctioned the application of ordinary contract law principles to all arbitration agreements without defining the principles or providing any guidance as to their application. Such a determination carries serious implications for the stability of the arbitral framework.

3. *Allocation of the Costs of Arbitration*

The D.C. Circuit has shown similar concern for the procedural difficulties of the arbitral framework. Yet it has exercised greater restraint in striking down arbitration agreements on those grounds. In *Cole v. Burns International Security Services*,[197] the court enforced an agreement compelling an employee to submit his statutory claims to binding arbitration.[198] In so doing, it held that the employer could not impose the substantial costs of the arbitration on the employee, as it effectively would deprive the employee of a forum for resolving statutory employment claims.[199] The court ruled that employers must bear the full costs of the arbitrator's fee.[200]

In *Cole*, the plaintiff-appellant sought reversal of a district court order dismissing his Title VII complaint and compelling arbitration.[201] Although the D.C. Circuit noted that it was required by *Gilmer* to

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193 Id. at 71 (quoting 9 U.S.C. § 2 (1994)).

194 Id.

195 Id. at 73.

196 See id. at 70.

197 105 F.3d 1465 (D.C. Cir. 1997).

198 See id. at 1485.

199 See id. at 1484-85.

200 See id. at 1485.

201 See id. at 1467. The plaintiff, Mr. Cole, worked as a security guard for LaSalle and Partners. When Burns International Security took over LaSalle's contract, it required all its new employees to sign a predispute agreement that included a compulsory arbitration provision. The agreement covered statutory claims and common law claims but excluded Worker's Compensation claims. The waiver of a jury trial was absolute and took effect even if the employer chose to litigate instead of arbitrate. After Mr. Cole was fired by Burns International Security, he filed charges with the EEOC and a complaint in the District Court. Burns moved to compel arbitration on the basis of the predispute agreement. The District Court granted Burns's motion to compel and dismissed Mr. Cole's complaint. See id. at 1469-70.

uphold the validity of the agreement,[202] it nevertheless gave thorough consideration to Mr. Cole's arguments against the mandatory enforcement of executory agreements to arbitrate.[203] The court also noted that there were "numerous concerns [raised] . . . regarding the potential inequities and inadequacies of arbitration in individual employment cases, as well as . . . concerns about the competence of arbitrators and the arbitral forum to enforce effectively the myriad of public laws protecting workers and regulating the workplace."[204]

The *Cole* court considered many of the concerns mentioned in Part I.C of this Note: the lack of public disclosure;[205] the difference in bargaining power;[206] the repeat-player problem;[207] and the uncertain competence of arbitrators to decide statutory claims.[208] It observed that the Supreme Court had voiced many of the same misgivings in *Alexander v. Gardner-Denver Co.*[209] and *Wilko v. Swan,*[210] but that the Court now disapproved of "generalized attacks on arbitration" of statutory claims.[211] The D.C. Circuit reasoned that the Supreme Court's strong endorsement of arbitration was linked to its assertion that "'[b]y agreeing to arbitrate a statutory claim, [a party] does not forego the substantive rights afforded by the statute; [it] only submits to their resolution in an arbitral, rather than a judicial, forum.'"[212] It further observed that *Gilmer* does not stand for the proposition that an arbitration agreement is enforceable "no matter what rights it waives or what burdens it imposes."[213] For the arbitral forum to be adequate, it must fulfill certain expectations of justice.[214]

In determining whether the arbitral forum was sufficient for the protection of statutory rights, the D.C. Circuit focused on the obliga-

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202 See id. at 1478, 1479-80.

203 See id. at 1468-69, 1486-87 (commenting on Mr. Cole's argument regarding judicial review).

204 Id. at 1467.

205 See id. at 1477. The court observed that a lack of public disclosure of arbitration awards may systematically favor companies over individuals. See id. The court noted problems with building a case for a pattern or practice of discrimination if all the complaints are arbitrated because the awards are confidential and not published. See id.

206 See id.

207 See id. at 1476.

208 See id. at 1477.

209 415 U.S. 36 (1974).

210 346 U.S. 427 (1953), overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

211 *Cole*, 105 F.3d at 1478 (quoting *Gilmer*, 500 U.S. at 30).

212 Id. at 1481 (quoting *Gilmer*, 500 U.S. at 26).

213 Id. at 1482.

214 See id. (noting that "beneficiaries of public statutes are entitled to the rights and protections provided by the law").

tion to pay arbitrators' fees.[215] The court found that this practice unduly burdens the vindication of statutory rights.[216] Though parties appearing in federal court incur filing and other administrative expenses, they do not have to pay the judge's salary.[217] Observing that arbitral fees might be "prohibitively expensive" for employees, the court found that the employer should bear the full cost of such fees.[218]

Another noteworthy aspect of the *Cole* decision was its consideration of the scope of judicial review.[219] One of Mr. Cole's arguments against compulsory arbitration was that the arbitrator's decision would not be subject to judicial review.[220] The court rejected this argument on the ground that meaningful review was available.[221] In addition to the FAA standards, an award may be vacated if it is in manifest disregard of the law.[222] The D.C. Circuit maintained that while there was no strict definition of the latter standard, it must be interpreted in light of the *Gilmer* Court's observance that judicial review is "'sufficient to ensure that arbitrators comply with the requirements of the statute at issue.'"[223] Thus the D.C. Circuit held that the manifest disregard standard merited a review rigorous enough to ensure that arbitrators correctly interpreted and applied the statutory law.[224]

The D.C. Circuit in *Cole* makes clear that the manifest disregard standard means, as other courts have held, "more than error or misunderstanding with respect to the law."[225] Courts are not only empowered to intervene and modify an arbitral framework when an employer crafts a system skewed in favor of the employer, but they may also vacate an award when the arbitrator has misinterpreted public-law issues. Widespread adoption of this standard would shift the boundaries of judicial review toward greater scrutiny of both the arbitral process and the arbitral award.[226]

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215 See id. at 1483-86.

216 See id. at 1484.

217 See id. ("[I]t would undermine Congress's intent to . . . require [employees] to pay for the services of an arbitrator when they would never be required to pay for a judge in court.").

218 Id.

219 See id. at 1485-86.

220 See id. at 1486.

221 See id.

222 See id.

223 Id. at 1487 (quoting *Gilmer*, 500 U.S. at 32 n.4).

224 See id. (noting that in novel cases courts are authorized "to review an arbitrator's award to ensure that its resolution of public law issues is correct").

225 Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

226 Some courts, however, have declined to follow *Cole*'s holding. See, e.g., Team Scandia, Inc. v. Greco, 6 F. Supp. 2d 795, 802 (S.D. Ind. 1998) (declining to follow *Cole*).

Judge Henderson, concurring in part and dissenting in part in *Cole*, articulated some of the problems with the majority's modification of the arbitral agreement to impose costs on the employer.[227] Finding no basis for this interpretation of the arbitration clause in either the FAA, *Gilmer*, or the parties' agreement, Judge Henderson cautioned against usurping the authority of the arbitral panel and ignoring the clear language of the arbitral rules.[228] Other courts have found the broad scope of review sanctioned in *Cole* to lack sufficient support in either Supreme Court precedent or the congressional record.[229] The positive implications of the *Cole* decision thus may be undermined by what appears to be judicial overreaching.

4. *Disregard of the Facts*

A recent Second Circuit decision provides further evidence that, in the absence of a systematic approach to reviewing arbitral decisions, judicial attempts to protect statutory claims will seem ad hoc and result oriented. In *Halligan v. Piper Jaffray, Inc.*,[230] the Second Circuit reversed a lower court judgment confirming an arbitral award.[231] While the decision was based on the arbitrators' "manifest disregard of the law,"[232] the opinion, in reality, turns on what appears to be de novo review of the evidence.

In *Halligan*, an ex-managing director brought an age-discrimination suit against his former employer, alleging that he had been forced out of his job for being too old.[233] Piper Jaffray, the employer, maintained that Mr. Halligan had retired of his own accord.[234] During the arbitration, Mr. Halligan provided evidence of his long and successful employment record as well as accounts of discriminatory statements made by the company about Mr. Halligan's age.[235] Notwithstanding this information, the arbitration panel ruled in favor of Piper Jaf-

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227 See *Cole*, 105 F.3d at 1489 (Henderson, J., concurring in part and dissenting in part).

228 See id. at 1489-90.

229 See, e.g., Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F. Supp. 218, 227 (S.D.N.Y. 1997) (finding "absolutely nothing" in any Supreme Court or Second Circuit precedent to justify broader scope of review for statutory claims and holding that "such a radical reassessment of the manifest disregard standard cannot be instituted by this court").

230 148 F.3d 197 (2d Cir. 1998).

231 See id. at 204. The court recognized its power to remand the case to the arbitrators for an explanation of their decision. See id. (citing Siegel v. Titan Indus. Corp., 779 F.2d 891, 894 (2d Cir. 1985)). However, it remanded the case to the district court for further proceedings instead. See id.

232 Id. at 203.

233 See id. at 198.

234 See id.

235 See id. at 198-99.

fray.[236] Applying the traditionally narrow scope of review in these cases, the district court affirmed the award.[237]

On appeal, the Second Circuit criticized the arbitrators for ignoring relevant evidence in the record.[238] Its highly factual review of the case appeared motivated by a concern for the employee's statutory rights.[239] The court noted the strong judicial support for arbitration[240] and described the manifest disregard standard endorsed by the Supreme Court.[241] However, the court found this standard of review to be "'severely limited.'"[242] Rationalizing its heightened scrutiny of the case, the court noted the controversy over increased use of mandatory predispute arbitration agreements to resolve statutory employment disputes.[243] It also contrasted recent reforms by major independent arbitration agencies in formulating due process standards with recent changes in the NASD rules that no longer mandate arbitration in securities industry employee contracts.[244]

Particularly noteworthy is the Second Circuit's treatment of the absence of a written record.[245] The court did not agree with the district court's conclusion that such absence prevented a finding that the arbitral panel ignored the law or the facts.[246] Rather, the court concluded from the arbitrators' failure to explain their decision that the arbitrators ignored the law, the facts, or both.[247] This novel approach

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236 See id. at 200.

237 See id. The district court noted the absence of a written opinion:

> [W]here [the arbitral panel] did not issue a written opinion, I cannot conclude that the panel did in fact disregard the parties' burdens of proof. . . . [C]rediting one witness over another does not constitute manifest disregard of the law [and] this court's role is not to second-guess the fact-finding done by the Panel.

Id. (alteration in original).

238 See id. at 204.

239 See id. at 202-03 (describing controversy over best way for employees to vindicate statutory rights and noting federal courts' growing concern over problem).

240 See id. at 200.

241 See id. at 201-02.

242 Id. (quoting Government of India v. Cargill Inc., 867 F.2d 130, 133 (2d Cir. 1989)).

243 See id. at 202-03.

244 See id.

245 See id. at 204.

246 See id.

247 See id. The court noted that the arbitral panel was under no obligation to explain its award. See id. (citing Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985); Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 704 (2d Cir. 1978); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972)). The court also explained that it was not holding that an arbitrator should explain the decision in every case. See *Halligan*, 148 F.3d at 204. However, the absence of such an explanation could "reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard." Id.

to the absence of a written record is without precedent in either the Civil Rights Act of 1991 or the *Gilmer* decision.[248]

Like *Olson*, *Lai*, *Rosenberg*, and *Cole*, the decision in *Halligan* suggests that courts may permit greater judicial scrutiny when statutory rights are at issue. *Halligan* goes further to suggest that the absence of a reasoned award—heretofore a hallmark of arbitration—may be a basis for overturning a decision. Those concerned with the protection of statutory rights applaud this trend. However, those concerned with preserving the benefits of arbitration recognize its difficulties.

When courts modify arbitral agreements or alter their background presumptions, they are in effect undermining the integrity of arbitration. Seemingly ad hoc judicial review of arbitral awards could deter the use of speedy dispute resolution mechanisms because parties may doubt their finality. It also raises concerns about unchecked judicial activism in the area of employment and labor arbitration.[249] The final Part of this Note explores whether the beneficial qualities of arbitration can be preserved in the context of meaningful judicial review.

III

JUDICIAL REVIEW WITHOUT JUDICIAL REFORMATION

The previous Part described how courts have applied heightened review in the context of arbitral decisions involving civil rights claims. This Part considers such review in light of the federal interests in promoting the benefits of arbitration while safeguarding statutory rights.[250] The first section maintains that in the presence of certain procedural protections, the two interests are compatible. The next section presents possible guidelines for federal courts in deciding whether to compel or enforce mandatory arbitration of statutory civil rights. The final section explains why these guidelines may require legislative amendment.

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248 The Second Circuit observed that there was precedent for discretionary remand of a case in order to obtain a written explanation of the arbitrator's award. See id. at 204 (citing Siegel v. Titan Indus. Corp., 779 F.2d 891, 894 (2d Cir. 1985)). However, "in view of the entire record," the court declined to do so. Id.

249 See Fitzgibbon, supra note 18, at 549 ("Like a spouse who 'must' adjust the temperature of the stove when the other spouse is cooking something, courts adjust the results of [arbitral] awards without necessarily having an awareness or an understanding of 'what's cooking' in a particular case.").

250 See discussion supra Part I.C.

A. Resolving the Tension Between Efficiency and Accountability

Both opponents and advocates of the mandatory arbitration of statutory employment disputes acknowledge the tension between federal policies favoring arbitration and those advancing civil rights. Opponents object to what they see as wholesale abdication of judicial oversight in areas of great federal interest. Proponents argue that, given judicial and administrative gridlock, the trade-off is not actually between public and private justice, but between private justice and no justice—no day in court—at all.[251] Thus, arbitrators' decisions should be given broad deference.

It is true that if courts exercised unlimited review, they would be inundated with cases. Arbitration would lose its credibility and hence its effectiveness.[252] Equally problematic are cases in which judicial review proceeds on a seemingly ad hoc basis. In *Cole*, for example, Judge Henderson seemed less concerned with the majority's more expansive standard of judicial review than with the fact that it seemed unprecedented.[253]

When presented with the question of enforcing arbitration decisions or agreements to arbitrate, courts should be mindful not only of the need for a neutral forum to protect rights against discrimination but also for clear guidelines. Though arbitral bias, knowing and voluntary waiver, procedural fairness, and correct interpretation of the law warrant judicial review, such review should proceed within a precisely defined and rigorously followed framework. Parties will then be on notice as to what constitutes arbitral fairness and how to structure arbitrations to avoid vacatur.

As the next section suggests, it is possible to limit the scope of judicial review to protect statutory rights without unduly burdening the arbitral process. Some authors have recommended heightened scrutiny and stricter review for cases "heavily laden with public value

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251 See 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, 1240 (1993) (discussing need to protect public justice values articulated in employment statutes).

252 See Jacob, supra note 36, at 1124 (arguing for discretionary judicial review but noting that courts need not review all arbitration cases).

253 See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1490 (D.C. Cir. 1997) (Henderson, J., concurring in part and dissenting in part). Judge Henderson stated:

> [T]he majority, under the rubric of contractual interpretation, modifies the contract's provisions by usurping the arbitrator's authority to allocate "arbitrator compensation" expressly granted under the rules and incorporated into the parties' agreement. The majority thereby ignores the terms to which the parties agreed, choosing instead to rewrite the agreement as the majority would have it read.

Id. (citations omitted).

choices."[254] A more sophisticated inquiry would focus not only on the nature of the claim and the cogency of the arbitral decision but also on the specific conditions surrounding the arbitral agreement and the protections guaranteed by the arbitral process. As the First Circuit observed in *Rosenberg*, arbitration has no inherent faults.[255] Rather, most criticisms of arbitration center on defects in how it is structured or practiced.[256] Judicial review oriented toward the most frequent and glaring deficiencies in the arbitral process will encourage the development and implementation of effective procedural safeguards when statutory rights are decided in arbitral fora.

B. Formulating Guidelines for Judicial Review

In searching for an appropriate paradigm for judicial review, a number of commentators have recommended the standards promulgated by the National Labor Relations Board (NLRB) in *Collyer Insulated Wire*[257] and *Spielberg Manufacturing Co.*[258] The so-called *Collyer-Spielberg* standards create a system of pre- and post-arbitration review whereby the NLRB will defer to the agreed method of dispute resolution when certain conditions are met.[259] Such a system seeks to preserve the parties' contractual relationship and uphold the federal policy favoring arbitration while protecting employees' statutory rights.[260]

The *Collyer* standards for predispute deferral focus on the nature of the parties' relationship, the extent to which the arbitral contract contemplates the dispute at issue, and the willingness of the party seeking deferral to waive any timeliness provisions in the arbitration clause.[261] The *Spielberg* standards ensure the adequacy of the arbitral procedures in post-arbitration review. In *Spielberg*, the NLRB stated that it would give deference to the arbitrator's decision because "the [arbitral] proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision [was] not clearly repugnant

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254 Malin & Ladenson, supra note 251, at 1208.

255 See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 163 F.3d 53, 60 n.4 (1st Cir. 1998).

256 See id.

257 192 N.L.R.B. 837 (1971).

258 112 N.L.R.B. 1080 (1955). Arnold M. Zack, President of the National Academy of Arbitrators, suggested that the *Spielberg* standard could be used as a guide for judicial deference to arbitration awards. See Buckley, supra note 95, at 183-84 & n.229. Other commentators agree. See id. at 183-84.

259 See Kasten & Coady, supra note 17, at B5 (describing NLRB's application of standards).

260 See id. (citing National Radio Co., 198 N.L.R.B. 527, 531 (1972)).

261 See id.

to the purposes and policies of the [National Labor Relations] Act."[262] The clarity and consistency of the trifurcated *Collyer-Spielberg* inquiry would increase predictability in the arbitral process. The next sections describe how the inquiry would proceed.

1. *Agreement to Be Bound*

In assessing whether to compel arbitration or enforce an arbitral agreement, courts should first look to the context of the predispute arbitration agreement. The inquiry should focus on whether or not the plaintiff-employee knowingly and voluntarily waived his rights to a jury trial. Following the Ninth Circuit's inquiry in *Lai v. Prudential Insurance Co. of America*,[263] for example, courts may inquire whether the contractual language was explicit,[264] whether the employee had adequate opportunity to review the provision,[265] and whether he was informed of the existence of the arbitral agreement.[266] To promote the use of arbitration, the presumption should favor arbitrability. Thus, the burden should rest on the plaintiff-employee to demonstrate the absence of a knowing waiver.

2. *Fair and Regular Proceedings*

The court should next consider the arbitral process itself.[267] When considering whether to *compel* an arbitration, a court should determine if certain minimum standards of arbitral procedural justice are in place. Such standards may be culled from guidelines established by federal agencies, arbitral associations, and dispute resolution providers that vigorously support such guarantees.[268] The guidelines they have created provide a point of departure for meaningful judicial review.

In 1995, representatives of the National Academy of Arbitrators (NAA), the American Bar Association (ABA), the American Arbitration Association (AAA), the National Employment Lawyers Association (NELA), the American Civil Liberties Union (ACLU), and others drafted and signed a Due Process Protocol for Mediation and

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262 *Spielberg Mfg. Co.*, 112 N.L.R.B. at 1082.

263 42 F.3d 1299 (9th Cir. 1994); see also supra notes 172-87 and accompanying text (discussing *Lai*).

264 See id. at 1305.

265 See id. at 1301.

266 See id.

267 The Supreme Court in *Gilmer* implicitly authorized the consideration of due process guarantees in the arbitral forum. See supra Part I.A.

268 See Estreicher, supra note 153, at 1349-50 (discussing U.S. Department of Commerce and Labor report containing recommendations on arbitration of employment disputes).

Arbitration of Statutory Disputes Arising Out of the Employment Relationship (Due Process Protocol).[269] Focusing on the structure of the arbitral process,[270] the document's recommendations included: joint selection and compensation of the arbitrator;[271] adequate (though limited) prehearing discovery; access to references from the arbitrator's six most recent cases; arbitrator training in employment law; arbitrator duty to disclose possible conflicts of interest; arbitral awards summarizing the type of dispute and damages or other relief requested and/or awarded; a statement of the issues and the statutory claims; and freedom to secure representation by a spokesperson.[272]

In addition to the Due Process Protocol, the AAA and the NAA have developed their own sets of guidelines and rules. The AAA's Employment Dispute Resolution Rules are designed for inclusion in employment agreements or personnel manuals.[273] The NAA, which on May 21, 1997, adopted a policy opposing mandatory arbitration as a condition of employment,[274] has issued guidelines permitting the arbitrator to withdraw from cases typified by procedural unfairness. The Guidelines encourage the arbitrator to "examine issues, ensure production of evidence, discuss witness lists, ensure discovery necessary for a fair proceeding, determine whether the rules of evidence should apply, follow the Due Process Protocol, and serve only so long as fundamental due process protections are afforded."[275] The Guidelines also direct the arbitrator to provide a reasoned arbitral decision with findings of fact and conclusions of law. The opinion must identify all of the statutory issues raised by the parties and consider them in light of judicial and administrative authority; arbitral awards must also be consistent with remedies available in civil trials.[276]

Many dispute resolution providers have modified their services to accord with the above guidelines.[277] JAMS/Endispute, a well-known

269 See Arnold M. Zack, The Evolution of the Protocol, 6 World Arb. & Mediation Rep. 217, 217-18 (1995).

270 The drafters could not agree on the enforceability of predispute agreements to arbitrate. See Stone, supra note 7, at 1045 (stating that task force did not achieve consensus whether to permit predispute arbitration and whether to allow employers to condition employment on signing of arbitration agreement).

271 Note that the D.C. Circuit rejected the joint compensation scheme in *Cole*. See supra notes 215-18 and accompanying text.

272 See Zack, supra note 269, at 218.

273 See Bingham, supra note 12, at 230.

274 See id.

275 Id.

276 See id.

277 Some providers have endorsed the elimination of mandatory arbitration of statutory discrimination claims. NASD determined that there was a "public perception that civil rights claims may present important legal issues better dealt with in a judicial setting." Evan J. Charkes, The Changing Landscape of Mandatory Arbitration in the Securities In-

ADR provider, has adopted policies to ensure minimal standards of procedural fairness.[278] It rejects employment cases in which the arbitral agreement limits statutory rights and remedies, restricts the right to counsel or the selection of a neutral arbitrator, or unreasonably limits discovery.[279] In addition, the Center for Public Resources, another provider of ADR services, has issued a model policy concerning the use of ADR in employment disputes.[280]

Courts confronted with motions to compel arbitration agreements relating to employment discrimination claims might look to some of the progress made by ADR providers in the area of due process. Courts should dismiss motions to compel arbitrations that do not meet minimum standards of fairness. While the added protections in the discovery and arbitrator selection processes may make arbitral proceedings less efficient, they may also have the effect of limiting the number of appeals.[281]

It is essential that courts adequately articulate the minimum standards in their opinions so as to provide notice and guidance to arbitrators, employers, and employees. Courts may, as in *Olson*, examine whether there has been adequate inquiry into the business relationships of the arbitrator,[282] or, with reference to *Cole*, may consider whether the arbitral process allocates burdensome or unreasonable costs to the employee.[283] Courts might also observe whether the nature or complexity of the dispute necessitates a written opinion.[284]

3. *Adequacy of the Arbitral Record and Consistency with Existing Precedent*

As in cases brought to compel arbitrations, courts considering whether to enforce arbitral agreements should consider the adequacy

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dustry, N.Y. L.J., May 11, 1998, at 1 (quoting Arbitration of Employment Discrimination Claims, available in 1997 SEC Lexis 2559, at *17 (proposed rule change by NASD, Dec. 10, 1997)).

278 See JAMS/Endispute Issues Minimum Standards for Employment Arbitration, 6 World Arb. & Mediation Rep. 50 (1995).

279 See id.

280 See Alternative Dispute Resolution: Center for Public Resources to Issue Model ADR Policy for Employment Disputes, Daily Lab. Rep. (BNA) (June 14, 1995), available in Lexis, BNA Library, Dlabrt File.

281 See Maltby, supra note 6, at 25 (noting that judicial review would not be as necessary if procedural due process minimums were in place); Employment Discrimination, supra note 1, at 1674-75 (observing that procedural safeguards could lead to protracted arbitration but that alternative course of banning all mandatory agreements would inhibit use of arbitration).

282 See supra Part II.B.1 (discussing arbitrator partiality).

283 See supra Part II.B.3 (discussing allocation of costs).

284 See Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998).

of the protections provided by the arbitral process. If the court is not satisfied with the procedural guarantees, the court should vacate the award.[285] If the court is satisfied with the procedural guarantees, then an award should be overturned only if it is either clearly erroneous—that is, if it violates an explicit and well-defined rule of law announced in legislation or court decisions[286]—or if the award is "clearly repugnant" to the purposes of the statute in question.[287] The arbitral award should reflect an adequate interpretation of the facts and an appropriate understanding and application of the relevant legal doctrines.[288] Such review would protect the public justice values embedded in discrimination statutes and create incentives for employers to provide procedurally fair arbitrations. Deference should be given to the arbitrator's findings of fact.[289] These findings are already adequately constrained by the minimal standards embodied in the FAA.[290] Furthermore, making the arbitrator's factual determinations effectively final and binding would preserve some of the efficiency gains of arbitration.[291]

C. *Implementing the Standard*

The guidelines discussed in the preceding section envision the augmentation of current standards of review in the context of statutory employment disputes. The current disarray in the common law articulation of judicial review suggests that legislative amendment is an appropriate course for achieving a more systematic framework of judicial review.[292]

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285 Courts should vacate or enforce the award or arbitration; they should refrain from rewriting or reinterpreting the arbitral contract.

286 See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987) (noting that court may overturn arbitration award only if it conflicts with other "laws and legal precedents"); see also Gorman, supra note 31, at 673 (discussing various bases for judicial review, including *Misco* and NLRB standards).

287 See Lechmere, Inc. v. NLRB, 502 U.S. 527, 545-47 (1992) (White, J., dissenting) (stating that courts should review agency interpretations of statutes by asking whether "the agency's view is based on a permissible construction of the statute" (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984))); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).

288 See Gorman, supra note 31, at 673.

289 See Malin & Ladenson, supra note 251, at 1237-38, 1240 (advocating deference to arbitrators' findings of fact and de novo review of their legal interpretations).

290 See id. at 1238 ("Arbitral factual findings remain properly constrained by the parties' expectations and the minimal standards embodied in the FAA.").

291 See Malin, supra note 40, at 104 (stating that de novo review is "not likely to erode significantly the finality of employment arbitration awards").

292 Some commentators have expressed a preference for the contractual expansion of judicial review. See, e.g., Cullinan, supra note 24, at 398-99. However, in the context of statutory employment disputes, the recommendation overlooks the fact that the predispute agreement rarely offers employees the opportunity to bargain about judicial review.

While these guidelines do not entail plenary review of arbitral awards, they do require a review more rigorous than that currently contemplated by the Supreme Court. Recent decisions reflect the Court's view that Congress favors mandatory arbitration of employment discrimination claims. It is therefore unlikely that the Court, in the absence of more pointed congressional endorsement of broader review, would sanction such an intrusion on the decisions of arbitrators handling public-law claims.[293] The tension between finality and fairness in the arbitral process requires debate and consideration that is arguably more appropriate to the legislative forum. Furthermore, judicial modification of the standard may take the courts many years to complete; for the Supreme Court to modify the existing guidelines, it would need an appropriate test case.

Against this backdrop, a more efficient and effective method for expanding judicial review would be through congressional action.[294] Such action might take the form of amendments to enforcement provisions in various worker protection statutes,[295] or the enactment of a single comprehensive statute concerning public-law arbitration or the arbitration of federal statutory rights.[296] For example, Congress could

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293 See Gorman, supra note 31, at 672 (arguing that Supreme Court will not allow lower courts to have full review of arbitration proceedings). One reason for the enactment of the FAA was disarray in the courts and the reluctance of courts to defer to arbitral awards in the absence of legislative prescription. See supra notes 27-30 and accompanying text.

294 Recently, bills have been introduced in Congress, and in some state legislatures, that would prohibit or limit the use of mandatory arbitration agreements in employment contracts. For example, in March 1997, Representative Edward Markey of Massachusetts introduced the Civil Rights Procedures Protection Act of 1996, H.R. 983, 105th Cong. (1997). The Act would amend eight federal statutes to make the remedies provided in them exclusive "unless after such claim arises the claimant voluntarily enters into an agreement to resolve such claim through arbitration or another procedure." Id. An identical bill was introduced in the Senate by Senator Russell Feingold. See Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997); see also S. 1012, 1995-96 Leg., Reg. Sess. (Cal. 1995) (prohibiting agreements to arbitrate claims under California Fair Employment and Housing Act prior to existence of such claims). The 1997 congressional bills were reincarnations of comparable bills introduced in the Senate by Senator Russell Feingold in 1994 and 1995, as well as a bill introduced by Representatives Patricia Schroeder and Edward Markey in 1996. See Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong. (1996); Civil Rights Procedures Protection Act of 1995, S. 366, 104th Cong. (1995); Protection from Coercive Employment Agreements Act, S. 2012, 103d Cong. (1994); Civil Rights Procedures Protection Act of 1994, S. 2405, 103d Cong. (1994). For a discussion of recent legislative attempts to restrict mandatory arbitration, see Amy L. Ray, Comment, When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements, 51 SMU L. Rev. 441, 459-62 (1998).

295 See, e.g., H.R. 983 (preventing involuntary application of arbitration to unlawful employment discrimination claims based on race, color, religion, sex, national origin, age, or disability).

296 See, e.g., Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. §§ 571-581, 583-584 (1994)). The Act was intended to pro-

amend the Federal Arbitration Act to mandate minimum due process protections in employment discrimination suits or expand judicial review when statutory rights are involved.[297] In either case, legislative amendment would send an emphatic and decisive message that even in the context of private justice, public rights remain paramount.

CONCLUSION

There is little doubt that the arbitration of workplace disputes can yield great benefits. While providing broad access to justice, this relatively inexpensive forum can also provide efficient results while easing overburdened court dockets.[298] These advantages, however, should not obscure the dangers of compulsory arbitration, particularly when civil rights are at issue. The protection of individual rights requires not only an accessible forum but also one that is neutral, consistent, and accountable. Thus, if mandatory arbitration is to serve as a palatable alternative to litigation, it must be subject to certain safeguards and standards of review.

The current system of judicial review under the FAA and common law is inadequate. Its limited scope constrains the federal courts in their efforts to police inequitable arbitral awards. In so doing, it thwarts congressional intent to protect federally guaranteed rights. When statutory civil rights are in question, courts routinely should scrutinize arbitral decisions for the presence of consent, procedural adequacy, and fairness of the arbitral process. In the absence of pro-

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mote the use of ADR in federal administrative agencies. Section 572(b) of the Act is particularly noteworthy. It provides:

> An agency shall consider not using a dispute resolution proceeding if—
> (1) a definitive or authoritative resolution of the matter is required for precedential value . . .;
> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made . . .;
> (3) maintaining established policies is of special importance . . . and such a proceeding would not likely reach consistent results among individual decisions;
> (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
> (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
> (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances . . . .

5 U.S.C. § 572(b) (1994).

297 See Gorman, supra note 31, at 680-81.

298 See Lynd, supra note 6, at 306 (noting that employees' waiver of their rights eases burden on judicial system and arguing that courts should be willing to review cases when problems arise).

cedural guarantees, courts should vacate the award. However, if procedural guarantees are in place, a reviewing court should defer to an arbitrator's findings of fact, vacating an award only for clear error or repugnance to the purposes of the act in question.

Some commentators have based their arguments for or against the enforcement of mandatory arbitration agreements on the incompatibility of arbitration and judicial review. This Note concludes the contrary. Rather than inhibiting recourse to arbitration, broader—yet rigorously defined—standards of judicial review may actually foster the use of arbitration by ensuring a competent and impartial forum for the vindication of statutory rights.