

Arbitrating Novel Legal Questions: A Recommendation for Reform

Michael A. Scodro

INTRODUCTION

Arbitration plays a significant role in the contemporary alternative dispute resolution (ADR) movement, a trend in conflict management affecting the practice of law in the United States to an ever-growing extent. In 1995 alone, the U.S. Supreme Court decided three cases requiring interpretation of the Federal Arbitration Act (FAA),¹ the federal statute chiefly responsible for regulating arbitration provided for in private, commercial contracts.² While these cases, and others like them brought in the more than seventy years since Congress enacted the FAA, have allowed the federal bench to resolve issues concerning federal arbitration law, the Act itself does not empower judges to reach the merits of the legal claims that underlie privately arbitrated disputes. Under the FAA, federal courts can be called upon to enforce arbitral awards against noncomplying parties, but, with certain narrow exceptions, they may not review the substantive decisions rendered by private arbitrators.

The Act's strict limitations on judicial review of arbitral awards have become more questionable in recent years, however, as arbitrators have begun to resolve an increasingly broad spectrum of claims. Once confined primarily to disputes over the language of private contracts, today arbitration is a judicially recognized and enforced means of resolution for virtually any controversy arising between parties that have contracted to arbitrate their present or future conflicts. Such contractual agreements are now binding under the FAA even for the resolution of claims brought under federal antitrust, RICO, patent, securities, and, increasingly, employment discrimination statutes—a development that represents a significant expansion in arbitral “jurisdiction.”

This Note argues that the greatest potential for injustice in the arbitral resolution of such statutory claims, both to the parties and to society more

1. *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995).

2. Other federal statutes, such as the Labor Management Relations Act and the Railway Labor Act, govern labor-management disputes brought under collective bargaining agreements.

generally, arises when these claims raise novel legal questions. First, when a party raises a legal claim that the courts themselves have never addressed, she is unable even to present a decision from a publicly accountable judge to guide or constrain an arbitrator's decisionmaking. Under these conditions, an arbitrator is particularly likely to render an interpretation that is inconsistent with what a public court would decide. Second, the private resolution of a novel point deprives the courts of the opportunity to flesh out important statutory standards.

This Note recommends a procedural innovation in the form of an amendment to the FAA narrowly tailored to target the potential harms in the arbitral resolution of disputes grounded in novel legal claims. In particular, it recommends the creation of a procedural link between the federal courts and private arbitrators based on a process currently in practice: federal courts' certification of unresolved state-law questions to state supreme courts. Applied to private arbitration, such a certification procedure has the potential to strike a balance between the arbitral independence advocated by arbitration's proponents and the harms identified above.

In making its practical recommendation, this Note is not intended to suggest that more substantial judicial oversight of private arbitration would not be preferable. Rather, recognizing that more ambitious reform is unlikely in the current era of rapid ADR expansion, it aims to rectify a narrow yet especially pernicious aspect of the arbitration of federal statutory claims.

I. THE CURRENT STATE OF THE LAW

Congress passed the Federal Arbitration Act in 1925. The Act, a history of which is provided in Part II, requires that courts enforce parties' contractual agreements to resolve present or future disputes through private arbitration. In particular, either by declining to hear such disputes³ or by mandating that they go to arbitration,⁴ federal courts are to uphold any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."⁵ The Act further provides that, following private arbitration

3. 9 U.S.C. § 3 (1994) provides:

If any suit . . . be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing . . . the court in which such suit is pending . . . shall on application of one of the parties stay the trial . . . until such arbitration has been had . . .

4. *Id.* § 4 provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court [that would otherwise have civil or admiralty jurisdiction over the matter] . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.

5. *Id.* § 2. This statutory language refers to what are typically termed "predispute" arbitration agreements. As their name suggests, these are contractual provisions mandating the arbitration of future disputes between the contracting parties. Unless otherwise stated, references to arbitration agreements in

conducted pursuant to such a contractual provision, a party to the dispute may call upon the courts to order the enforcement of the resulting award.⁶

A. *The Expanding Sphere of Arbitrability*

Judicial interpretation of the FAA has undergone a significant change in recent years. Earlier in the century, the courts had placed extensive limitations on arbitration. In the past decade, however, the trend has been for the federal courts to expand the sphere of substantive issues that they consider to be legitimate subjects of the binding, minimally reviewable arbitration that the Act governs. This section describes the key decision in the initial limitation of the arbitrability of claims brought under the FAA and the line of cases defining arbitrability's subsequent expansion. It emphasizes in particular the change in the Court's view of arbitral competence to resolve legal issues and, relatedly, of arbitration's ability to recognize and preserve substantive statutory rights.

The Supreme Court first advanced the notion that courts should refuse to order the arbitration of certain claims in *Wilko v. Swan*,⁷ a customer's private action against his broker under the Securities Act of 1933. The Court found that a provision in the parties' margin agreement requiring the arbitration of future disputes constituted a "stipulation" waiving compliance with [a] 'provision'" of the 1933 Act, a waiver prohibited by § 14 of the Act.⁸ The Court expressed its concern that an arbitrator might enforce the Securities Act's substantive requirements less effectively than would a court.⁹ In particular, the *Wilko* majority explained that arbitral legal determinations may

this Note should be assumed to mean "pre-dispute" agreements, as opposed to arbitration arrangements entered into to resolve already existing disputes. The latter are also covered by the FAA, however. *See id.*

Exempt from the broad range of contracts to which the Act applies are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1. This limiting language remains ill-defined. *See* Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims after Gilmer v. Interstate/Johnson Lane Corp.*, EMPLOYEE REL. L.J., Autumn 1995, at 21, 28-29. Although most lower courts have interpreted the exception narrowly, some opinions have endorsed a broader reading, *see* Jay W. Waks et al., *Gilmer: Where We Are and Where We Are Going*, C976 A.L.I.-A.B.A. 423, 443-44 (1994), and the Supreme Court has so far declined to determine its bounds, *see* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) ("[I]t would be inappropriate to address the scope of the § 1 exclusion because the arbitration being enforced here is not contained in a contract of employment.").

6. *See* 9 U.S.C. § 9 (1994) (giving parties opportunity to receive judicial confirmation of award); *id.* § 10 (providing grounds on which courts can vacate award); *id.* § 11 (providing grounds on which courts can modify or correct award). Sections 10 and 11 are discussed in greater detail *infra* text accompanying notes 57-58.

7. 346 U.S. 427 (1953); *see also* John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 233-34 (1986); Jenifer A. Magyar, Comment, *Statutory Civil Rights Claims in Arbitration: Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. REV. 641, 643 (1992).

8. *Wilko*, 346 U.S. at 434.

9. *Id.* at 435-37.

lack the accuracy of judicial conclusions and yet stand up in the face of the narrow powers of judicial review provided for in the FAA:

As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," . . . cannot be examined. . . . In unrestricted submissions . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject . . . to judicial review for error in interpretation. The [FAA] contains no provision for judicial determination of legal issues such as is found in the English law.¹⁰

If the arbitrator reached inaccurate legal conclusions, the parties might not be subject to the proper substantive principles laid out in the Securities Act.

Although the *Wilko* decision specifically involved the Securities Act of 1933, its concerns apply more broadly, and courts subsequently extended its limitations on arbitration to other areas of federal statutory law. A "public policy exception" developed, whereby courts would refuse to order the arbitration of claims involving areas of public law despite the existence of otherwise valid predispute arbitration agreements. As one commentator notes, "Courts have found exceptions to the Arbitration Act based on the public policy underlying patent, copyright, antitrust, civil rights, and other statutes, and although *Wilko v. Swan* was not based on a generalized public policy exception, it has frequently been cited for that proposition."¹¹

While the Supreme Court actually began to chip away at the public policy exception as early as 1974, the first in this line of cases, *Scherk v. Alberto-Culver Co.*,¹² did not reflect a rethinking of arbitrators' competence to resolve statutory claims. Rather, in requiring the arbitration of a cause of action under the Securities Exchange Act of 1934, the *Scherk* Court stressed the fact that the contract at issue was international, with the parties' dealings taking place in several countries.¹³ There is a need, the Court explained, for parties to be

10. *Id.* at 436-37 (footnotes omitted). The Court footnoted its reference to English law with § 21 of the English Arbitration Act of 1950. *Id.* at 437 n.25. This statutory provision allowed for procedures whereby arbitrators could certify questions of law to the English courts in the course of an arbitration or, alternatively, could render awards in the form of multiple outcomes, allowing the courts to choose among them depending on a judgment about a specified legal issue. See Arbitration Act of 1950, 14 Geo. 6, ch. 27, § 21 (Eng.). These procedures, and their American analogues, are discussed in more detail below. See *infra* Part II.

11. Michael A. Lindsay, "Public" Rights and Private Forums: Predispute Arbitration Agreements and Securities Litigation, 20 LOY. L.A. L. REV. 643, 681 (1987) (citing Allison, *supra* note 7, at 233-34). The public policy exception for antitrust claims warrants special mention, as the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), discussed in detail *infra* text accompanying notes 18-35, was in part a direct response to the Second Circuit's opinion in *American Safety Equipment Corp. v. P.J. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), the central case establishing this exception.

12. 417 U.S. 506 (1974); see also Magyar, *supra* note 7, at 643-44.

13. *Scherk*, 417 U.S. at 515.

able to choose a forum for the reconciliation of disputes when they do not share a single national legal system.¹⁴

Unlike *Scherk*, a series of decisions beginning in the 1980s revealed a turnaround in the Court's conception of arbitration. These decisions rapidly expanded the sphere of arbitrability to include securities, antitrust, and RICO claims; other areas covered by federal statutes, such as copyrights, patents,¹⁵ and pensions¹⁶ also became appropriate subjects of arbitration.¹⁷ The Court in these opinions no longer depicted arbitration as an inappropriate means to resolve statutory claims; indeed, the Court has effectively proscribed any such assumption.

This recent rush of cases expanding arbitrability began in 1985 with the Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁸ In the face of a contractual dispute with Soler, Mitsubishi had moved under both the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to enforce an arbitration clause in their contract.¹⁹ Soler, in turn, had levied a number of allegations against Mitsubishi, including Sherman Act antitrust claims, and it wanted to resolve its causes of action in a federal court.²⁰ Based on the proceedings below, the specific issue before the Court was "whether an American court should enforce an agreement to resolve anti-trust claims by arbitration when that agreement arises from an international transaction."²¹ As a first step in resolving this issue, the Court made it clear that the fact that Soler's claim was statutory, in itself, said nothing about its arbitrability.²² In language subsequently quoted on numerous

14. *Id.* at 515–19. The *Scherk* dissent, however, continued the line of argument regarding arbitral competence to interpret federal statutes reflected in the majority opinion in *Wilko*. Writing for the four dissenters, Justice Douglas cited *Wilko* for the failings it identified in arbitration, including the fact that "[h]ere, as in *Wilko*, the allegations . . . will involve 'subjective findings on the purpose and knowledge' of the defendant, questions ill-determined by arbitrators without judicial instruction on the law." *Id.* at 532 (Douglas, J., dissenting) (quoting *Wilko*, 346 U.S. at 435).

15. See Michael F. Hoellering, *Arbitrability*, in *COMMERCIAL ARBITRATION FOR THE 1990S*, at 1, 5–6 (Richard J. Medalie ed., 1991). A series of statutes enacted in the early 1980s allowed parties to subject patent issues to private arbitration. *Id.* at 5. With respect to copyright claims, the Seventh Circuit held that a dispute over a copyright's validity is arbitrable in *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1198–99 (7th Cir. 1987).

16. See, e.g., *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116 (2d Cir.), cert. denied, 501 U.S. 1251 (1991); *Fabian Fin. Servs. v. Kurt H. Volk, Inc. Profit Sharing Plan*, 768 F. Supp. 728 (C.D. Cal. 1991).

17. As one author remarked in 1991, "During the last five years, there have been a number of developments and landmark decisions from the United States Supreme Court that have expanded significantly the domain of arbitration." Hoellering, *supra* note 15, at 1.

18. 473 U.S. 614 (1985).

19. *Id.* at 616–19.

20. *Id.* at 619–21.

21. *Id.* at 624.

22. *Id.* at 625 ("[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims."). The Court proceeded to explain in an accompanying footnote that the FAA was intended "to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Id.* at 625 n.14.

occasions by both the Supreme Court and lower federal courts, the *Mitsubishi* majority explained:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.²³

It is the language of the statute from which the claim arises, the Court reasoned, that one should examine for evidence of congressional intent to preclude arbitration.²⁴ Alternatively, the intent of the parties to avoid the arbitral resolution of statutory claims could appear in the language of their contract.²⁵ Absent indications of nonarbitrability from either of these sources, the claim should go to binding arbitration.

Acknowledging that its holding was restricted to the context of an *international* contract,²⁶ the Court nevertheless went on to express its misgivings about the Second Circuit's reasoning in *American Safety Equipment Corp. v. P.J. Maguire & Co.*,²⁷ the key case extending the public policy exception to antitrust claims. The *Mitsubishi* Court challenged, for example, the supposition that arbitrators are either unwilling to, or incapable of, following the antitrust laws. A case's complexity, its need for "sophisticated legal and economic analysis,"²⁸ the Court reasoned, can be met with the appointment of appropriately trained arbitrators and the use of experts.²⁹ Arbitral hostility to U.S. antitrust laws is similarly avoidable through the careful selection of arbitrators; indeed, the Court explained that "where the dispute has an important legal component, the parties and the arbitral body . . . can be expected to select arbitrators accordingly. We decline to indulge the presumption that the parties and arbitral body . . . will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."³⁰

Extending this line of reasoning, the Court next considered the public importance of legal claims arising in private arbitration. Again challenging the *American Safety* decision, the *Mitsubishi* majority indicated that courts should

23. *Id.* at 628.

24. *Id.* at 627-28.

25. *Id.* at 628.

26. *Id.* at 629.

27. 391 F.2d 821 (2d Cir. 1968).

28. *Mitsubishi*, 473 U.S. at 632.

29. *Id.* at 633.

30. *Id.* at 634 (footnote omitted).

not assume that arbitrators are incapable of properly resolving disputes with an important public impact:³¹

Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.³²

Finally, the Court explained that U.S. courts retain some power of review when enforcing any award, making reference to language in the international convention allowing countries to invalidate awards that violate public policy.³³ In particular, while the Court admitted that any post-award “substantive review [would] . . . remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”³⁴ At the very least, arbitrators would have to acknowledge and decide the Sherman Act claims.³⁵

With the *Mitsubishi* Court’s stress on the international aspects of the case,³⁶ the more definitive sign of the deterioration of the public policy exception did not come until two years later, in *Shearson/American Express, Inc. v. McMahon*.³⁷ Shearson, a leading brokerage firm, had entered into a contract with its customers providing for the arbitration of all future disputes. When several of those customers brought claims against Shearson under RICO and the Securities Exchange Act of 1934, Shearson moved under the FAA to compel the arbitral resolution of these issues.

On the 1934 Securities Exchange Act claims, the Court distinguished its 1953 holding in *Wilko*,³⁸ in which it had refused to compel arbitration of a suit brought under the 1933 Securities Act. It did so, in part, by noting the SEC’s extensive authority to oversee the arbitration procedures of the securities exchanges that were eligible to govern the arbitration of the McMahons’

31. *Id.* at 634–37.

32. *Id.* at 636–37 (citation and footnote omitted).

33. *Id.* at 638.

34. *Id.*

35. *See id.* at 636 n.19 (noting that Court “would have little hesitation in condemning the agreement as against public policy” if arbitration agreement precluded arbitral recognition of statutory claims).

36. While the Supreme Court’s holding in *Mitsubishi* was in the context of an international contract, lower courts have held that the prohibition on the arbitration of domestic antitrust claims is no longer good law. *See, e.g., Syscomm Int’l Corp. v. Synoptics Communications, Inc.*, 856 F. Supp. 135, 139 (E.D.N.Y. 1994) (“While *American Safety* has not been explicitly overruled, this Court believes that in light of the federal policy favoring arbitration agreements that has fueled the expansion of the types of federal statutory claims that may be arbitrated, . . . domestic antitrust claims are arbitrable.”).

37. 482 U.S. 220 (1987).

38. *Wilko v. Swan*, 346 U.S. 427 (1953); *see supra* text accompanying notes 7–10.

claims.³⁹ More interestingly, however, the majority contrasted the *Wilko* Court's assumptions about arbitration with the Supreme Court's more recent views. Relying on *Mitsubishi* in particular, the *Shearson* Court rejected the fears expressed in *Wilko*:

[W]e recognized [in *Mitsubishi*] that arbitral tribunals are readily capable of handling the factual and *legal complexities* of antitrust claims, notwithstanding the absence of judicial instruction and supervision. Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. Finally, we have indicated that *there is no reason to assume at the outset that arbitrators will not follow the law*; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.⁴⁰

The Court thus reiterated, this time in the context of a domestic arbitration, the *Mitsubishi* majority's assertions that arbitrators can be expected to follow the law in deciding statutory claims and that parties do not forfeit substantive statutory rights in arbitration. Turning to the RICO claim, the *Shearson* Court again invoked *Mitsubishi*, this time to challenge the position that a statutory claim's complexity provides a sufficient reason to deny arbitrability.⁴¹

Two years after *Shearson*, the Court explicitly overruled *Wilko*, holding that a claim under the Securities Act of 1933 was the proper subject of binding, private arbitration pursuant to a predispute agreement. Invoking *Mitsubishi* and *Shearson*, the Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁴² concluded that it was not possible to distinguish the 1933 Act from the 1934 Act as a source of claims that are somehow immune from arbitration. Referring to the change in the Court's "views on arbitration away from those adopted in *Wilko*," the Court found that the language of the 1933 Act relied upon in *Wilko* did not proscribe arbitration "[o]nce the outmoded presumption of disfavoring arbitration proceedings is set to one side."⁴³ The Court challenged the *Wilko* decision's concern over arbitrators' not correctly applying statutory principles: "To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has

39. *Shearson*, 482 U.S. at 233–34.

40. *Id.* at 232 (emphasis added) (citations to *Mitsubishi* omitted).

41. *Id.* at 239. The Court also rejected the argument that private RICO plaintiffs' roles as "private attorneys general" rendered their claims nonarbitrable. The Court reasoned that the private antitrust claims ordered to arbitration in *Mitsubishi* were, if anything, more important to society generally; private RICO claims, as an empirical matter, only rarely target the organized criminal behavior that Congress had hoped the statute's treble damages provisions would create an incentive to challenge. *Id.* at 240–42.

42. 490 U.S. 477 (1989).

43. *Id.* at 481.

fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.”⁴⁴

Even after the Court’s decisions in *Mitsubishi*, *Shearson*, and *Rodriguez de Quijas*, however, lower courts continued to recognize a distinction between the statutory rights rendered arbitrable by these cases and employment discrimination claims, which many courts still refused to send to arbitration under the FAA. Indeed, the finality of arbitral awards in cases involving discrimination claims had been limited beginning in the 1970s in a series of non-FAA, labor arbitration cases in which the Court had held that adverse arbitral awards on statutory claims did not preclude plaintiffs from receiving de novo review in the federal courts. In the first of these cases, *Alexander v. Gardner-Denver Co.*,⁴⁵ the Court had ordered the de novo review of a Title VII race discrimination claim. Finding arbitration to be “comparatively inappropriate” for rendering final Title VII determinations, the Court had articulated a variation of the arbitral-competence theme evident in *Wilko*: “[T]he resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.”⁴⁶ While *Gardner-Denver* and its progeny⁴⁷ involved collective bargaining arbitration, which is not covered by the FAA, their limitations on arbitral finality were thought to apply more broadly,⁴⁸ preserving a zone of nonarbitrability for discrimination claims. Thus, for example, even after *Mitsubishi*, *Shearson*, and *Rodriguez de Quijas*

44. *Id.*

45. 415 U.S. 36 (1974).

46. *Id.* at 57. The Court further explained that arbitrators are, in fact, selected for their understanding of “the demands and norms of industrial relations,” *id.*, citing the fact that “a substantial proportion of labor arbitrators are not lawyers,” *id.* at 57 n.18. The opinion does provide that a court may admit the arbitral award into evidence, however, “accord[ing it] such weight as the court deems appropriate.” *Id.* at 60.

47. A series of Supreme Court collective bargaining cases followed in *Gardner-Denver*’s wake, extending its rule allowing for de novo judicial review to cover other statutory claims. See *Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557 (1987) (extending rule to Federal Employers’ Liability Act claim); *McDonald v. City of W. Branch*, 466 U.S. 284 (1984) (extending rule to § 1983 action); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (extending rule to Fair Labor Standards Act (FLSA) claim). In *Barrentine*, the majority further elaborated on the courts’ unique competence to interpret statutory rights. As one of the factors rendering arbitration inferior to formal adjudication for the purpose of resolving the plaintiff’s FLSA claim, the Court noted that “many arbitrators may not be conversant with the public law considerations underlying the FLSA,” *id.* at 743, citing *Gardner-Denver* for the fact that many arbitrators are not lawyers, *id.* at 743 n.21. Moreover, the opinion continued:

FLSA claims typically involve complex mixed questions of fact and law—e.g., what constitutes the “regular rate,” the “workweek,” or “principal” rather than “preliminary or postliminary” activities. These statutory questions must be resolved in light of volumes of legislative history and over four decades of legal interpretation and administrative rulings.

Id. at 743. The Court thus expressed concern over the ability of arbitrators to interpret statutory language in a manner consistent with the public policies that Congress intended to advance.

48. R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1541 (1994) (“The Court’s broad pronouncements in *Gardner-Denver* led most courts and commentators to believe the holding applied to any employer-employee agreement to arbitrate discrimination claims, not just those in collective bargaining agreements.”).

eliminated the public policy exception for many statutory causes of action, some courts refused to send Title VII claims to arbitration under the FAA.⁴⁹

In 1991, however, in the case of *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court compelled an individual to bring his Age Discrimination in Employment Act (ADEA) claim to arbitration pursuant to a predispute agreement in a contract with his employer.⁵⁰ In so doing, the majority distinguished *Gardner-Denver* and its progeny: Those were not commercial arbitration cases governed by the FAA; rather, they involved labor arbitration pursuant to collective bargaining agreements, where, in addition to other differences, there is the danger that unions will not adequately represent individual claimants.⁵¹ Moreover, the Court argued, the notion that arbitrators are not competent to handle statutory issues, put forth in *Gardner-Denver*, had been refuted by the *Mitsubishi* line of cases.⁵² Already, many lower courts have interpreted *Gilmer* to require that claims under other employment discrimination statutes, most notably Title VII, are also subject to compelled arbitration under predispute agreements.⁵³

49. See, e.g., *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186 (1st Cir. 1989) (upholding district court's refusal to stay in favor of arbitration in-court proceedings on plaintiff's Title VII sex discrimination claims, noting that "[n]otwithstanding [the Court's expansion of arbitrability since *Alexander v. Gardner-Denver*] . . . the Court has done nothing to disturb its prior ruling in *Alexander* that arbitration agreements do not preclude an independent right of access to a judicial forum for resolution of Title VII claims"), cert. denied, 493 U.S. 1045 (1990); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1307 (8th Cir. 1988) ("We conclude that in the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII."), cert. denied, 493 U.S. 848 (1989).

50. 500 U.S. 20 (1991).

51. *Id.* at 35.

52. See *id.* at 34 n.5. Earlier in the opinion, relying in part on its decisions in *Mitsubishi*, *Shearson*, and *Rodriguez de Quijas*, the Court refuted a barrage of additional arguments, several of them regarding arbitral procedure, that *Gilmer* had levied as challenges to the propriety of allowing arbitrators to decide his ADEA claim. See *id.* at 26-33.

53. See, e.g., *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) ("Because both the ADEA [held arbitrable in *Gilmer*] and Title VII are similar civil rights statutes, and both are enforced by the EEOC, we have little trouble concluding that Title VII claims can be subjected to compulsory arbitration." (citation omitted)); *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 109 (S.D.N.Y. 1995) ("[I]t is well established by courts in the Second Circuit that Title VII claims are arbitrable. Courts in other Circuits have reached the same conclusion." (citations omitted)); see also *Waks et al.*, *supra* note 5, at 431-32, 437. Other employment statutes, including the Americans with Disabilities Act and the Employee Polygraph Protection Act, have also been subject to court-compelled arbitration. See Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 605 (1995) (listing employment statutes that have been subject to court-compelled arbitration in *Gilmer's* wake).

Even if the Supreme Court ultimately upholds the compelled arbitration of Title VII claims, however, its impact will be subject to certain limitations. First, *Gardner-Denver* still commands that Title VII claims resolved through labor arbitration in the collective bargaining context be subject to de novo judicial review; it is only commercial contracts that, when they contain covenants to arbitrate future disputes, are subject to the FAA and, therefore, to the *Gilmer* holding. Second, § 1 of the FAA excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). As noted above, the boundaries set by this exception are still unclear. See *supra* note 5. Finally, as the *Gilmer* Court itself noted, employees who must bring discrimination claims to binding arbitration pursuant to the FAA can still file charges with the EEOC. *Gilmer*, 500 U.S. at 28.

This line of recent decisions expanding the sphere of arbitrability reflects a drastically changed judicial view of arbitral competence. The Court's statements in *Mitsubishi* that parties to arbitration "do[] not forgo" their "substantive rights" under a statute,⁵⁴ and in *Shearson* that arbitrators "are readily capable of handling the . . . legal complexities of antitrust claims"⁵⁵ mark a sharp break with earlier judicial skepticism.

B. *Bases for Judicial Review: "Manifest Disregard"*

While the *Shearson* Court indicated that "judicial scrutiny of arbitration awards . . . is sufficient to ensure that arbitrators comply with the requirements of the statute,"⁵⁶ the extent of courts' substantive review of arbitral decisions remains quite restricted. The FAA itself fails to provide the courts with any power of substantive review. Section 10 enables a court to vacate an arbitral award only in the face of procedural impropriety, that is, if

the award was procured by corruption, fraud, or undue means. . . . there was evident partiality or corruption in the arbitrators the arbitrators were guilty of misconduct . . . by which the rights of any party have been prejudiced. . . . [or] 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.⁵⁷

Similarly, § 11 provides that courts may modify an award only if it contains a numerical error, an inaccurate "description of any person, thing, or property referred to in the award," or if "the arbitrators have awarded upon a matter not submitted to them," or "the award is imperfect in a matter of form."⁵⁸ As with § 10, § 11 does not contemplate judicial review of arbitrators' legal reasoning.

There is also, however, a series of court-made grounds for vacating arbitral awards,⁵⁹ one of which, the "manifest disregard for the law" doctrine, does

54. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

55. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

56. *Id.*

57. 9 U.S.C. § 10 (1994).

58. *Id.* § 11.

59. For a discussion of some of these court-made exceptions, see Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759. Thus, for example, some courts have vacated arbitral awards upon a finding that "the underlying contract or the award violates the law" or that "enforcing the award would somehow violate the public's interests." *Id.* at 769. While the former category includes cases in which courts appear to have performed a substantive review of the arbitrator's legal reasoning, Randall questions the validity of these decisions: "Although the Supreme Court has stated that federal courts are not allowed to reverse an arbitrator's award based on legal errors, a few circuit courts seem to hold that some egregious legal errors actually violate the law." *Id.* at 770 (footnote omitted). The "manifest disregard of the law" doctrine, in contrast, requires a finding not merely of legal error but of an arbitral decision not to follow established law.

provide the courts with a means to check arbitrators' legal reasoning.⁶⁰ The doctrine is attributed to the Supreme Court's statement in *Wilko v. Swan* that "interpretations of the law by . . . arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."⁶¹ Espoused by a growing number of courts, the doctrine forbids the enforcement of any award clearly based on a conscious misapplication of a legal rule. As the Second Circuit put it in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*,⁶² the most frequently invoked articulation of the standard, "manifest disregard"

clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a *clearly governing legal principle* but decides to ignore or pay no attention to it. . . . The governing law alleged to have been ignored by the arbitrators must be *well defined, explicit, and clearly applicable*.⁶³

Given the infrequency with which arbitrators provide written opinions⁶⁴ that might reveal their awareness of a governing legal principle, coupled with the need for the arbitrator to ignore the law in some observable way, however, "it is not surprising that few, if any, arbitration awards have been vacated under

60. The "manifest disregard" doctrine represents the primary means of substantive judicial review of arbitral awards. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law . . ."); 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, 1226 (1993) ("Arbitral errors of law are not grounds for judicial vacation of an arbitration award, unless the award displays a manifest disregard for the law."); see also *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 234 n.5 (3d Cir. 1989) (Becker, J., dissenting) (following list of statutory grounds for review and reference to manifest disregard doctrine, noting that *Shearson* Court found these bases "sufficient to ensure that arbitrators comply with the requirements of the statute" (quoting *Shearson*, 482 U.S. at 232)); cf. C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 KY. L.J. 347, 352-54 (1990-91) (identifying manifest disregard doctrine as nonstatutory source of judicial review that is under pressure to expand in light of recent Supreme Court opinions "stressing that arbitrators must look to and follow the law").

61. 346 U.S. 427, 436-37 (1953); see also Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 249-50 (1993) (noting that this language in *Wilko* initiated manifest disregard doctrine).

62. 808 F.2d 930 (2d Cir. 1986); see also Randall, *supra* note 59, at 766 (referring to *Bobker* holding as "the most often cited formulation of the manifest disregard standard").

63. *Bobker*, 808 F.2d at 933-34 (emphasis added) (citations omitted).

64. See Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 13 (1987); cf. Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 215 (1992) (noting that arbitrators are discouraged from providing written opinions).

the manifest disregard standard.”⁶⁵ It is, as one commentator notes, “a virtually insurmountable” hurdle.⁶⁶

Moreover, the facts of *Bobker* itself highlight another limitation on the use of the manifest disregard doctrine: An arbitrator cannot disregard law that is not sufficiently clear and well settled. The interpretation and validity of the SEC rule at issue in *Bobker* were open to question. Indeed, the arbitrators themselves noted this. A member of the panel explained that the claim came “down to . . . a matter of interpretation of the law, . . . and we now hopefully have to come up with the right answer on this law, and it is a very gray area,”⁶⁷ while the Second Circuit concurrence referred to it as “an unclear rule of law.”⁶⁸ In light of such uncertainty, the court held that the arbitrator could not have acted in “manifest disregard” of the legal standard.⁶⁹ Other cases have made this point even more explicitly than did the court in *Bobker*; they have more directly linked a legal question’s novelty or its unsettled nature with the inapplicability of the manifest disregard doctrine.⁷⁰

Thus, while the doctrine does consider the substance of an arbitrator’s underlying legal reasoning, it provides only the most narrow window for judicial intervention. Most importantly for this analysis, its use is limited to those cases in which the law is sufficiently well defined.

II. THE HISTORICAL EXPERIENCE IN AMERICA AND ENGLAND

The expansive scope of arbitrability allowed by federal courts today stands in stark contrast to a historical judicial antagonism to private arbitration. Only gradually, first in Britain and later in the United States, did the courts abandon a long-held reluctance to enforce predispute agreements to arbitrate. Like the procedure that this Note recommends, one of the ways in which English and American law responded to increasing arbitration was with a certification procedure that allowed interaction between arbitrators and courts. This part provides a description of these early models, which offer compelling examples

65. Randall, *supra* note 59, at 767.

66. *Id.*

67. *Bobker*, 808 F.2d at 933 (quoting chair of arbitration panel).

68. *Id.* at 938 (Meskill, J., concurring).

69. *Id.* at 936–37; *see also* Galbraith, *supra* note 61, at 252 (“[T]he court of appeals determined that the disputed SEC rule was unclear, and thus, the actions of the arbitrators did not meet the test for ‘manifest disregard’ of the law.”).

70. *See* Nicoletti v. E.F. Hutton & Co., 761 F. Supp. 312, 314 (S.D.N.Y. 1991) (finding that, because “[t]he New York State Court of Appeals ha[d] not decided either question” at issue and “[t]he lower New York State courts ha[d] reached conflicting conclusions,” legal standard was not sufficiently clear to meet *Bobker* requirement for manifest disregard); Mutual Redevelopment Houses, Inc. v. Local 32B-32J, Serv. Employees Int’l Union, 700 F. Supp. 774, 778 (S.D.N.Y. 1988) (rejecting manifest disregard claim because “[p]laintiff’s contention that complete mitigation is required in the present case, which it supports by citation to allegedly analogous . . . cases, does not rise to the level of defined and settled law that is necessary to establish manifest disregard” (citation omitted)).

of alternatives to the current, more hands-off practice provided for under the FAA.

A. *The English Statutory Approach to Arbitration*

Before turning to the American arbitration reform movement of the early twentieth century, it is helpful to examine English developments in arbitration procedure; innovations implemented in England would help shape the agenda for change in the United States. Since 1698, the English government has regulated the interaction between courts and private arbitrators through a series of statutes.⁷¹ While these laws have formally sanctioned the use of predispute arbitration clauses, they have simultaneously institutionalized means by which the courts can control the substantive norms that arbitrators apply. One such means was the use of a certification procedure between arbitrators and the courts. Thus, for example, by 1840, arbitrators had begun to engage in a practice, later termed a "special case," whereby they rendered their awards in the form of alternative outcomes, leaving it to the courts to choose among them based on their judgment about specified legal questions that had arisen during the arbitration.⁷²

England's 1889 Arbitration Act added a second procedural mechanism for receiving judicial input on legal questions arising in the course of private arbitrations. In a process known as a "consultative case," an arbitrator could certify a legal question to a court during the course of an arbitration, on his own accord or at the insistence of the court itself, and would incorporate the court's response in the ultimate arbitral award.⁷³ As state legislatures in this country adopted statutes governing arbitration, variations on the special and consultative case procedures were put into place on this side of the Atlantic.

B. *The United States: State and Federal Statutory Approaches to Arbitration*

During the early decades of the twentieth century, two conceptions of arbitration competed for acceptance in the United States. In one, arbitrators interacted with the courts in rendering their awards. In the other, arbitrators were almost entirely insulated from judicial intervention. While the latter

71. For a chronology of the British statutes governing arbitration, see SIR MICHAEL J. MUSTILL & STEWART C. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 436-58 (2d ed. 1989).

72. *Id.* at 439-40.

73. *Id.* at 448. The most recent English arbitration statute, passed in 1979, has reduced the role of the bench in arbitration. In place of the special case procedure, parties can "appeal" arbitral awards to the courts, *id.* at 456-57, with the courts retaining the right to refuse to hear the appeal, *id.* at 457. Parties can contract out of the right to appeal in certain classes of cases in advance of the dispute, and after the dispute has arisen in all cases. *Id.* at 456. A procedure whereby parties can certify legal questions to the courts during the pendency of an arbitration still remains, see Arbitration Act of 1979, ch. 42, § 2 (Eng.), subject to the same possibility of contractual limitations on its use, see *id.* § 3.

model is in wide use today, the other, more interactive approach gained legislative approval in a number of states during the first half of the century.

A movement advocating the enforcement of predispute arbitration agreements and the independence of private arbitrators from court intervention originated in the New York State Chamber of Commerce in the early 1900s.⁷⁴ In 1920, the state legislature passed an arbitration statute reflecting this position: Predispute agreements to arbitrate were to be enforceable,⁷⁵ courts were not to hear questions on points of law arising during the course of arbitration,⁷⁶ and there was to be only minimal post-award judicial review.⁷⁷ As we shall see below, this statute ultimately served as the model for the FAA when it was enacted in 1925.

In 1924, however, despite opposition from advocates of the then recently promulgated New York Arbitration Act, the ABA's Conference of Commissioners on Uniform State Laws passed a statutory recommendation that limited the authority of private arbitrators more than did even the interventionist British laws. Following the lead of Illinois's restrictive 1917 statute, the Commissioners recommended a Uniform Arbitration Act (UAA) that did not empower the courts to enforce arbitration agreements entered into in advance of the dispute⁷⁸ and permitted the parties to arbitration to submit purely legal questions to the courts, either during or at the conclusion of the arbitration.⁷⁹

Statutes on the 1924 UAA model were put in place in several states.⁸⁰ Meanwhile, laws in Massachusetts and Connecticut, while departing from the UAA in some respects, retained a degree of judicial oversight; more closely

74. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 25–28 (1992).

75. *Id.* at 35.

76. *Id.* at 37.

77. *Id.*

78. As ultimately enacted, § 1 provided: "Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this act, any controversy existing between them *at the time of the agreement to submit.*" An Act Concerning Arbitration, to Make Uniform the Law with Reference Thereto, in *Report of the Committee on Uniform State Laws*, 50 REP. A.B.A. 560 app. A at 591 (1925) (emphasis added).

79. Section 13 allowed for submission of legal questions to the courts through one of two methods: Either (1) an arbitrator or a party could "[a]t any stage of the proceedings submit any question of law . . . for the opinion of the court, stating the facts upon which the question arises," or (2) the arbitrator could render the "award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing." *Id.* at 592–93. These same two methods had been developed earlier in England. See *supra* text accompanying notes 71–73.

80. Nevada enacted the UAA in 1925, MACNEIL, *supra* note 74, at 54, including its provision for submitting legal questions to the courts, see NEV. REV. STAT. § 38.140 (1957). North Carolina enacted it in 1927. See N.C. GEN. STAT. § 1-556 (1969) (providing for certification of legal questions to courts); see also Wesley A. Sturges, *Arbitration Under the New North Carolina Arbitration Statute—The Uniform Arbitration Act*, 6 N.C. L. REV. 363, 406–08 (1928) (fleshing out provisions of act, noting incorrectly that North Carolina was only state aside from Illinois with procedures to submit legal questions to courts, and criticizing these provisions as ambiguous and therefore as sources of future litigation). Utah and Wyoming also adopted the UAA in 1927. See UTAH CODE ANN. § 104-36-13 (1943) (providing for certification of legal questions to courts); WYO. STAT. § 1-1038 (1957) (same).

following the English model, they permitted predispute arbitration agreements but allowed parties to certify legal questions to the courts.⁸¹

The Massachusetts law was distinct from the UAA, and from the Connecticut statute for that matter, in another way: It explicitly provided the receiving court with the *discretion* to answer a certified question if a single party, rather than both parties or the arbitrator, requested the court's input.⁸² The uniqueness of this discretionary component did not go unnoticed. A 1927 *American Bar Association Journal* article comparing the 1920 New York legislation with its 1925 counterpart in Massachusetts praised the latter as a middle ground between conflicting interests.⁸³ Describing the need for a "compromise between speed and absolute justice," the article held out Massachusetts's legislation as an ideal accommodation: "Recourse is limited to questions of substantive law. The instructions are subject to the Court's discretion and hence, if refused, are not the subject of appeal. And the instructions may be given contemporaneously with the hearing before the arbitrator."⁸⁴ To this commentator, certification to the courts, subject to their discretionary acceptance, provided the ideal balance between the substantive legal rights of the parties and their prerogative to resolve disputes through arbitration. The proposal that this Note outlines in Part V includes such a discretionary component, grounded specifically in a novelty determination, in the hopes that it might provide such a balance.

While several states thus strayed from the New York statute's virtual elimination of judicial authority over legal points raised in arbitration, the tide unmistakably favored New York's position. Most important in this respect, the

81. As Joseph F. O'Connell, a member of the Massachusetts delegation to the 1925 gathering of the National Conference of Commissioners on Uniform State Laws, explained, his state enacted a statute similar to that in England: "[T]he court[s] shall have some jurisdiction in [arbitrated disputes] and . . . the matter may be referred to the court if any of the parties want it or if all the parties want it, or if the arbitrators think it necessary." 35 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 76 (1925).

As for Connecticut, it remains the only state with a certification procedure between arbitrators and the courts. The state code currently provides:

At any time during an arbitration, upon request of all the parties to the arbitration, the arbitrators or an umpire shall make application to any designated court, or to any designated judge, for a decision on any question arising in the course of the hearing, provided such parties shall agree in writing that the decision of such court or judge shall be final as to the question determined and that it shall bind the arbitrators in rendering their award. An application under this section may be heard in the manner provided by law for the hearing of written motions at a short calendar session, or otherwise as the court or judge may direct.

CONN. GEN. STAT. § 52-415 (1995).

82. The statute provided:

Any question of law may, and upon the request of all parties shall, be referred by the arbitrator or arbitrators to the court to which the report is to be made. Upon application by a party at any time before the award becomes final under section nineteen, the superior court may in its discretion instruct the arbitrator or arbitrators upon a question of substantive law.

MASS. GEN. L. ch. 251, § 20 (1932).

83. See Richard C. Curtis, *A Comparison of the Recent Arbitration Statutes*, 13 A.B.A. J. 567, 570 (1927).

84. *Id.*

federal bill enacted in 1925 followed the New York statute in all essential aspects:⁸⁵ There is no certification procedure to the federal courts under the FAA, and predispute arbitration agreements are enforceable.⁸⁶ Also consistent with the more expansive vision of arbitration, the FAA provides very limited bases upon which courts have authority to vacate or modify arbitral awards.⁸⁷ While it demands procedural propriety, the FAA strictly limits interaction between arbitrators and courts.⁸⁸ Continuing this trend, the Commissioners on Uniform State Laws withdrew the UAA in 1943, replacing it in 1955 with a second uniform act more along the lines of the New York model.⁸⁹ The vast majority of states have adopted this current UAA.⁹⁰

III. PROBLEMS WITH ARBITRAL DETERMINATIONS OF NOVEL LEGAL CLAIMS

As the federal courts have broadened the spectrum of claims appropriately subject to arbitration pursuant to the FAA, the importance of arbitrators' ability to grapple with statutory issues has increased. This part describes two concerns that arise from a particular aspect of the arbitration of statutory causes of action. First, when arbitrators face legal questions that the courts themselves have not addressed, there is an especially dangerous possibility that their awards will be inconsistent with the substantive law that publicly accountable tribunals would apply. Second, the arbitral resolution of novel legal issues deprives the courts of the opportunity to establish precedent resolving ambiguous areas of law.

A. *Rights of the Parties to a Judicial Interpretation*

As described in Part I, the Supreme Court has recently characterized arbitrators as competent to follow established legal norms in resolving statutory

85. In fact, Francis B. James, former member of the ABA's committee on commerce, trade, and commercial law, testified before the Senate and House Judiciary Committees that it was on Julius Henry Cohen, a leading member of the New York arbitration movement, that "the burden fell of drafting the [federal] bill." *Joint Hearings Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 19 (1924) [hereinafter *1924 Joint Hearings*].

86. See 9 U.S.C. § 2 (1994).

87. See *supra* text accompanying notes 57–58.

88. The FAA was in fact heralded as an attempt to overcome traditional judicial hostility to arbitration. Lindsay, *supra* note 11, at 647 (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 1–2 (1924), *quoted in* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985)).

89. MACNEIL, *supra* note 74, at 55. All of the first UAA states, see *supra* note 80, have since adopted this second UAA, as have Illinois and Massachusetts. See ILL. ANN. STAT. introduction to ch. 710, act 5 (Smith-Hurd 1993 & Supp. 1995) (listing states that have adopted second UAA).

90. As Leo Kanowitz notes, "Starting with the New York Arbitration Act of 1920, and followed by the United States Arbitration Act of 1925 (also known as the Federal Arbitration Act) and extensive state enactments of the Uniform Arbitration Act, Congress and most state legislatures have essentially repudiated the traditional judicial hostility toward arbitration." Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 256 (1987).

claims. Thus, for example, the *Shearson* Court, invoking *Mitsubishi*, noted that “arbitral tribunals are readily capable of handling the . . . legal complexities of antitrust claims” and that “the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.”⁹¹ True to this view, recent lower court opinions have reflected the assumption that arbitrators will follow judicial precedent in particular.⁹²

This notion that arbitrators can be expected to handle legal questions competently is not new. In his 1924 testimony before the House and Senate Judiciary Committees, the Arbitration Society of America’s Alexander Rose explained that he “never knew of an arbitration where questions of law were not to be passed upon, and where some retired jurist, or a lawyer could not sit and pass on them.”⁹³ For Rose in 1924, as for the *Mitsubishi* majority in 1985, the solution was not to keep legal issues out of arbitration, but to select arbitrators familiar with the law.

Nor is the idea that arbitrators will apply established law without contemporary, theoretical support. Professor Mark R. Lee, for example, suggests that it is in the best interest of antitrust arbitrators to follow the substantive law—doing so requires the least work on the part of the arbitrator and conforms to the expectations of the parties.⁹⁴ Similarly, Professor John R. Allison explains that “arbitrators have strong incentives to decide antitrust claims in a manner consistent with the antitrust laws. . . . Arbitrators must adhere at least to the general spirit of antitrust rules to perform their arbitral

91. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987). As one commentator puts it somewhat differently, “As the arbitration process has become more widely utilized over the past decade, the U.S. Supreme Court has taken the lead in stressing that arbitrators must look to and follow the law.” Stewart, *supra* note 60, at 352.

92. The Third Circuit noted in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, a decision overturning the district court’s denial of a motion to compel arbitration of the plaintiffs’ ERISA claims:

[I]n arguing that arbitration is inconsistent with ERISA’s statutory purpose, the Trustees contend that since there is no assurance that arbitrators will follow court precedents, compulsory arbitration of ERISA claims frustrates the legislative goal of developing a consistent body of law. This argument has a familiar ring; it is a reiteration of the traditional distrust of arbitration on the ground that arbitrators cannot be relied upon to follow the law. The Court has uniformly rejected this position in its recent arbitration cases, however, and we will only briefly address the Trustees’ contentions in this regard.

7 F.3d 1110, 1121 (3d Cir. 1993). Similarly, in *Fabian Financial Services v. Kurt H. Volk, Inc. Profit Sharing Plan*, 768 F. Supp. 728 (C.D. Cal. 1991) (enforcing arbitration of ERISA claims), the court noted that “[t]he body of [judicial] case law interpreting ERISA will continue to grow and provide the framework within which arbitrators may base their decisions.” *Id.* at 733.

93. 1924 *Joint Hearings*, *supra* note 85, at 27.

94. See Mark R. Lee, *Antitrust and Commercial Arbitration: An Economic Analysis*, 62 ST. JOHN’S L. REV. 1, 25–26 (1987). Lee explains that:

In terms of personal labor, [following the law] might be less costly than developing an alternative set of principles and acceptable modes of reasoning and then applying that set to the claim at hand. And in terms of income from serving as an arbitrator in subsequent proceedings, it might be less costly than any other method of ruling on antitrust claims because applying antitrust law might be most consistent with the well-counseled expectations of parties to agreements containing broad scope arbitration clauses.

Id. at 26.

function responsibly and to fulfill their contractual obligations to the parties.”⁹⁵

Moreover, there is some empirical evidence to suggest that external law is likely to inform arbitral awards. Frank and Edna Elkouri, for example, suggest that labor arbitrators have a nuanced conception of legal principles:

[M]any arbitrators do give consideration to “the law,” but the extent of adherence thereto may vary considerably from case to case depending largely upon the source, form, and status of the legal rule or principle before the arbitrator. . . . Clearly defined law will be given more consideration than unsettled and uncertain law or rules based upon controversial views as to what should be the public policy. Decisions by courts of final jurisdiction normally carry more weight than those of lower courts.⁹⁶

With this in mind, the Elkouris summarize, “It should be apparent . . . that parties preparing cases for arbitration . . . may well be advised to take into consideration pertinent laws, legal principles, and court and administrative rulings.”⁹⁷

But even accepting the assumption that arbitrators will follow legal norms in deciding statutory claims, what happens when arbitrators face legal questions that the courts have not decided? Interestingly, concern about arbitral decisionmaking in the absence of clearly governing standards was raised in a report by the Association of the Bar of the City of New York’s Special Committee on Arbitration; issued in 1925, the report appeared the year that Congress enacted the FAA and just five years after New York passed its pathbreaking arbitration statute. Chaired by Karl T. Frederick, the committee explained that, in order to avoid capricious awards, the arbitrator’s “true guide must be found in established customs, practices and standards.”⁹⁸ Recognizing that, in the absence of such guidance, arbitrators would be left to their “unconscious bias or personal whim,”⁹⁹ the committee recommended specifically that disputes arbitrated pursuant to predispute agreements be limited to cases “of a kind which are frequently recurring and which relate to

95. Allison, *supra* note 7, at 242–43. Allison further notes, however, that, if more perfect adherence to the antitrust laws is desired on particular occasions, “a court can identify and outline these laws and require the arbitrator to apply them.” *Id.* at 242.

96. FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 368 (4th ed. 1985).

97. *Id.* at 369. Intuitively, it makes sense that parties will cite any law that may be helpful to their claim. See Brunet, *supra* note 64, at 27 (“Law is a regular tool of mediation and arbitration In any ADR process, a participant possessing a clear advantage in substantive law will explain that advantage.” (footnote omitted)).

98. See *Report of the Special Committee Appointed in February, 1924, to Consider the Subject of Arbitration with Particular Reference to its Operation in New York*, in *YEARBOOK OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 267, 273 (1925).

99. *Id.* at 276.

matters of such a sort that the arbitrators can, in deciding them, draw upon a well-established and recognized body of custom and trade practice."¹⁰⁰

While concern over unconstrained arbitral decisionmaking is thus not a new phenomenon, today the issue of arbitration in the absence of guiding legal norms in particular is especially relevant. The Court's decisions expanding the scope of arbitrability have assumed that parties bringing statutory claims to arbitration retain their substantive legal rights. In language subsequently quoted by the majorities in *Shearson, Rodriguez de Quijas*, and *Gilmer*, the *Mitsubishi* Court explained that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."¹⁰¹ Indeed, this statement is in keeping with the courts' expectation that arbitrators will follow applicable legal rulings: Arbitrators' adherence to interpretive judicial decisions will ensure that parties are subject to substantially similar statutory norms, whether they pursue their claims in a judicial or an arbitral forum.

Without the guidance of judicial authority, however, while parties may not experience an arbitrator's "personal whim," as Frederick's committee feared, they are at the greatest risk of being subject to different substantive law than a court would apply.¹⁰² A party in this position lacks even the option of invoking the decision of a public judicial body to guide the arbitrator's decisionmaking. Moreover, as described in Section I.B, it is in the face of novel legal questions that the courts' substantive review, by way of the "manifest disregard" standard, is inherently incapable of checking arbitral decisionmaking. Indeed, it is hardly surprising that some practitioners have recommended against bringing novel legal claims before arbitrators.¹⁰³

100. *Id.* at 272; *see also id.* at 275-78.

101. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987).

102. Thus, while Chief Judge Harry Edwards recommends that all arbitrated public law issues should be subject to de novo judicial review, he advocates the initial arbitration only of those claims for which the governing legal principle is well defined. To allow the arbitration of unsettled or novel questions, he warns, would lead to "public law issues [being] resolved by nongovernmental bodies." Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 672 n.13 (1986). In another piece, Edwards notes that "arbitrators may be able to resolve expeditiously many routine employment discrimination claims that involve the application of settled law to particular facts." Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 931 (1983).

Along similar lines, Professors Malin and Ladenson, while arguing ultimately for de novo judicial review of arbitrated employment discrimination claims, suggest that arbitrators take a "judicially cautious approach" to the resolution of legal issues. *See Malin & Ladenson, supra* note 60, at 1233. As a means of both upholding the determination of publicly accountable bodies and maximizing uniformity in the law's application, they recommend that arbitrators follow established law and, "[w]hen extending current law, . . . [that they] do so in relatively familiar and unsurprising ways." *Id.*; *see also* Lamont E. Stallworth & Martin H. Malin, *Workforce Diversity*, DISP. RESOL. J., June 1994, at 27, 38 ("In gray areas where judges have yet to tread, arbitrators should avoid novel interpretations and instead extend the law in relatively unsurprising ways.").

103. In a recent piece in *Estate Planning*, the authors, both trusts and estates attorneys, suggest that trusts and estates arbitration may be inappropriate when there is no precedent shaping the legal issue. They

There are several reasons why arbitrators and courts are likely to approach novel claims differently. As a preliminary matter, the two institutions may well be unequally equipped to research surrounding law or legislative history, steps that may be necessary in addressing novel legal issues.¹⁰⁴ Moreover, courts must discipline their reasoning in light of the fact that they render written decisions subject to public scrutiny.¹⁰⁵ Most fundamentally, arbitrators and courts are likely to approach their decisions from very different points of view. Numerous commentators have distinguished between the public values informing judicial decisions and the narrower, single-conflict perspective more common in arbitration.¹⁰⁶ It is concern over this difference in perspective, in fact, that has led several scholars to recommend either that certain public law issues be the subject of a renewed public policy exception to arbitrability,¹⁰⁷ or that the courts be available for the *de novo* judicial review of all arbitral awards resolving public rights issues.¹⁰⁸

note that “[a]rbitration is beneficial for *both* parties if the amounts at issue are not great or the case hinges solely on factual determinations which, when made, will decide the outcome under clearly established legal theories.” Stanard T. Klinefelter & Sandra P. Gohn, *Alternative Dispute Resolution: Its Value To Estate Planners*, 22 EST. PLAN. 147, 154 (1995). The authors continue, “Arbitration appears less desirable for a party whose case rests on the application of a technical theory or where the matter is a case of first impression in the jurisdiction.” *Id.*

Along similar lines, noting the minimal opportunity to appeal an arbitral award, family law practitioner James E. Mahood recommends that “arbitration of the entire matter may not be the best option for a case that presents a novel or undecided issue of law.” James E. Mahood, *A Negotiated Settlement*, FAM. ADVOC., Fall 1994, at 46, 48.

104. The Court’s opinion in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), referred to this difference between courts and arbitrators. See quotation *supra* note 47.

105. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1175 (1978). While the federal courts are not required to issue written opinions to accompany all decisions, courts are encouraged to do so if a decision breaks new ground, either by questioning or overturning existing law or by recognizing a novel legal claim. For discussions of the criteria governing opinion publication in the federal courts, see Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909 (1986); Reynolds & Richman, *supra*.

106. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (“[A judge’s] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”); Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL’Y REV. 42, 59 (1988) (“Ordering by public justice produces decisions resting on considerations that transcend the immediate dispute and the immediate parties [whereas] [o]rdering by private disposition can involve a normative frame of reference that includes only the immediate parties.”); Malin & Ladenson, *supra* note 60, at 1229 (“Under a system in which employment arbitrators make final and binding decisions in cases involving charges of discrimination based on Title VII, there will be serious concern about whether those decisions adequately reflect the public justice values at the heart of the statute.”).

107. See, e.g., Magyar, *supra* note 7, at 654–55 (advocating nonarbitrability of civil rights claims).

108. See Edwards, *supra* note 102, at 679 (“A potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our lawmakers and may, as a result, ignore public values reflected in rules of law.”); *id.* at 682 n.48 (“In order to ensure that public law issues are not resolved in private fora, we must permit litigants who raise issues of public or constitutional law to use courts even if private ADR systems have already settled the dispute.”). Malin and Ladenson make this point in the specific context of employment disputes arbitrated pursuant to private contracts. See Malin & Ladenson, *supra* note 60, at 1237 (“To ensure that public law continues to develop in accordance with public justice values as articulated by publicly accountable judges constrained by the

On the one hand, such a difference in approach may surface in the form of an outcome completely at odds with what a public court would decide.¹⁰⁹ On the other hand, arbitration's exclusive focus on the resolution of the claim at issue may result in a compromise solution where a court would have resolved the claim more absolutely. Thus, for example, consider again the *Bobker* case, in which an arbitral panel faced what one of its members described as "a gray area" in the law. Without a written explanation for its decision, the panel awarded the plaintiff one half of the damages he requested.¹¹⁰ A court, with its eye to the development of the law and the vindication of public values, would likely have answered the legal question at issue, producing a written decision and awarding judgment to one side or the other; courts are not inclined to split the difference in the face of a novel legal question.¹¹¹ Under the procedure recommended in this Note, both parties in cases like *Bobker* would have at least the *option* to invoke the interpretation of a court on a novel legal issue. If each party decides that she would prefer an arbitral decision without guidance from the courts, she need not ask for judicial input.

principle of integrity, arbitral legal conclusions must be subject to de novo judicial or administrative review."); see also Cooper, *supra* note 64, at 241. Cooper writes:

There must be a mechanism for the redirection of issues of public policy and statutory construction back into the courts. This can be handled at the front end by removing such issues from arbitration, or at the back end by providing for judicial review of arbitration awards on such matters. Public policy issues need public resolution.

Id. (footnote omitted).

109. Professor Cooper, herself an arbitrator, asks, "If arbitrators display weaknesses in applying the law . . . they are completely inadequate to develop the law. Could an arbitrator have come up with the disparate impact theory of discrimination? With an understanding that environmental sexual harassment is sex discrimination?" Cooper, *supra* note 64, at 218. *But see* Susan A. Fitzgibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485, 503 (1990) (suggesting that labor arbitrators "have demonstrated the ability to decide cases involving external law, and even novel issues, as well as courts").

110. The district court felt that the 50% award itself constituted a manifest disregard of the law. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 636 F. Supp. 444, 447 (S.D.N.Y. 1986) ("The arbitrators' disregard of the law is underscored by the fact that although Bobker claimed he lost profits totalling \$23,000, the arbitrators, without explanation, reduced the request by exactly fifty percent (after allowing for costs and expenses).") (footnote omitted). The appeals court, however, countered that the 50% award may have indicated the arbitrators' true estimate of the damages, and noted that "the arbitrators were not required to explain their computation." 808 F.2d 930, 937 (2d Cir. 1986). In any case, it seems likely that the splitting of the award must have had some connection to the ambiguity of the governing legal principle. For a case in which arbitration served even more clearly to avoid the resolution of a novel legal issue in favor of a compromise, see John V. O'Hara, Comment, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way"?*, 136 U. PA. L. REV. 1723, 1747-51 (1988) (describing IBM-Fujitsu arbitration, in which uncharted legal terrain in copyright law was avoided in favor of arbitral compromise).

111. Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 161 (1989) ("[I]n arbitration, a compromise decision is possible while judicial decisions tend to be either win all or lose all.").

B. *Developing Precedent*

Another difficulty with resolving novel legal questions in private arbitration is the fact that this very process deprives the courts of the opportunity to resolve unsettled issues of statutory interpretation. Yet as one commentator notes, “The ambiguous statutory language that frequently results from legislative compromise remains with the understanding that the courts will supply an interpretation.”¹¹² In denying courts the opportunity to provide such interpretation, arbitration may reduce individuals’ certainty about what private activity is within the law¹¹³ and, consequently, encourage greater litigation in the future.¹¹⁴ Moreover, reliance on private tribunals deprives Congress of the ability to monitor the judicial interpretation of statutes and thereby to make any modifications in statutory language necessary to correct readings at odds with its intent. A party’s right to request the judicial resolution of a novel legal claim, when used, would have the additional benefit of mitigating these broader, societal disadvantages of arbitration.

1. *Arbitration and Precedent*

In diverting cases from the courts to fora that do not produce binding precedent and, in fact, only rarely produce written explanations for their awards, the arbitration of statutory claims has the potential to stifle the development of the law. While some contemporary scholars have made this observation,¹¹⁵ a number of commentators recognized arbitration as a threat to precedent development as early as the 1920s and 1930s.¹¹⁶ Professor Carl

112. O’Hara, *supra* note 110, at 1746.

113. Henry M. Hart, Jr., and Albert M. Sacks, for example, provide a substantial list of reasons in favor of following precedent that translates easily into an enumeration of the positive effects of the creation of precedent. Among these is the “desirability of enabling people to plan their affairs at the stage of primary private activity with the maximum attainable confidence.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 587 (tentative ed. 1958).

114. See O’Hara, *supra* note 110, at 1750.

115. See, e.g., Brunet, *supra* note 64, at 19–20 (noting, in comparing private and public dispute resolution mechanisms, that “society gains more from litigation than would be produced if litigation were left to the private market. . . . [and] litigation guides third parties” by “apply[ing] . . . vague positive law to concrete fact situations” (footnote omitted)); O’Hara, *supra* note 110, at 1745–51 (explaining benefits of creation of formal precedent and identifying arbitration’s capacity to undermine this process).

116. Even Julius Henry Cohen, the primary author of the New York Arbitration Act and the ABA’s version of the federal act—adopted by Congress with few modifications to become the FAA—acknowledged the trade-off between the use of arbitration and the development of judge-made law. In his well-known 1918 book, *Commercial Arbitration and the Law*, he attempted to defuse this concern, noting that:

From the point of view of society, in some instances it might sometimes be better to secure a determination of the particular question of constitutional or other law involved; yet this consideration has never prevailed with the Court, nor resulted in the rejection of an adjustment or a settlement of the controversy, with the consequent waiver and elimination of an interesting and perhaps important question of law.

F. Taeusch, for example, in a 1934 article characterizing the business world's view of commercial arbitration, reminded his readers of the benefits of judicial precedent. Describing the commercial sector's disdain for the creation of legal precedent governing its activities, Taeusch warned that this position ignored "that a social-economic system which, like ours, stresses property rights, becomes inevitably involved in the necessity of certainty in regard to their vindication, and that it is doubtful whether such certainty can be secured through a series of sporadic arbitrations which purposely avoid precedent."¹¹⁷ Taeusch's admonition continued with the observation that "the finality which characterizes most arrangements for arbitration settlements . . . contrasts radically with the method of judicial review and still further prevents the reflective development of business doctrine."¹¹⁸ Based on a similar concern, Philip G. Phillips, a contemporary of Taeusch's, took the position that arbitration is useful *only* when it decides issues of pure fact.¹¹⁹ Phillips argued that allowing courts to handle the legal issues would not only assure valuable standardization in the law, but would permit courts to generate more innovative, probusiness precedent.¹²⁰

The petitioner in *Gilmer v. Interstate/Johnson Lane Corp.*¹²¹ also raised the issue of precedent development in challenging the arbitrability of his ADEA claim. He argued that, because "arbitrators often will not issue written opinions," there will be "a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law."¹²² In response, the Court noted that, under the New York Stock Exchange arbitration rules at issue in *Gilmer*, arbitrators must provide a written description of the controversy and the reasons for their award.¹²³ Moreover, the Court reasoned, the law will continue to develop because most ADEA claims will not be arbitrated and will therefore reach the courts; the lack-of-precedent argument, it suggested, applies equally to settlement, which goes on without public disclosure or the creation of precedent.¹²⁴

As for the Court's first response, while the New York Stock Exchange may require written awards from its arbitrators, the reasoning of most arbitral

JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 12 (1918). While Cohen ultimately decided that the value of unimpeded arbitral authority outweighed its possible costs in terms of forgone precedent, he was at least aware of these costs.

117. Carl F. Taeusch, *Extrajudicial Settlement of Controversies: The Business Man's Opinion: Trial at Law v. Nonjudicial Settlement*, 83 U. PA. L. REV. 147, 156 (1934).

118. *Id.*

119. See Philip G. Phillips, *A Practical Method for the Determination of Business Fact*, 82 U. PA. L. REV. 230, 251 n.88 (1934).

120. *Id.* at 250-51. For another commentator supporting this proposition, see Harry S. Wollheim, *Commercial Arbitration and the Law*, 13 MARQ. L. REV. 225, 228 (1929).

121. 500 U.S. 20 (1991); see *supra* text accompanying notes 50-52.

122. See *id.* at 31 (emphasis added).

123. *Id.* at 31-32.

124. *Id.* at 32.

decisions is never put in writing. Furthermore, even written arbitral awards carry no binding legal authority, and thus do not add to the stock of controlling legal precedent. With respect to the argument that courts will continue to resolve most ADEA claims, first, more and more employers in the wake of *Gilmer* are designing contracts with their employees to require the arbitration of such claims.¹²⁵ Second, unlike the petitioner's argument in *Gilmer* that all ADEA claims should be exempt from arbitration, the recommendation proposed in this Note would only require the judicial resolution of those claims that actually raise novel questions; even if very few ADEA claims are arbitrated, it is important to allow those involving novel claims to reach the courts. Finally, it is true that settlement deprives the courts of an opportunity to resolve what may be a novel legal question. But there is still a stark distinction between settlement and the arbitration of statutory claims pursuant to a predispute agreement. Parties realize at the time of settlement that their claim is novel and nevertheless opt to resolve it informally, just as this Note's proposed procedure would allow parties to decide not to request judicial intervention into their arbitration *once a dispute has arisen*. Parties bound to arbitrate pursuant to a predispute agreement, however, commit themselves to invoking an informal dispute resolution method before they know whether their claim raises issues that the courts have not addressed.

Commentators defending the arbitration of antitrust claims in particular have also challenged the proposition that arbitration reduces the generation of precedent.¹²⁶ They have argued that the number of arbitrated antitrust claims will remain too small to cause a significant decline in precedent-generating litigation,¹²⁷ that courts, like arbitrators, often do not publish opinions;¹²⁸ and that a lack of precedent is self-correcting because any resulting ambiguity will simply inspire later litigation.¹²⁹ These responses are not persuasive, however. First, with respect to the small number of antitrust arbitrations, the minimally intrusive procedure recommended in Part V of this Note offers a way of using court intervention only when there are in fact novel questions in private arbitration. If such novel issues rarely arise outside the courts, then the procedure will rarely be invoked; this is not an argument for not having such a procedure in place. Second, while it is true that courts often do not publish their opinions, existing criteria designed to govern judicial discretion in determining what to publish emphasize the need for written opinions in cases that contribute significantly to the body of precedent by questioning or

125. Bompey & Stempel, *supra* note 5, at 22 ("Since the Supreme Court's ruling [in *Gilmer*], numerous companies . . . have implemented policies requiring their employees to submit to binding arbitration all disputes arising from their employment . . . that cannot be resolved through internal dispute resolution mechanisms.")

126. See Allison, *supra* note 7, at 241-42; Lee, *supra* note 94, at 14-18.

127. See Allison, *supra* note 7, at 241.

128. See *id.* at 242.

129. See Lee, *supra* note 94, at 18.

overturning existing law or by resolving novel questions.¹³⁰ Finally, the self-correction argument accepts that there must be additional, future litigation when a legal point is left unresolved. Again, however, the crux of the precedent argument in this section is that judicial decisions can play a role in increasing certainty about the law and, by implication, can *prevent* future litigation.

2. *Congressional Monitoring*

While the need for courts to generate precedent is important in itself, the formal, public resolution of novel issues also keeps Congress informed about the interpretation of its statutes. As a result, legislative reform is possible as a check on unintended applications of the law.¹³¹ Such a reform process is visible, for example, in the context of civil RICO legislation. On several occasions, Congress has held hearings to consider the expansive use of civil RICO to encompass activities that Congress had never intended to penalize under the statute.¹³² As Stephen S. Trott, an Assistant Attorney General, noted in speaking before the Senate Judiciary Committee in 1985, "We understand and share the concern of those who believe that, to a significant extent, private civil RICO is not being used as originally intended, and we stand willing and ready to join in the effort to see what can be done to correct this situation."¹³³ While bills have been proposed to amend civil RICO in an effort to rein in its scope, these have "either been tabled or defeated by a narrow margin."¹³⁴ Thus, although Congress has not yet elected to modify the language of the RICO statute, its awareness of federal court RICO decisions enables it to contemplate measures to correct adjudicative trends at odds with its intent. Decisions contrary to congressional intent, if they take place in arbitration, will likely go unnoticed.

130. See *supra* note 105.

131. See Malin & Ladenson, *supra* note 60, at 1237 ("Judicial mistakes are . . . more likely to be corrected legislatively because of their sweeping precedential value than are arbitral mistakes which have no stare decisis value. Indeed, the history of employment discrimination laws is replete with legislative correction of judicial mistakes.").

132. See Wendy W. Wolfe, Case Note, *Holmes v. Securities Investor Protection Corporation: A Warning to Legitimate Business*, 65 U. COLO. L. REV. 659, 680 n.164 (1994) (listing congressional hearings and reports concerning civil RICO reform, dating from 1985 to 1990).

133. *Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 94 (1985) (statement of Stephen S. Trott, Assistant Attorney General, Criminal Division, U.S. Dep't of Justice). Later in his testimony, Trott indicated explicitly that the controversy surrounding private RICO suits "has led to growing pressure for statutory changes." *Id.* at 102 (statement of Stephen S. Trott).

134. Wolfe, *supra* note 132, at 680.

3. *An Example: Antitrust*

While scholars and, more recently, Congress,¹³⁵ have acknowledged the potential dangers inherent in arbitration's inability to create precedent, particular attention has been given to the importance of precedent in certain substantive areas of the law. Commentators, for example, have noted the value of formal adjudication in creating socially valuable precedent in the context of antitrust law.

The importance of judicial precedent to the development of U.S. antitrust doctrine is understandable considering what William F. Baxter describes as the "common law nature" of this body of law.¹³⁶ Looking to the central passages in the Clayton and Sherman Acts, Baxter explains their generality:

In failing to provide more guidance, the framers of our antitrust laws [possessed an] awareness of the diversity of business conduct and . . . the knowledge that . . . detailed statutes . . . would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide this flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.¹³⁷

Thus, "[b]y adopting a common-law approach, Congress in effect delegated much of its lawmaking power to the judicial branch."¹³⁸ Moreover, the common law character of the law, Baxter argues, is as appropriate in today's antitrust arena as it was in the days of Senator Sherman and Congressman Clayton.¹³⁹ Similarly, David Klingsberg concludes a 1991 article on private antitrust suits with the following commentary:

Congressional enactment of private remedies not only has provided additional deterrence of potential violators and a means of compensation to victims, but also assures a cauldron of cases and controversies that produce a continually evolving brew of developing antitrust doctrine. Through this common law process, today's antitrust principles now seem more economically rational than those of the not-so-distant past. Although we have arrived at antitrust's centennial, we have not reached the millennium, and the continuation of the

135. See *infra* Part IV.

136. See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982). Baxter was serving as Assistant Attorney General for Antitrust when he published this article.

137. *Id.* at 663.

138. *Id.*

139. *Id.* at 669. Baxter describes "the conceptual quagmire faced by those who sought to regulate competitive business behavior at the turn of the century and the need for a common-law approach to antitrust law." *Id.* at 668-69. He adds, "[t]his need remains apparent today as the law continues to evolve." *Id.* at 669.

process, enriched by privately filed cases, is likely to provide even more refined means of assuring the competitiveness of the economy.¹⁴⁰

Perhaps recognizing the particularly important role of new suits in antitrust law, several authors, writing well before the courts began to enforce predispute arbitration agreements, warned specifically about the potentially deleterious effects of antitrust arbitration. In 1969, for example, in the aftermath of the Second Circuit's *American Safety* decision refusing to order the arbitration of a Sherman Act claim,¹⁴¹ Professor Robert Pitofsky noted arbitration's potential dangers as a means of handling antitrust disputes:¹⁴² While he emphasized the third-party effects of erroneous awards, among his criticisms was the potential for private dispute resolution to deprive the courts of valuable opportunities to generate new precedent.¹⁴³

Writing in the same year, John J. Finn speculated as to the impact on antitrust doctrine of arbitrators freely developing their own substantive standards.¹⁴⁴ While Finn's analysis differed from Pitofsky's in that he envisioned an independent and competing body of law generated by private arbitrators, his argument similarly touched on the development of precedent. Finn noted that "[a] myriad of judicial precedents have been necessary to establish standards for 'unreasonable' restraints of trade and per se violations of the antitrust laws;"¹⁴⁵ and he stressed the continuing "necessity of consistent interpretation of antitrust policy" by the courts.¹⁴⁶ He thus identified a need "to preserve the . . . judicial development of substantive antitrust law."¹⁴⁷

IV. CONGRESSIONAL MEASURES EXEMPTING NOVEL LEGAL CLAIMS FROM ARBITRATION

In 1990, motivated by the docket-control problems of administrative law judges and federal district courts, Congress passed the Administrative Dispute Resolution Act (ADRA),¹⁴⁸ explicitly encouraging federal agencies to use

140. David Klingsberg, *Balancing the Benefits and Detriments of Private Antitrust Enforcement: Detering, Antitrust Injury, Standing, and Other Proposed Solutions*, in 3 ANTITRUST IN TRANSITION 1155, 1181 (Milton Handler ed., 1991).

141. 391 F.2d 821 (2d Cir. 1968).

142. See Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072 (1969).

143. See *id.* at 1076-77 (noting that, because arbitral awards are unwritten and immune from substantive judicial review, "other businessmen in a particular industry . . . will not be put on notice as to the boundaries of permissible behavior").

144. See John J. Finn, Comment, *Private Arbitration and Antitrust Enforcement: A Conflict of Policies*, 10 B.C. INDUS. & COM. L. REV. 406 (1969).

145. *Id.* at 412.

146. *Id.* at 417.

147. *Id.*

148. Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified in scattered sections of U.S.C.).

informal procedures as an alternative to formal adjudication. The statute lapsed pursuant to a sunset provision in October 1995, and an indefinite extension of the Act is currently before Congress. Whether or not it is ultimately renewed, the ADRA is interesting in that it recognizes limits to the appropriate use of arbitration not reflected in the FAA.

Taking care to promote the consistent implementation of formal legal rules, the ADRA mandates that “[t]he arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.”¹⁴⁹ Also included in the ADRA is a list of factors to be considered by the parties to a dispute in deciding whether to go to arbitration.¹⁵⁰ The bulk of the criteria concern the public externalities of arbitration, and, as such, provide an interesting contrast with the factors permitting judicial review under the FAA.¹⁵¹ Recommended by the Administrative Conference of the United States, the first two of the ADRA’s six criteria acknowledge the public value of the precedents that formal conflict resolution generates. Specifically, “[a]n agency shall consider not using a dispute resolution proceeding if”

- (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
- (2) the matter involves . . . significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency[.]¹⁵²

Witnesses before the congressional committees responsible for drafting the ADRA made clear the purpose of these qualifiers as a means of protecting the development of precedent. The House Judiciary Committee, for example, in its report accompanying the bill to the floor, stated, “[o]f course, claims which establish precedent or involve complex issues of law may be better suited for

149. 5 U.S.C. § 579(c)(5) (1994).

150. *Id.* § 572(b).

151. 9 U.S.C. §§ 10, 11 (1994). These factors concern the rights of the parties involved in the dispute. See *supra* text accompanying notes 57–58.

152. 5 U.S.C. § 572(b)(1)–(2) (1994). Chief Judge Edwards, in a 1978 article, recommended a procedure by which the EEOC could select from its caseload discrimination claims appropriate for arbitration. Edwards’s suggested procedure similarly distinguished between settled and unsettled areas of law. See Harry T. Edwards, *Arbitration as an Alternative in Equal Employment Disputes*, *ARB. J.*, Dec. 1978, at 23. As one of the six categories of claims that he suggested should be proper subjects of adjudication, rather than arbitration, Edwards included “grievances . . . involving unsettled areas of the law.” *Id.* at 24. More recently, a similar recommendation was made, this time in the form of an amendment to Title VII that would allow the EEOC to determine which employment discrimination claims should go to arbitration. See Laura R. Hillock, Comment, *Arbitration of Title VII and Parallel State Discrimination Claims: A Proposal*, 27 *CAL. W. L. REV.* 179, 206–07 (1990). Among other criteria, Hillock recommended that the EEOC should prevent the arbitration of claims raising “novel statutory construction[s] of Title VII” or “case[s] of first impression which require[] resolution by a court.” *Id.* at 207.

full litigation.”¹⁵³ Similarly, Deputy Assistant Attorney General Stuart E. Schiffer’s 1988 submission to the House subcommittee considering the bill included the observation that “[c]ases which are expected to establish important legal precedent . . . do not lend themselves to resolution by mini-trial [a form of alternative dispute resolution].”¹⁵⁴ Along the same lines, Marshall Breger, chair of the Administrative Conference, responded to “concerns that resolving many disputes through informal means will fail to yield precedents for future jurists” by recommending that “[g]enerally [arbitrated cases] should not involve *precedential issues* or the application of fundamental *legal norms that are evolving*.”¹⁵⁵ Finally, Senator Charles Grassley raised a similar point on the Senate floor, stating, “[o]f course, even private disputes can raise public policy questions that are inappropriate for ADR. The bill carefully recognizes this, and exempts entire categories of cases from coverage, such as cases in which precedent is important”¹⁵⁶ In a sense, the ADRA is reminiscent of the recommendation put forth by Frederick’s New York City Bar Association committee some sixty-five years earlier.¹⁵⁷ Today, though confined to the context of disputes involving federal administrative agencies, Congress itself has limited arbitration to claims that do not raise novel legal questions.

The ADRA is not alone among congressional initiatives in its awareness of the particular dangers in arbitrating novel issues. In 1988, Congress enacted a statute authorizing selected federal judicial districts to introduce court-annexed arbitration. Under this process, a court can refer cases from its civil docket, reserving the parties’ right to appeal the award back to the court.¹⁵⁸ As one of the guidelines that the statute establishes, courts are required to exempt from arbitration, “*sua sponte* or on motion of a party, any case . . . in which the objectives of arbitration would not be realized . . . because the case involves complex or novel legal issues.”¹⁵⁹ Thus, as with the ADRA, Congress recognized unique problems in the arbitration of novel legal claims. The next part proposes that this same recognition motivate a change in the FAA as well.

153. H.R. REP. NO. 513, 101st Cong., 2d Sess. 11 (1990).

154. *Alternative Dispute Resolution Use by Federal Agencies: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 52 (1988) (written submission of Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, U.S. Dep’t of Justice).

155. *Id.* at 75, 77 (written submission of Marshall J. Breger, chair of the Administrative Conference of United States) (emphasis added).

156. 136 CONG. REC. S18,090 (daily ed. Oct. 24, 1990).

157. See *supra* text accompanying notes 98–100.

158. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659–62 (1988) (codified at 28 U.S.C. §§ 651–658 (1994)).

159. 28 U.S.C. § 652(c) (1994). This requirement, among others that the Act imposes, led one commentator to note that “[s]uch standards would ensure that the law continues to grow and that judicial pronouncements will not be foreclosed on important issues of public policy.” Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 31 (1990).

V. A RECOMMENDATION FOR REFORM

While the ADRA's encouragement of federal agencies to decide whether cases raise novel legal issues may work in the administrative context, and court-annexed arbitration can rely on the courts to distinguish between the novel and the legally routine, a different approach is needed when both parties are private and are appearing before a private arbitrator. An appeals process whereby a federal court reviews an arbitrator's legal reasoning, however, would likely encounter significant opposition. Courts¹⁶⁰ and commentators¹⁶¹ alike have remarked on parties' interest in receiving arbitral awards that are *final*. At the same time, the courts benefit from arbitration as a source of relief from an ever-increasing caseload.¹⁶² Allowing any party dissatisfied with an arbitral award to bring it to a federal court on the ground that it involves a novel point of law would be seen as a serious affront to these interests. Moreover, the effective implementation of such a procedure would require that arbitrators put all of their awards in writing, thereby lengthening the arbitral process and potentially eliminating much of the privacy that proponents hold out as another of arbitration's greatest virtues.¹⁶³

This Note has outlined two reasons why novel legal questions provide the most compelling subject for formal judicial resolution. This part suggests a procedural reform narrowly tailored to mitigate these particular dangers, keeping in mind the need to preserve the finality of arbitral awards and the judicial interest in lightening the courts' already overwhelming caseload.

160. The federal courts have repeatedly recognized the importance of this "finality interest" in arbitration. *See, e.g.*, *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 167 (1983) ("[T]he short limitations period for vacating the arbitral award would protect the interest in finality of the opposing party to the arbitration . . ."); *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577, 580 (9th Cir. 1982) ("When an arbitration decision has been rendered, the interest in finality of that decision is sufficiently strong to warrant clear evidence of a breach of a union's duty of fair representation before the courts should overturn the arbitration award.").

161. *See Speidel, supra* note 111, at 191-92 ("Finality is part of the package that supposedly gives arbitration an advantage over litigation. It is a core ingredient in the concept of arbitration."); *Stewart, supra* note 60, at 347-48 n.4 (listing among "virtues trumpeted" about arbitration fact that "the process provides finality, since there is virtually no right of appeal").

162. Galbraith, for example, writes, "[t]he federal courts of the United States are immensely overcrowded. Each year, more cases are filed than in the previous year, making the administration of justice progressively more difficult. The search for solutions to this problem has continually focused upon alternative dispute resolution, and, in particular, arbitration." Galbraith, *supra* note 61, at 241 (footnotes omitted); *see also* *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1197 (7th Cir. 1987) (noting "the warm judicial regard for arbitration evident in the modern cases—a warmth that in part reflects modern caseload pressures").

163. *Speidel, supra* note 111, at 161 ("Arbitration is touted as a private process where confidence is normally maintained while the opposite is true in court.").

A. *The Uniform Certification of Questions of Law Act:
A Model for Reform*

Since the Supreme Court's decision in *Erie Railroad v. Tompkins*,¹⁶⁴ the federal courts have been required to apply substantive state law to state-law claims that come before them.¹⁶⁵ While the federal bench is equipped to apply state law when the courts of that state have spoken to the legal question at issue, they are without a means to "resolve legal issues that have not been squarely decided by the highest court of the relevant jurisdiction."¹⁶⁶ When a case in federal court raises a state-law issue of first impression, that court faces a challenge in divining the relevant state doctrine.¹⁶⁷

Prior to the introduction of the certification procedure discussed below, the federal courts had established two processes for confronting novel issues of state law: abstention, whereby a federal court declines to decide the state-law question, and prediction, whereby the court attempts to anticipate what a state supreme court would do.¹⁶⁸ Abstention leads to considerable delay because parties must litigate their cases anew in the state trial courts.¹⁶⁹ While prediction avoids this delay, federal courts experience tremendous difficulty in trying to predict the outcome of an identical case hypothetically brought before the relevant state supreme court; at times, the federal court's prediction is proven incorrect by a subsequent state court holding.¹⁷⁰ As when arbitrators face novel questions of federal law, an adjudicator outside the relevant legal system is left to extrapolate from that jurisdiction's existing law.

In response to these concerns, most states have enacted the Uniform Certification of Questions of Law Act or an analogous piece of legislation.¹⁷¹ Recommended by the National Conference of Commissioners on Uniform State Laws in 1967,¹⁷² the Uniform Act permits state supreme courts to answer

164. 304 U.S. 64 (1938).

165. PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 304-05 (3d ed. 1994) (explaining that, while *Erie* itself was a diversity case, its requirement that federal courts apply substantive state law applies to other classes of cases in which federal courts hear state-law claims).

166. Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 3 (1989).

167. See Note, *The Uniform Certification of Questions of Law Act*, 55 IOWA L. REV. 465, 465 (1969).

168. Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 135 (1992).

169. John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 416 (1988).

170. See, e.g., *id.* at 415 n.11 (listing examples of cases in which state courts rejected federal interpretations of state law).

171. CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 52, at 334 n.57 (5th ed. 1994).

172. Yonover, *supra* note 166, at 16.

questions of unsettled state law certified from federal courts. Section 1 of the Uniform Certification Act provides specifically that the state supreme court:

may answer questions of law certified to it . . . when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and *as to which it appears to the certifying court there is no controlling precedent* in the decisions of the [Supreme Court] [and the intermediate appellate courts] of this state.¹⁷³

This certification procedure has met with considerable satisfaction.¹⁷⁴ While it does impose some costs, in terms of delay and expense, on the litigants, it mitigates harms that are similar to those identified in Part III with respect to novel legal claims in arbitration. As Professors Corr and Robbins note, “the long-range benefits of certification—consistency in the law and finality of state pronouncements that makes it unnecessary for future parties to litigate the same issue—will often outweigh the inconveniences imposed on the litigants involved in a particular case.”¹⁷⁵ The procedural mechanism this Note recommends is based on this model, designed to promote a communicative link between arbitrators and the courts. Unlike federal-state certification, however, in which state courts are to resolve questions that have received inconsistent state court treatment in addition to truly novel legal claims, the procedure recommended for arbitrator-court interaction would only allow for certification of questions of the latter sort.

B. *The Uniform Certification Act Applied to FAA Arbitration*

This Note proposes an amendment to the FAA to provide for a procedure, analogous to federal-state certification, whereby parties can receive a federal court’s decision on a novel point of law raised in arbitration. Under the proposed procedure, if a party to a private arbitration raises a statutory claim that she believes would constitute a novel question for the federal courts, she may ask the arbitrator to certify that question to a federal district court. It is for the arbitrator (1) to make the factual determination of whether the legal claim is dispositive of the case, given the facts as she finds them, and (2) to examine case law presented by the parties or that she herself discovers to

173. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT §1, 12 U.L.A. 21 (Supp. 1995) (alterations in original).

174. See, e.g., WRIGHT, *supra* note 171, § 52, at 334 (“The certification procedure has been regarded with quite an extraordinary enthusiasm by the commentators”); YONOVER, *supra* note 166, at 16–17 (“[T]he notion of certification is alive and well in many jurisdictions and has been frequently approved of by commentators and the Supreme Court alike.” (footnotes omitted)).

175. CORR & ROBBINS, *supra* note 169, at 430; see also ROBBINS, *supra* note 168, at 137 (noting that resolution of cases of first impression through certification procedures can decrease future litigation).

determine whether the question is novel. As for the latter decision, the arbitrator's role is to weed out claims of novelty that are mere attempts to stall the arbitration process or to avoid a body of controlling precedent that is detrimental to the certifying party. Arbitrators who believe that no federal court has addressed the claim at issue must certify it to the federal district court that would have jurisdiction over the dispute.

If the arbitrator's factual findings do not render the legal claim dispositive, or if the arbitrator determines that she has sufficient guidance from the courts on the question at issue, there should be no certification.¹⁷⁶ If, however, the arbitrator finds that the legal question is both dispositive and novel, she would be required to submit it to the federal district court with an adequate factual record to allow for a judicial response. As with the certification process currently in use between federal courts and state supreme courts, once a question is certified, the receiving tribunal would be permitted to request additional factual information from the certifying body if necessary to answer the stated question. The federal district court would also make an independent determination as to whether the claim presents a novel legal question. Again, the relevant determination would be whether the question were novel for the federal judiciary generally: The procedure is not to serve as an opportunity to add precedent to one side of an existing dispute within or among federal circuits. Indeed, such a use would run counter to both of the arguments against the private resolution of novel legal questions discussed in Part III: (1) Even if courts have decided an issue inconsistently, the arbitrator would have some judicial guidance on a question of statutory law; and (2) the addition of precedent in an area already addressed by other federal courts might muddle, rather than clarify, legal doctrine.

If the court determines that the issue is not novel, it should, like the state supreme courts under the Uniform Certification Act, return it without a response.¹⁷⁷ If, however, the court decides to reach the merits of the certified question, the parties would be asked to present arguments on the issue, and the court's decision would be subject to appeal through the normal process.

The court's ultimate decision on the question of law must be binding on the arbitrator;¹⁷⁸ the arbitrator would be required to provide a (brief) written explanation of her decision, including an explicit account of the way in which the court's holding figured into the award. Arbitrators would continue to receive the degree of deference they currently enjoy with respect to their

176. Yonover, *supra* note 166, at 20 (describing Seventh Circuit refusals to certify questions, despite party's request, because "there was sufficient precedent" on the issue or the "state law was not *so* unsettled as to justify the use of certification").

177. *See, e.g.,* *Western Helicopter Servs. v. Rogerson Aircraft Corp.*, 811 P.2d 627 (Or. 1991) (refusing to answer certified question because it represented settled point of law).

178. This is essential to satisfy Article III's case or controversy requirement. *See* U.S. CONST. art III, § 2.

awards, as long as they incorporate the response to the certified question as binding on their decision.

The notion of a certification mechanism between arbitrators and courts is not unprecedented. As shown in Part II, early initiatives in this country, building on the English model, included certification procedures, different in that they aimed to capture any question of law, but structurally similar to what this Note proposes. Indeed, this proposal would require a return to such a certification procedure, this time at the federal level, and with the significant modification that only novel legal questions would receive a judicial response.

CONCLUSION

This Note does not mean to suggest that arbitration is appropriate in all cases involving statutory claims. Congress may determine that certain causes of action, such as those based on Title VII law,¹⁷⁹ should simply not go to arbitration. The notion of conferring federal jurisdiction based on the newness of a legal claim is meant, rather, as a modest recommendation tailored to meet what is an especially troublesome aspect of the arbitration of statutory claims. Particularly in light of recent Supreme Court decisions assuming a degree of legal expertise on the part of arbitrators, it is important that there be a means of handling issues that even an expert would have difficulty resolving: issues that the courts themselves have not yet addressed. Moreover, such a procedure would ensure that, no matter how large the number of arbitrated statutory claims becomes, novel questions will continue to reach the courts and facilitate the law's development.

179. In 1994, members of both houses of Congress introduced legislation to prevent the arbitration of various employment discrimination claims, including causes of action arising under Title VII. Waks et al., *supra* note 5, at 446. As of yet, there has been no significant action on these proposals.

