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JUDICIAL MORPHALLAXIS: MANDATORY ARBITRATION AND STATUTORY RIGHTS

Michael A. Landrum[†]

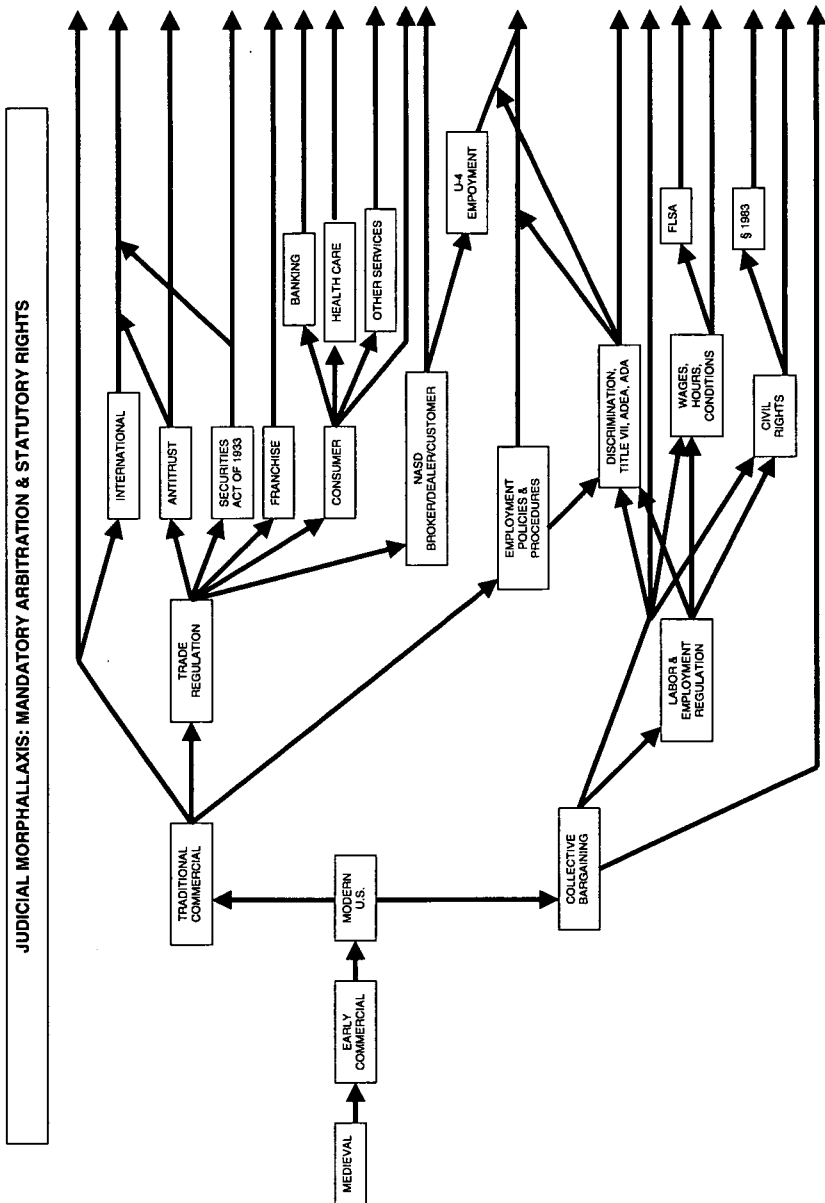
Dean A. Trongard^{††}

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I. INTRODUCTION

Judicial efforts to reconcile the advantages of arbitration with the protection of disputing parties' legal rights have pursued a meandering, if not tortuous, path. The courts' labors in this field resemble the biological process known as "morphallaxis."¹

This article discusses judicial morphallaxis in the sense that the entire field of arbitration has been organized and reorganized with limited consistency or concern for future ramifications or precedent. Each area of arbitration has pursued its own unique meandering path towards its current state of being.² This article examines the past, present, and future direction of arbitration, in addition to proposing a united and uniform code of arbitration categorized into various types.

There have been challenges to the policy and practice of private adjudication from the earliest days of the English courts' disapproval of private arbitration as "ousting" them of jurisdiction, to the passage of the Federal Arbitration Act³ and state legislative variants of the Uniform Arbitration Act.⁴ Examining arbitration

1. The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1175 (3d ed. 1992) (defining "morphallaxis" as "[t]he regeneration of a body part by means of structural or cellular reorganization with only limited production of new cells, observed primarily in invertebrate organisms, such as certain lobsters.") In comparison with the biological metaphor, each new arbitration "rule" or "test" can be viewed as a sort of legal "mutant." One definition of a "mutant" is "[a]n individual, an organism, or a new genetic character arising or resulting from mutation." *Id.* at 1192. "Mutation" is also defined as: "1. The act or process of being altered or changed. 2. An alteration or change, as in nature, form, or quality. 3. *Genetics*. A sudden structural change within a gene or chromosome of an organism resulting in the creation of a new character or trait not found in the parental type." *Id.*

2. See *Agar v. McKlew*, 57 Eng. Rep. 405, 407 (1825) (holding specific performance will not be employed to support an arbitration clause); see also Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 271-75 (1990) (discussing the history of judicial hostility towards arbitration).

3. In 1925, the Federal Arbitration Act (hereinafter "FAA") was established out of a judicial environment that did not appreciate arbitration. The purpose of the FAA was "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (citing H. R. REP. NO. 96, 68th Cong., 1st Sess., (1924)). In *Dean Witter Reynolds, Inc.*, the United States Supreme Court stated Congress passed the FAA "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate." *Id.* at 219-20.

4. Currently, thirty-four states and the District of Columbia have adopted arbitration statutes based on the Uniform Arbitration Act, (hereinafter "UAA").

from this array of perspectives, courts have struggled, to no great avail, to create a sort of 'Grand Unified Theory of the Law of Arbitration.'⁵ Differences in the respective adjudicative mechanisms have forced arbitration principles back into the courts for reevaluation. Courts have examined whether an agreement to arbitrate was a product of a "knowing waiver" of a party's right to proceed in court.⁶ They have also considered the enforceability of agreements to arbitrate as "contracts of adhesion,"⁷ and scrutinized the fun-

Jurisdictions that have adopted arbitration statutes based on the UAA include Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wyoming. Section 1 of the U.A.A. establishes the validity of arbitration agreements by stating:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

UNIF. ARBITRATION ACT § 1, 7 U.L.A. 6-7 (1997).

5. By a "Grand Unified Theory of the Law of Arbitration," we mean a coherent body of principles that are universally applicable regardless of the subject matter of the underlying dispute. See Sternlight, *infra* note 12.

6. The United States Supreme Court indicated that an employee could not forfeit substantive rights under Title VII absent a voluntary and "knowing waiver." *Alexander v. Gardner - Denver Co.*, 415 U.S. 36, 51-52 (1974). Less clear, however, is whether the right to have federal claims determined judicially rather than in an arbitration proceeding qualifies for this added protection. Compare *Patterson v. Tenet Healthcare, Inc.* 113 F.3d 832, 834 (8th Cir. 1997) (applying ordinary contract principles in determining whether employee agreed to submit Title VII claims to arbitration), with *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104, 1105-06 (9th Cir. 1997) (stating "a Title VII plaintiff may only be forced to forgo her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.") Although the Supreme Court has not specifically reached this issue, it has, in dicta, stated that in agreeing to arbitrate a federal 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." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) On the other hand, "by being forced into binding arbitration [employees] would be surrendering their right to trial by jury—a right that civil rights plaintiffs (or their lawyers) fought hard for and finally obtained in the 1991 amendments to Title VII." *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997).

7. Claims of "contracts of adhesion" typically "are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties." *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643, 647 (N.Y. 1989).

Agreements to arbitrate have
been held to be enforceable if [they have] been openly and fairly en-

damental fairness of particular processes.⁸ Congress has considered whether it is against public policy for parties to contract away the right to have certain disputes determined by a court.⁹ Further, commentators have ruminated about the standards arbitrators apply in making decisions.¹⁰ Courts have also ruled upon issues of federalism while harmonizing decisions of federal arbitrators with

tered into. In determining whether plaintiff in this case entered into such agreement, the principles governing enforcement of contracts of adhesion must be considered. Adhesion contracts refer to a standardized contract form offered to consumers of goods and services essentially on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain, and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing to the form of the contract

Miner v. Walden, 422 N.Y.S. 335, 337 (1979).

8. It is true that federal courts have never limited their scope of review [of an arbitration award] to a strict reading of [9 U.S.C. § 10].” *Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012 (10th Cir. 1994) (quoting *Jenkins v. Prudential Bache Securities Inc.*, 847 F.2d 631, 633 (10th Cir. 1988)). Due process in arbitration means satisfying “minimal requirements of fairness.” *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964).

9. In 1932, Congress enacted the Norris-LaGuardia Act, 29 U.S.C. § 101-15 (1932). The Norris-LaGuardia Act foreclosed the individual from “contracting away rights” that are important. *Id.* § 102.

10. Many people feel that if the arbitration process arises from a consensual contractual agreement that is entered into by two or more parties who have explicitly expressed their willingness to be bound by the arbitrator’s decision, then the process the arbitrator undertakes to arrive at his or her decision should not matter. David A. Lipton, *Should Arbitrators Follow the Law?*, Vol. V., No. 6 SEC. ARB. COMMENTATOR, Mar. 1993, at 2. Realistically, arbitrator’s decisions likely include the utilization of the arbitrator’s commercial wisdom and likely do not include the application of “law.” *See id.*

The practice of commercial arbitration in the United States is indeed that the arbitrator has the freedom of determining the disputed questions according to his sense of the justice of the case. Unless parties expressly or impliedly wish the arbitrator to determine the question by application of a specific law, the arbitrator appears free to resolve the dispute on the basis of his just and fair appreciation. GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 25:01, at 391 (rev’d ed. 1990).

In 1961, Professor Soia Mentschikoff conducted a study that revealed, at that time, ninety percent of the arbitrators polled “believed that they were free to ignore these rules [of substantive law] whenever they thought that more just decisions would be reached by so doing.” Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961). “It is well established that arbitrators are not strictly bound by traditional procedural and evidentiary rules governing judicial actions.” John F.X. Peloso, *A Discussion of Whether Arbitrators Have a Duty to Apply The Law*, 949 P.L.I. CORP. July-Aug. 1996, at 61, 64. “The New York Stock Exchange, American Stock Exchange and the National Association of Securities Dealers each has a specific rule to this effect.” *Id.*

state proceedings.¹¹ The journey of the law in this area is disjointed and confusing. Rather than resembling a coherent evolution, the law of arbitration in this area embodies the definition of morphallaxis.

Notwithstanding this quest, recent developments in the arbitration of disputes between individual employees and their employers, and between the providers of consumer goods and services and their customers, seem to suggest that the courts are coming to the end of their analytical ropes in the search for a 'Grand Unified Theory.'¹² These decisions have put into sharp relief the need for a body of arbitration law distinguished by and specific to the *subject matter* of the dispute. Unless a logical and coherent approach is adopted, even more mutated standards of arbitration agreement enforcement and judicial review of awards will evolve. This effect will multiply both the complexity and incoherence of the current standards. The result will essentially transform arbitration in many contexts from a final and binding process into a breed of private litigation with quasi-appellate features.

This article reviews the conflicting and competing considerations with which the courts have struggled. It suggests an approach to arbitration which strikes a balance between competing and conflicting considerations without eviscerating arbitration of its historical benefits. While this section discusses the scope of the article and provides an outline of attempts to unravel and understand the morphallaxis of arbitration, Section II discusses the current state of arbitration, which views the process from the historical perspective, and then discusses the modern genre of arbitration and how statutory and case law affect the arbitration process. Section III addresses the evolution of judicial tests for arbitration agreements and their enforceability, and award review. Section IV touches upon the consumer and non-collective bargaining agreements of employment disputes. There are several intersections and collisions in this area. As a result, Section IV attempts to illuminate some of the confusion and the meandering effect of the current

11. "We do not believe that a contracting party or a state court may act in any way to undercut [notions of federalism and comity], where as here a federal court order compelling arbitration has been issued." *Specialty Bakeries, Inc., v. Robhal, Inc.*, 961 F. Supp. 822 (E.D. Pa. 1997).

12. See generally Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637-44 (discussing recent developments in the courts and Congress that suggest support for arbitration).

arbitration path. Finally, Section V provides a conclusion to the meandering chaos and suggests a possible solution to understand and categorize the current "morphallaxis" of arbitration.

II. THE ORIGIN OF THE SPECIES: GENESIS OF THE CURRENT STATE OF THE LAW

A. *The Historical Order*

1. *Ancient Concepts of Limitation*

Arbitration has been called "the oldest known method of settlement of disputes. . . ."¹³ Even in the earliest of tribal times, arbitration was utilized by decision makers who needed little in the form of pleadings or discovery.¹⁴ These decision makers made their decisions based on little to no information of the specific facts of the case.¹⁵ Accordingly, these decisions were virtually impossible to reverse.¹⁶

Tribal arbitration awards were based on the principles of fairness, which the Romans called "aequitas."¹⁷ Fairness was critical, because an obviously unfair and biased decision within the small community could quickly lead to violence and the possible overthrow of the decision maker.¹⁸

But throughout the ancient history of arbitration, circumstances have existed in which an award might be set aside. The medieval French jurist, Philippe de Beaumanoir records the following example:

[§]1296. A bourgeois committed an offense against an-

13. *McAmis v. Panhandle E. Pipe Line Co.*, 273 S.W.2d 789, 794 (Kan. Ct. App. 1954) (holding "where grievance, submitted for arbitration under bargaining agreement, charged that employee had been unjustly discharged for reasons not justified by bargaining agreement, award of arbitrators based on evidence relating to those matters within their jurisdiction was binding").

14. See James E. Beckley, *Equity and Arbitration*, 949 P.L.I. CORP. July-Aug. 1996, at 31, 35.

15. See *id.*

16. See *id.*

17. See *id.* The Romans derived the meaning of the "aequitas" term from the Greek term "EpsilonPilota EpsilonKappaAlphaIotaAlpha," which meant reasonableness and moderation in the exercise of one's rights and the disposition to avoid insisting on them too strenuously." *Id.* (quoting 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 262 (1971)).

18. See *id.*

other by attacking him in such a way that he killed his horse under him, and beat him, without killing or injuring him, because of a dispute that had arisen among their relatives [*amis*]. And after doing this, he repented and tried to arrange a peace . . . and the peace was made on condition that the offender would be penalized according to the report and the order of three of the relatives of the person assaulted, and they were named. And the arbitrators accepted by the assaulter did not take any notice of the form of the offense, and did not make the report in conformity with law or pity, but were so outrageous as to make their report and issue an order that the assaulter would have to go to Notre Dame of Boulogne, barefooted, and would set out the day after the report was made; and when he came home, he could stay only eight days, and on the ninth must set out for Santiago de Compostella, and when he came home he would leave on the ninth day to go on foot to St. Gilles in Provence; and when he came home, on the fifteenth day he would leave for overseas, and must stay away three years, and bring back valid writings to show he had stayed there for three years. And along with this he was to give the person he assaulted three hundred pounds, and swear on the saints that if the assaulted man ever needed his help, he would help him if requested to do so as readily as he would his own first cousin. And when the person against whom this order was issued heard this, he said he would never observe such a report and order, because it was exaggerated for such a small offense. And the person on whose behalf the order was pronounced sued the sureties named by the assaulter to guarantee his observance of the report of the three arbitrators. And the person naming the sureties, in order to release them, said that he was not bound by such an outrageous order, for if he agreed to their arbitration of his order, it was in good faith, in the belief they would give an order in good faith and had proceeded like persons full of cruelty and bearing a grudge [*haineus*], which two things should be absent from arbitrators and those issuing orders. And the other party answered saying that he must observe their report, because he had obligated himself to do so and given sureties. And they requested a judgment on whether such an order had to be observed.

[§]1297. It was judged that the order would not be enforced, and that what the arbitrators had said would be

invalid because they had gone outrageously beyond moderation. And the dispute was reduced by an estimate to an honest judgment, that is to say that the person committing the assault paid a fine to the victim and paid his damages for killing his horse; and he paid a fine to the lord of sixty pounds, and a guaranteed peace was made between the parties. And by this judgment you can see that too-outrageous orders are not to be observed, nor are orders from arbitrators when they depart from what is contained in the protocol, such as if they give a report on what they were not charged with, or on more than they were charged with.¹⁹

2. *Post-Colonial America*

By the beginning of the nineteenth century, arbitration was well-established in American common law.²⁰ Arbitration awards were enforceable at law,²¹ but the courts did not specifically enforce voluntary agreements to arbitrate future disputes until the twentieth century.²² The non-breaching party's remedy was limited to damages.²³

During the late 1800s there was an increased interest in expanding arbitration.²⁴ A demand for commercial arbitration began to emerge due to a "court crisis" caused by cumbersome judicial procedures, court congestion, and the increasing cost of litigation.²⁵ Advocates for commercial arbitration saw the process as a

19. THE COUTOUMES DE BEAUVISIS OF PHILIPPE DE BEAUMANOIR 467-68 (F.R.P. Akehurst tran., Univ. of Penn. Press 1992).

20. See Mette H. Kurth, *An Unstoppable Mandate And An Immovable Policy: The Arbitration Act And The Bankruptcy Code Collide*, 43 UCLA L. REV. 999, 1003 (1996).

21. See IAN R. MACNEIL, et al., FEDERAL ARBITRATION LAW § 4.2.2. (1992).

22. See Stempel, *supra* note 2, at 273-74.

23. See MACNEIL, *supra* note 21, § 4.2.2. See also *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120-23 (1924). The difficulty was that damages were often considered an illusory remedy for breach of an arbitration agreement. See Kurth, *supra* note 20, at 1004. See also *Munson v. Straits of Dover S.S. Co.*, 102 F. 926, 928 (2d Cir. 1900). Parties had agreed to arbitrate a dispute which instead was litigated when the "claimant" breached the agreement to arbitrate. The party who would have been the "respondent" in the arbitration incurred attorneys fees and costs defending the lawsuit, and sought to recover same as damages for the breach. The court awarded only nominal damages, commenting that the judicial process is "theoretically, at least, the safest and best devised by the wisdom and experience of mankind." See *id.*

24. See Kurth, *supra* note 20, at 1004.

25. CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 17-18 (1985).

practical solution to the cost and delay of litigation.²⁶

B. The Modern Genera: Species of Arbitral Constraints and their Varieties

1. Legislative

The enactment of a 1920 New York statute initiated the trend toward the legal enforceability of agreements to arbitrate and the codification of limited grounds for judicial review of arbitration awards.²⁷ In 1925, Congress enacted the Federal Arbitration Act (FAA),²⁸ modeled after the New York statute. Section 2 of the Act provides:

A 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁹

The opportunities for vacating an award are limited.³⁰ This trend became irreversible in 1955 when the National Conference of the Commissioners on Uniform State Laws adopted and in 1956

26. *See id.* at 36 n.2.

27. 192 N.Y. Laws 275 (1920).

28. 9 U.S.C. §§ 1-14 (1994).

29. 9 U.S.C. §2 (1994).

30. With respect to vacating an award, Section 10 limits such actions as follows:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators or either of them. . . .

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

amended the Uniform Arbitration Act (UAA).³¹ Indeed, the legacy of the old New York statute is apparent in Section 1 of the UAA which reads:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].³²

Section 12 of the UAA authorizes vacatur of arbitration awards under narrow circumstances substantially similar to those of the FAA.³³ The adoption of some form of the UAA by most states has ended centuries of judicial hostility towards arbitration.³⁴

2. Case Law: Two Similar, Yet Different Strains

a. Commercial Arbitration

The case law regarding the enforceability of agreements to ar-

31. UNIF. ARBITRATION ACT, 7 U.L.A. 1 (1997).

32. *Id.* § 1.

33. *Id.* § 12.

- (a) Upon application of a party, the court shall vacate an award where:
- (1) The award was procured by corruption, fraud or other undue means;
 - (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
 - (3) The arbitrators exceeded their powers;
 - (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 5, as to prejudice substantially the right of a party; or
 - (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Id.

34. *But see* MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 3.02 (1996) (noting that although the courts of nearly all states uphold agreements to arbitrate *existing* disputes, a small number of jurisdictions still refuse to enforce agreements to arbitrate *future* disputes).

bitrate and the judicial review of arbitration awards has developed along two distinct paths. The first is “commercial” arbitration; voluntary agreements between business people who seek a substitute for court litigation, the benefits of efficiency, lower transaction costs, decision-maker expertise, and to some extent, consideration of industry customs and practices. These benefits are sought either in addition to, and in lieu of, the law as a paradigm for decision-making.³⁵ Commercial arbitration was the impetus for and the originally intended subject of both the FAA and the UAA. The evolution of judicial restraints on commercial arbitrators is the focus of Section III.

b. Labor Arbitration

Arbitration law’s second distinct path flows out of its key role in labor-management relations and is referred to in this article as “labor arbitration.” Limited judicial review is a legal characteristic that both commercial and labor arbitration awards share. However, in an effort to create a coherent, universally applicable set of legal principles for arbitration law, judicial analysis generally blurs the essential qualitative differences between the two. As the *quid pro quo* for the no-strike provision of a collective bargaining agreement, arbitration in this field developed, not as a substitute for litigation, but as a substitute for industrial strife.³⁶ Commercial arbitration agreements merely provide a fail-safe mechanism—like the courts—for the resolution of potential disputes which may or may not arise *ad hoc* out of a discrete transaction. On the other hand, labor arbitration is an ongoing institution of diplomacy and peace-keeping, designed and implemented to develop, evolve, and monitor norms of interaction between the company and the union.

It is important to note the fundamentally different reasons labor arbitration is accorded a form of great judicial deference similar to its commercial cousin. Unlike their counterparts in the

35. See *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (noting “[t]he benefits of efficiency can never be purchased at the cost of fairness.”); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-14 (1972) (stating that many uncertainties are eliminated when parties can agree on an acceptable forum).

36. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957). In *Lincoln Mills*, the Supreme Court found that the congressional intent was to promote the collective bargaining process while trying to avoid the more radical remedy of strikes. See *id.* at 453. The Court also held that the agreement to arbitrate grievance disputes is the “quid pro quo” for a no-strike clause in a collective bargaining agreement. See *id.* at 455. Additionally, the Court found federal policy favors arbitration as a method of preserving industrial peace. See *id.*

commercial field, labor arbitrators have always accompanied their awards with detailed written opinions.³⁷ But these opinions are not a privatized substitute for a judge's findings of fact and conclusions of law. Rather, they are an expression of neutral interpretation of the terms and provisions of a collective bargaining agreement—a compact more like a treaty between nations than a commercial contract's establishment of transactional rights and remedies. The company and the union have selected the arbitrator as their joint "alter ego"³⁸ to provide a neutral interpretation of their own negotiated rules of engagement.³⁹ The arbitrator is *expected* to take into account how his or her interpretations and rulings will affect the ongoing labor-management relationship by helping to develop the "common law of the shop, not of the land."⁴⁰ A labor arbitration award will withstand judicial scrutiny if it merely draws its essence from the collective bargaining agreement.⁴¹

37. See Note, *Compulsory Arbitration in the Unionized Workplace: Reconciling Gilmer, Gardner-Denver and the Americans With Disabilities Act*, 37 B.C. L. REV. 479, 504 & n.222 (1996) (citing an "[i]nterview with Joan G. Dolan, Arbitrator and Professor of Arbitration, at Boston College Law School, Newton, Mass. (Apr. 18, 1995)") (stating that "because labor arbitrators issue written opinions detailing the reasoning behind their awards, labor arbitration awards actually would have more value in the development of the law than would commercial arbitration awards").

38. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) (stating "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept"). *But see* ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1460 (10th Cir. 1995) (holding an arbitrator may not use the alter ego principle to compel nonparties to arbitrate because only the court may compel a party to arbitrate).

39. See *United Paperworkers Int'l Union*, 484 U.S. at 38.

40. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-83 (1960)).

41. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In this case, a group of employees were fired for walking off the job in protest of the discharge of another employee. See *id.* at 595. The collective bargaining agreement between the union and the employer stated that any disagreements "as to the meaning and application" of the contract should be determined by final, binding arbitration. *Id.* at 594. The arbitrator reinstated the workers after a ten day suspension. See *id.* at 595. The employer, however, failed to comply with the order. See *id.* The Supreme Court, reversing the Fourth Circuit Court of Appeals, held that "[t]he refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *Id.* at 596. The union brought a motion before the district court to enforce the award and the court directed the employer to comply with the arbitration decision. The court of appeals reversed the district court stating since the collective bargaining agreement expired before the award was issued, the reinstatement and the award of back pay could not be enforced. See *id.* Addi-

Notwithstanding respectable judicial and scholarly efforts to integrate lessons from labor arbitration into the “Grand Unified Theory,” the fundamental differences between labor and commercial arbitration discussed above render such efforts at best inapt and at worst as contributors to the morphallaxis. Accordingly, for purposes of this article, standards for judicial review of labor arbitration awards *vis à vis* statutory rights will be considered in Section III.

Another inquiry used by the courts in determining the reviewability of a labor arbitration award is whether the provision of the collective bargaining agreement that is the focus of the award is “susceptible of” the interpretation given by the arbitrator.⁴² The Supreme Court’s reasoning for this view is not that it is simply part and parcel of forum selection, as with commercial arbitration, but exists because of the qualitative nature of the labor arbitration process and its contribution to refining the ongoing relationship between the company and the union.⁴³ Labor arbitration is only an incidental process for resolving individual grievances: it is primarily an institution for the practice of diplomacy between constituencies whose continuing relationships are an important part of national

tionally, the parties have agreed to the arbitrator’s “informed judgment” regarding the “knowledge of the custom and practices of a particular factory, or of a particular industry.” *Id.* at 597. Specifically, the court stated that “an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own hand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.” *Id.*

42. *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.* 363 U.S. 574, 582-83 (1960)); *see also* the cases commonly referred to as the *Steelworkers Trilogy*: *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The *Steelworkers Trilogy* emphasized the importance of arbitration to resolve labor-management disputes); *Excel Corp. v. United Food and Com. Workers Int’l Union, Local 431*, 102 F.3d 1464, 1465-68 (8th Cir. 1996) (vacating a labor arbitration award as violative of “clear and unambiguous” contract language permitting the termination of employees unable to return to work after one year of medical leave, notwithstanding union’s argument that the provision should be read as excluding those absences that were due to work-related injuries).

43. *See AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986).

industrial policy.⁴⁴

Accordingly, efforts to analogize to and borrow from both bodies of law to formulate approaches to the regulation of mandatory arbitration of employment or consumer disputes have resulted in a metamorphic outcome that continues to mutate with each subsequent judicial effort.⁴⁵

III. ALTERATION BY MUTATION: THE EVOLUTION OF JUDICIAL TESTS FOR ARBITRATION AGREEMENT ENFORCEABILITY AND AWARD REVIEW

A. "Statutory Rights" Analysis

When statutory claims are involved there is a public interest in the manner in which the statutory law is interpreted and applied.⁴⁶ That interest is reflected in the evolution of the Supreme Court's acceptance of agreements to arbitrate statutory-based claims.

1. Trade Regulation Disputes: Specimens for Early Experimentation

In securities law, both Section 14 of the 1933 Securities Act⁴⁷ and Section 29 of the 1934 Securities Exchange Act⁴⁸ prohibit contractual agreements which serve to waive substantive rights provided to investors under these statutes.⁴⁹ A reasonable interpretation of these provisions might well dictate that arbitrators need to comply with the law when rendering awards pursuant to contractual agreements to arbitrate.⁵⁰

44. *See id.*

45. Interestingly, notwithstanding the principles just discussed, labor arbitration recently has once again become a focal point for dealing with the current "collisions and intersections" of analytical and decisional paradigms. *See* discussion *infra* notes 280-337 and accompanying text.

46. *See, e.g.,* RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* (1997). Professor Richard Bales argues courts will continue the current trend of enforcing arbitration agreements that are fundamentally fair to employees, but refuse to enforce agreements that are unfair to the employees.

47. 15 U.S.C. § 77aaaa (1994) (Contrary stipulations void), "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void."

48. 15 U.S.C. § 78cc (a) (1994) (Waiver provisions).

49. David A. Lipton, *Should Arbitrators Follow the Law?*, 5 *SEC. ARB. COMMENTATOR*, Mar. 1993, at 2, 3.

50. *See id.*

In *Wilko v. Swan*,⁵¹ the United States Supreme Court considered the question of whether an investor could litigate against a brokerage firm a misrepresentation claim arising out of the Securities Act of 1933 and Rule 10b-6 of the Securities and Exchange Commission, notwithstanding an arbitration provision in the investor-broker agreement.⁵² Concerned that arbitrators must make determinations “without judicial instruction on the law,” that an award “may be made without explanation of their reasons, and without a complete record of their proceedings,” the *Wilko* court refused to enforce the agreement.⁵³ The Court concluded that “the protective provisions of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness,” and held that the statute should be read as preventing a “waiver of judicial trial and review.”⁵⁴

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁵⁵ represented the first significant boost in the Court’s elevation of the FAA to a position of unwarranted stature.⁵⁶ The broad issue presented was an updated version of the subject matter dealt with by the court some thirty-two years earlier in *Wilko*: Whether the FAA required the enforcement of an agreement to arbitrate a dispute involving a federal “statutory right.”⁵⁷

Mitsubishi upheld an agreement to arbitrate antitrust claims arising under the Sherman Act and implicitly overruled *Wilko*.⁵⁸ Writing for the majority, Justice Blackmun quoted approvingly from the Supreme Court’s opinion in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*:⁵⁹

[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable is-

51. 346 U.S. 427 (1953).

51. *See id.* at 428.

53. *Id.* at 436.

54. *Id.* at 437.

55. 473 U.S. 614, 615 (1985).

56. *See Sternlight*, *supra* note 12, at 661-62 (stating the court may “reject proposed statutory exemptions to arbitration”).

57. *See Mitsubishi*, 473 U.S. at 616.

58. *See id.* at 640. A few years later, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Supreme Court took the final step to overrule *Wilko*. The majority rejected *Wilko* because of its judicial hostility to arbitration.

59. 460 U.S. 1, 24-25 (1983).

sues should be resolved in *favor* of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.⁶⁰

Justice Blackmun further instructed:

Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability. There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claim founded on statutory rights.⁶¹

However, there are four significant aspects of the Court's decision in *Mitsubishi* which could have prevented the later uncontrolled morphing. First, *Mitsubishi's* agreement dealt with an international transaction and involved the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁶² At various places in the opinion the Court made pointed references to the "international character" of the litigants' "undertaking," and noted that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement. . . ."⁶³ The international character of the transaction was enough to justify enforcement of the agreement to arbitrate.⁶⁴ The lengthy discourse on the general arbitrability of disputes arising from "statutory claims" served only to create a rut in the mud of legal reasoning which the Court has continued to track in other, totally different "statutory claim" cases. Although in *Scherk v. Alberto-Culver Co.*⁶⁵ the Supreme Court had an opportunity to directly confront the issue of arbitrability of a right created by a related statute,⁶⁶ it resolved the question of arbitrability by resorting to the

60. *Mitsubishi*, 473 U.S. at 626 (quoting *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25 (emphasis added)).

61. *Id.*

62. See *Mitsubishi*, 473 U.S. at 616. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards pertained to claims arising under the Sherman Act and the claims encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction. 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970).

63. *Mitsubishi*, 473 U.S. at 629.

64. See *id.*

65. 417 U.S. 506 (1974).

66. The related statute was the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj (1994).

same distinction articulated in *Mitsubishi* - the international character of the transaction involved.⁶⁷

The second important element in *Mitsubishi* was the Court's own caveat about an overly-broad reading of the opinion:

That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the [FAA] that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some *other* statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.⁶⁸

This insightful observation has apparently escaped much judicial inquiry in later cases involving the employment and consumer disputes which have precipitated the need for the approach advocated in Section V this article.

The third important comment is Justice Blackmun's cautionary admonition that:

Of course, the courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or *overwhelming economic power* that would provide grounds "for the revocation of any contract." But, *absent such compelling considerations*, the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.⁶⁹

The aimless wandering exhibited by the circuit courts of appeal and the Supreme Court in subsequent employment and consumer cases could have been avoided by proper application of this observation.⁷⁰

The fourth and final significant comment arose out of the *Mitsubishi* Court's endorsement of the First Circuit's two-step analysis. Following the *Mitsubishi* Court's approach, statutory issues were al-

67. See *Scherk*, 417 U.S. at 524.

68. *Mitsubishi*, 473 U.S. at 627 (citing *Wilko v. Swan*, 346 U.S. at 434-35 (1953)) (emphasis added); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 224-25 (1985) (White, J., concurring)).

69. *Mitsubishi*, 473 U.S. at 627 (emphasis added).

70. See Section IV, *infra*.

ways within the scope of the parties' arbitration agreement. It then went on to consider whether "legal constraints external to the parties' agreement" foreclosed the arbitration of those claims.⁷¹ There is no good reason why this second part of the inquiry inexplicably went into remission in dealing with numerous later fact situations where such "constraints" were arguably present. Although the *Mitsubishi* Court ultimately relied on "concerns of international comity"⁷² as the essential reason the disputed arbitration must go forward, it clearly recognized the appropriateness of a different conclusion in other circumstances.⁷³

2. Later Cases / Early Mutations

The Supreme Court's next significant "statutory claims" mutation also occurred in the trade regulation/securities industry context. However, whereas the dispute in *Mitsubishi* arose out of an international corporate transaction, the court would now revisit virtually the same issue presented in *Wilko*—disputes between broker/dealers and their investing customers.⁷⁴ In *Shearson /American Express, Inc. v. McMahon*,⁷⁵ the statutory rights involved flowed from: (1) The Securities Act of 1933, and (2) Rule 10b-5.⁷⁶ Both rights impose liability for making misleading or false statements in connection with selling securities. The *McMahon* decision upheld agreements mandating the arbitration of such claims by customers against their brokers. Aside from its heavy reliance on *Mitsubishi's* implicit overruling of *Wilko*,⁷⁷ the *McMahon* Court expressly noted that the SEC had oversight authority to ensure that the arbitration procedures of the various exchanges (which the SEC had recently approved) adequately protected statutory rights.⁷⁸ Finally, the

71. *Mitsubishi*, 473 U.S. at 628 (citations omitted) (emphasis added).

72. *Id.* at 629 (holding that respect for the capacities of foreign and transnational tribunals and sensitivity to the need for predictability in international dispute resolution, were the other reasons for the court's decision).

73. *Id.* (noting that a different result would be forthcoming in a domestic context).

74. See *Wilko v. Swan*, 346 U.S. 427 (1953).

75. 482 U.S. 220 (1987).

76. *Id.* at 222-23.

77. See *Mitsubishi*, 473 U.S. at 633. Most notably the observation that "the mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time." See also *McMahon*, 482 U.S. at 233 (noting that intervening changes in the regulatory structure of the securities laws have increased the difficulties).

78. See *McMahon*, 482 U.S. at 233-34.

Court articulated the now-familiar refrain that 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*.”⁷⁹ Two years later, the Court underscored this view in finally—expressly—overruling *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁸⁰

3. *Outbreak: Mandatory Arbitration of Employment Disputes*

The next mutation is the classic, still purportedly having to do with statutes regulating the securities transactions, but touching only obliquely, at best, on either the workings of the business or the regulated nature of the industry. *Gilmer v. Interstate/Johnson Lane Corp.*⁸¹ generated an entirely new strain of cases, upholding an industry scheme requiring arbitration of disputes between broker/dealers and their own employees.⁸²

Robert Gilmer was terminated from his position as a Manager of Financial Services for Interstate.⁸³ He sued his former employer in federal court, alleging a violation of the Age Discrimination in Employment Act (ADEA).⁸⁴ Interstate responded with a motion to compel arbitration, pursuant to Gilmer’s signed application to register as a securities representative with several stock exchanges (called a “U-4” form⁸⁵), including the New York Stock Exchange.⁸⁶ The U-4 provided that Gilmer agreed to arbitrate any dispute between him and his employer which was “required to be arbitrated under the rules, constitutions, or by-laws” of the organizations with which I register.⁸⁷ NYSE Rule 347, in turn, provided for arbitration of any controversy related to his employment.⁸⁸ The District Court for the Western District of North Carolina denied the motion to compel arbitration, concluding that “Congress intended to

79. *Id.* at 229-30 (emphasis added) (quoting *Mitsubishi*, 473 U.S. at 628).

80. 490 U.S. 477, 485 (1989) (holding a customer with claims under the Securities Act of 1933 could be compelled to arbitrate them pursuant to a pre-dispute arbitration agreement).

81. 500 U.S. 20, 20 (1991).

82. *See id.* at 23.

83. *See id.*

84. *See id.* The specific statute employed is found at 29 U.S.C. § 621.

85. The arbitration clause contained in the Form U-4 defines those disputes that plaintiff is required to arbitrate and with whom. It does not determine where the arbitration must take place.

86. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

87. *See id.* at 23.

88. *See id.*

protect ADEA claimants from the waiver of a judicial forum.”⁸⁹ In a seven to two decision, the Supreme Court disagreed, holding that Gilmer failed to meet the burden of “showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under the Act.”⁹⁰

Gilmer had advanced several arguments in support of his position: (1) that the arbitration panels provided under the “captive” industry arbitration program would be biased;⁹¹ (2) that the “discovery allowed in arbitration is more limited than in the federal courts” (thus making it more difficult to prove discrimination);⁹² (3) that the arbitration panels’ usual practice of not issuing written opinions would result “in 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;”⁹³ (4) “that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions;”⁹⁴ and (5) that often there will be unequal bargaining power between employer and employees.⁹⁵

Although the Court addressed each of these arguments, it basically gave them short shrift, concluding in effect, “maybe so, somewhere, sometime, but not here and now.” However, there is nothing in the statute itself that would have precluded opposite conclusions had the Court been inclined to recall its own recognition in *Mitsubishi*⁹⁶ of potential circumstances where such determinations could be appropriate. Further, the *Gilmer* Court heavily relied on its *McMahon*⁹⁷ and *Rodriguez de Quijas*⁹⁸ “precedents” in which the Court buttressed its approval of arbitration by taking comfort in the SEC’s “oversight role.” But it could not have escaped the Justices that the primary focus of that agency’s oversight mission was never intended to include employee relations. On the

89. *Id.* at 24. The district court based its decision on the holding found in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

90. *Gilmer*, 500 U.S. at 35.

91. *Id.* at 30.

92. *Id.* at 31.

93. *Id.*

94. *Id.* at 32.

95. *See id.* at 33.

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

97. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

98. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

contrary, the Court summarily dismissed any suggestion of a similar “oversight role” for the Equal Employment Opportunity Commission (EEOC), with whom Gilmer had filed a charge of discrimination.

The Court noted that, “Gilmer’s argument ignores the ADEA’s flexible approach to resolution of claims. The EEOC, for example, is directed to pursue informal methods of conciliation, conference, and persuasion, 29 U.S.C. § 626(b), which *suggests* that out-of-court dispute resolution, such as arbitration, is *consistent with* the statutory scheme established by Congress.”⁹⁹

The Court went on to compare arbitration agreements to the provision for concurrent federal and state court jurisdiction over ADEA claims.¹⁰⁰ Justice White observed for the majority that both arbitration agreements and concurrent jurisdiction “serve to advance the objective of *allowing* [claimants] a broader right to *select* the forum for resolving disputes, whether it be judicial or otherwise.”¹⁰¹

This reasoning is deficient. First, it should be clear that the “informal methods of conciliation and persuasion” which the EEOC was “directed to pursue” are processes which afford the parties an opportunity for voluntary, negotiation-based *settlement*. For the Supreme Court to conclude from this directive’s support of *bargaining-based* ADR processes that Congress has imposed on the agency a sweeping policy virtually mandating *all* forms of out-of-court *dispute resolution*, including mandatory, binding *arbitration*, is at best flawed reasoning and at worst self-serving judicial policy.¹⁰²

Second, in the Court’s comparisons between the objectives of concurrent jurisdiction and arbitration agreements, the phraseology of “allowing” claimants to “select” the forum is inapt. To compare the choice of whether to have a claim heard in federal or state court with the “choice” Gilmer had with respect to signing his U-4 form is an exercise in erroneous logic and discounts the realities of employer-employee relationships.

Similarly, although agreeing with Gilmer that the ADEA is designed not only to address individual grievances, but also to further important social policies, the Court did “not perceive any inherent

99. *Gilmer*, 500 U.S. at 29 (emphasis added).

100. *See id.* (citing *Rodriguez de Quijas*, 490 U.S. at 483).

101. *Id.* (emphasis added).

102. *See* Sternlight, *supra* note 12. Driven, perhaps by the judicial obsession with court delays and backlogs.

inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims."¹⁰³ In citing several supportive decisions' lines of reasoning while distinguishing those which were arguably contrary, and in dismissing *Gilmer's* concerns about the fundamental fairness of the process, the Court simplistically relied on the FAA itself as an expression of a "liberal federal policy favoring arbitration agreements."¹⁰⁴ The Court concluded that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."¹⁰⁵

4. *The Virus Spreads: The Progeny of Gilmer*

Since *Gilmer*, numerous circuit courts of appeal have considered the issue of mandatory arbitration of statutory employment rights.¹⁰⁶ The Southern District of New York, whether emboldened or mandated by *Gilmer* and its progeny, has recently produced still another mutation in the evolution of the substantive right/forum choice analysis. The *DeGaetano v. Smith Barney, Inc.*¹⁰⁷ court upheld an arbitration agreement between a securities industry employee and employer that expressly waived rights to attorney's fees, injunctive relief and punitive damages.¹⁰⁸ In *Alford v. Dean Witter Reynolds, Inc.*,¹⁰⁹ the Fifth Circuit required plaintiff's compliance with an agreement to arbitrate discrimination claims.¹¹⁰

Not long after *Alford*, the Tenth Circuit decided *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*¹¹¹ Applying the ADEA-context reasoning of *Gilmer* to Metz's Title VII claim, the court held that the plaintiff's pregnancy-related sex discrimination Title VII claim was subject to the National Association of Securities Dealers (NASD) industry mandatory arbitration program as invoked by her

103. *Gilmer*, 500 U.S. at 27.

104. *Id.* at 35 (citing *Mitsubishi*, 473 U.S. at 625).

105. *Id.* at 26.

106. See Sternlight, *supra* note 12, at 671 n.202; See also *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Wilis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

107. No. 95 CIV.1613, 1996 WL 44226, at *8 (S.D.N.Y. Feb. 5, 1996), *rev'd*, 1997 WL 697928 (S.D.N.Y. Nov. 5, 1997) (reversing the denial of attorney fees).

108. See *id.* (stating the motion to compel arbitration presents a new issue of law and the court decided to use its discretion by not imposing attorney's fees).

109. 939 F.2d 229 (5th Cir. 1991).

110. See *id.* at 229-30.

111. 39 F.3d 1482 (10th Cir. 1994).

signed U-4 form.¹¹² Like Gilmer, Metz argued that her registration form was a contract of adhesion and should therefore be unenforceable.¹¹³ Contract of adhesion arguments are, for the most part, without merit.¹¹⁴ Modern commercial realities require the widespread use in many industries and contexts of form contracts that are not subject to negotiation.¹¹⁵ The court found that inasmuch as a party had signed the agreement voluntarily, no further inquiry was required.¹¹⁶

The Ninth Circuit, however, has recently put the subject line of cases into regional remission.¹¹⁷ Clearly bothered by what it perceived as an inequitable situation, but constrained by *Gilmer*,¹¹⁸ the court created another subspecies of analysis and decision-making in *Prudential Insurance Co. of America v. Lai*.¹¹⁹ In *Lai*, plaintiffs Lai and Viernes, sales representatives for Prudential, sued their employer and immediate supervisor in state court asserting various claims of sexual harassment.¹²⁰ Prudential then brought an action in federal court to compel arbitration under the NASD program, pursuant to the plaintiffs' U-4 forms.¹²¹

After considering all the usual *Gilmer*-type arguments, the court focused its examination on the circumstances under which the agreement to arbitrate was entered into, and, in particular,

112. See *id.* at 1488.

113. See *id.*

114. Common law has recognized that standardized form contracts are a significant portion of all commercial agreements, therefore, the courts look more toward the reasonableness of the contract. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179-80 (1983); W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 12-13 (1974); KARL LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960).

115. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), in which a judicial forum selection provision in a "contract of adhesion" was upheld. However, the significance of whether an agreement is a contract of adhesion (other than the egregious cases of threats, coercion and undue influence), is not whether the agreement will be upheld, but rather, which rules of interpretation will apply to the agreement. See *id.* at 592-95.

116. See *id.* See also Penelope Hopper, *Mandatory Arbitration And Title VII: Can Employees Ever See Their Rights Vindicated Through Statutory Causes of Action*, 2 J. DISP. RESOL. 315, 323-25 (1995) (noting the court's distinction between "voluntary" and "involuntary" agreements).

117. See *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

118. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991).

119. 42 F.3d 1299 (9th Cir. 1994). For a review and analysis of this decision, see Catherine Chatman, *Mandatory Arbitration of Title VII Claims: A New Approach Prudential Insurance Co. of America v. Lai*, 1 J. DISP. RESOL. 255 (1996).

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

121. See *id.*

whether it was a “knowing agreement.”¹²² For support in this approach, the court invoked, among other considerations, the legislative history of the Civil Rights Act of 1991.¹²³ The court reviewed a House of Representatives report that dealt in part with congressional comments regarding Section 118 of the new Act, which, unlike the EEOC directive considered in *Gilmer*, specifically encourages the use of arbitration to resolve claims arising under it.¹²⁴ The court cited Senator Dole’s statement that arbitration would be appropriate only “where the parties knowingly and voluntarily elect to use these methods.”¹²⁵

Having adopted “knowing waiver” as the applicable standard, the Ninth Circuit concluded that the *Lai* plaintiffs were not required to submit their Title VII claims to NASD arbitration because: (1) they were not afforded an opportunity to read the agreement; (2) they were misled as to its contents; and (3) the U-4 form failed to specify exactly what disputes were subject to arbitration.¹²⁶

But the new subspecies of “knowing waiver” thrives for now only in its natural habitat of the Northern District of California. The test was rejected in the hostile environment of the Southern District of New York in *Hall v. Metlife Resources*.¹²⁷ In *Hall*, echoing the *McMahon/Gilmer* refrain, the court reasoned that U-4-mandated arbitration agreements constitute merely a forum choice, and not a waiver of substantive rights guaranteed by Title VII.¹²⁸

B. Arbitration and Substantive Law

Related, albeit somewhat obliquely, to the consideration of appropriate limits on the arbitration of disputes involving “statutory rights” *per se*, are two lines of cases regarding the interplay between arbitration and substantive law. The first deals with whether arbitrators should be required to adhere to the law at all in making their decisions. The second, which assumes the first, examines the principle of “manifest disregard” of law.

122. See *id.* at 1304.

123. See *id.*

124. See *id.*

125. See *id.* at 1305 (citing 137 Cong. Rec. S.15472, S.15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)). See also Chatman, *supra* note 119, at 262.

126. See Chatman, *supra* note 119, at 262 (citing *Lai*, 42 F.3d at 1305).

127. No. 94 Civ.0358, 1995 WL 258061, at * 4 (S.D.N.Y. May 3, 1995).

128. See *id.*

1. Role of the Law in Arbitrators' Decision-Making Processes

When an arbitration award is challenged based on the arbitrator's purported misapplication of statutory law, "there is a tension between the tradition of limited judicial review of arbitration awards and the presence of an independent public interest in ensuring that the law is correctly and consistently being applied. . . ." ¹²⁹

The Supreme Court addressed this tension in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* ¹³⁰ In *Mitsubishi*, the Court distinguished pre-arbitration attempts to avoid enforcement of an arbitration agreement from post-arbitration attempts to vacate an award. ¹³¹ According to Professor Bales, the *Mitsubishi* Court decided that the FAA requires a presumption that the arbitrator will decide the dispute in accordance with the applicable law. The mere possibility that an arbitrator will misapply the law, therefore, will not serve as a basis for refusing to enforce an arbitration agreement. ¹³²

There appears to be an abundance of compelling statutory, case law, and public policy arguments supporting reasons why arbitrators should apply the rule of law. ¹³³ How can it be possible that the rule of law position is not more commonly accepted? ¹³⁴

Although, the case law requiring arbitrators to apply the rule is compelling, it is not etched in stone, nor is it a "commandment." ¹³⁵ Additionally, several practical and legal considerations suggest that the rule of law position is at most, suggestive. ¹³⁶

First of all, how could arbitrators be required to apply the law if non-lawyers may sit as arbitrators? ¹³⁷ A possible response points out the American jury system which resolves legal disputes even though the juries are typically not made up of lawyers. ¹³⁸ However,

129. Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI-KENT L. REV. 753, 777 (1990).

130. 473 U.S. 614, 614 (1985).

131. See BALES, *supra* note 46, at 135.

132. See *id.* at 135-36 nn.128-29 (citing *Mitsubishi*, 473 U.S. at 636-37).

133. A study indicates that over 90-percent of the arbitrators polled felt they did not need to apply the law. See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961).

134. See Lipton, *supra* note 49, at 2-3.

135. *Id.* at 3-4.

136. See *id.* at 4.

137. See *id.*

138. See *id.*

a counter argument is that juries are instructed and supervised by judges who are lawyers and no such instructions or supervision is given to non-lawyer arbitrators.¹³⁹ In the securities area of arbitration, for example, most self-regulatory bodies usually include lawyers on their arbitration panels when legal expertise is required.¹⁴⁰

Second, if arbitrators were required to apply the law, this requirement would be relatively meaningless unless there exists a method for enforcing its application.¹⁴¹ The standards for vacating awards set forth in both the FAA and state variants of the UAA are not interpreted to mean that an arbitration award may be overturned if the arbitrator fails to apply the law.¹⁴² Various state law standards for vacating arbitration awards are typically similar to the federal standards.¹⁴³ No state law standard includes failure to apply the law as a proper reason for vacating an arbitration award.¹⁴⁴

In his recent book on compulsory arbitration Professor Richard A. Bales speculates that we are currently witnessing an experiment to determine whether arbitration should become the pre-eminent method of resolving workplace disputes in the nonunion sector.¹⁴⁵ Bales asserts that courts likely will continue the current trend of enforcing arbitration agreements that are fundamentally fair to employees, while refusing to enforce those agreements that are unfair.¹⁴⁶

Bales claims that "the argument that an arbitral decision already rendered is based on a misapplication of the law may justify a court's vacation of the award."¹⁴⁷ The *Mitsubishi* Court stated that "the national courts of the United States will have the opportu-

139. See *id.* at 4.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *id.*

144. See *id.* But see MINN. R. GEN. P. 114. Rule 114 sets forth the state's mechanism for court-annexed non-binding arbitration. See *id.* Rule 114 provides that the arbitrator has the power to "decide the law and the facts of the case and make an award accordingly." MINN. R. GEN. P. 411.09 (b). Rule 114 also provides that "[I]f the parties stipulate in advance, the award is binding and is enforceable in the same manner as a contractual obligation." MINN. R. GEN. P. 411.02 (a)(1). A more intriguing question is how these provisions square with Minnesota's form of the UAA, which provides, "but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." MINN. STAT. § 572.19, subd. 1(5) (1996).

145. See generally BALES, *supra* note 46, at 136.

146. See *id.*

147. See *id.*

nity . . . to ensure that the legitimate interest in the enforcement of . . . [statutory] laws ha[ve] been addressed.”¹⁴⁸

Bales believes that the Supreme Court stopped far short of indicating that an arbitral award would be reviewable for factual or legal error in the same way as an adjudication by a trial court: “While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the [statutory] claims and actually decided them.”¹⁴⁹

“This language seems to imply that courts will examine arbitral awards only to ensure that statutory issues were considered and decided, which is markedly different from ‘ensur[ing] that the legitimate interest in the enforcement of statutory laws have been addressed.’”¹⁵⁰

2. “Manifest Disregard of the Law”

In reviewing arbitration decisions involving statutory claims, courts typically refuse to reverse an award based on the “mere” fact that the arbitrator incorrectly interpreted or applied the law.¹⁵¹ Rather, the courts utilize the standard that they will reverse an arbitrator’s decision only if the arbitrator acted in “manifest disregard of the law.”¹⁵²

This judicial strategy for dealing with awards at variance with established legal principles originated from dicta in the 1953 Supreme Court decision in *Wilko v. Swan*.¹⁵³ In that case the Court invalidated the use of pre-dispute arbitration provisions in securities agreements mainly because of the “old judicial hostility to arbitra-

148. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985); see also BALES, *supra* note 46, at 136.

149. *Mitsubishi*, 473 U.S. at 638; see also BALES, *supra* note 46, at 136.

150. *Mitsubishi*, 473 U.S. at 638.

151. See BALES, *supra* note 46, at 136. Bales cites the following cases in support of this assertion: *Gingiss Int’l, Inc., v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995); *Ainsworth v. Skurnick*, 960 F.2d 939, 940 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993); *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992); *National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 143 (7th Cir. 1977); *Republic of Korea v. New York Navigation Co., Inc.*, 469 F.2d 377, 379 (2d Cir. 1972); *Regina M. Lyons, Testamentary Trust v. Shearson Lehman Hutton, Inc.*, 809 F. Supp. 302, 304 (S.D.N.Y. 1993). See BALES, *supra* note 46, 136 n.132.

152. See BALES, *supra* note 46, at 136; see discussion *infra* Part III.B.2.

153. 346 U.S. 427, 436-37 (1953), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

tion."¹⁵⁴ The primary reasons the *Wilko* Court was uncomfortable with arbitration in securities disputes were that arbitrators lacked "judicial instruction on the law," awards may be made without explanation or a complete record of the arbitration proceedings, and the "[p]ower to vacate an award is limited."¹⁵⁵

Notwithstanding the later reversal of *Wilko*'s primary holdings, the "manifest disregard" standard continues to be raised and discussed.¹⁵⁶ For years it has been conventional wisdom that, although many courts have spoken to the issue, no arbitration award has ever been vacated on this ground.¹⁵⁷ But on November 24th, 1997, the Eleventh Circuit made such a finding in *Montes v. Shearson Lehman Brothers, Inc.*¹⁵⁸ The Court reversed and remanded an arbitration award on the basis of manifest disregard of the law.

In *Montes*, the plaintiff, a security industry employee, had signed an agreement to arbitrate all disputes with her employer. After she stopped working for Shearson she brought a state court action alleging that under the Fair Labor Standards Act¹⁵⁹ she was entitled to overtime pay and that she had not been so compensated during certain periods of her employment with Shearson. The

154. *Rodriguez de Quijas*, 490 U.S. at 480 (citing *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

155. *Wilko*, 346 U.S. at 436. The *Wilko* Court noted the following in dicta: While it may be true, as the [Second Circuit] Court of Appeals thought, that a failure of the arbitrators to decide in accordance with [applicable law] would "constitute grounds for vacating the award pursuant to Section 10 of the Federal Arbitration Act" that failure would need to be made clearly to appear. . . . [T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. *Wilko*, 346 U.S. at 436-37 (footnotes and citations omitted).

156. *See id.*

157. *See* BALES, *supra* note 46, at 136; *but see* *Lickteig v. Alderson, Ondov, Leonard & Sween*, 556 N.W. 2d 557, 562 (Minn. 1996) (finding that arbitrator's award of emotional distress damages in a legal malpractice case vacated where parties had agreed that any "legal" decisions made by the arbitrator would be subject to judicial review and state law does not permit such damages in such an action. Although this was a case of "manifest disregard," the better analysis of the grounds for vacatur is that the arbitrator exceeded his authority). *See also* BALES, *supra* note 46, at 136 n.136 (citing Stephen L. Hayford and Michael J. Evers, *The Interaction between the Employment-At-Will Doctrines and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employees*, 73 N.C. L. REV. 443 (1995); Brad A. Galbraith, Note, *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, 252 (1993); *but see* *Lickteig*, 556 N.W.2d at 560.

158. 128 F.3d 1456 (1997).

159. 29 U.S.C. § 201-19 (1994).

employer removed the case to federal district court, where it contended that as an “administrative” or “executive” employee Montes was exempt from the Act’s overtime pay requirements. That court referred the case to an arbitration panel, which found in favor of Shearson. Montes appealed the district court’s denial of her petition to vacate the award.

Montes argued on appeal that enforcement of the arbitration award would be “violative of public policy.”¹⁶⁰ The court observed that her arguments were “overlapping versions of three non-statutory reasons for vacating arbitration decisions...: that the decision (1) is arbitrary or capricious; (2) is in manifest disregard of the law; and (3) is violative of public policy.”¹⁶¹ The court recognized each as a distinct ground, but because the thrust of this case involved the specific direction to disregard the law, the court chose to focus primarily on the manifest disregard standard.

The record showed that at the arbitration hearing Shearson’s counsel had urged the panel not to follow the FLSA and to reject Montes’ claim for overtime pay, even if it were determined that her job duties and responsibilities did not qualify her for the exemption. On appeal, Shearson asserted that its counsel at the arbitration hearing was merely arguing that Montes did not qualify for overtime under the statute and therefore, the arbitrators were not bound by the FLSA.

The court did not accept Shearson’s interpretation. Arbitration counsel had urged the panel to exercise its “ability” to be “not strictly bound by case law and precedent;” to recognize the “difference between law and equity;” that “in this case the law is not right” and to “do what is right...fair and proper;” and “not to follow the FLSA if you determine she’s not an exempt employee.”¹⁶² The court concluded that “trial counsel’s meaning is clear: notwithstanding Montes’ entitlement to overtime under the FLSA, the arbitrators should ignore the dictates of the law.”¹⁶³

Although the court noted that under *Wilko* an arbitration panel’s erroneous interpretation of the law is not grounds for vacatur, manifest disregard of it is. The court said it could “clearly discern from the record...that arbitrators recognized that they were told to disregard the law (which the record reflects they knew) in a

160. *Montes*, 128 F.3d at 1459.

161. *Id.* at n.5.

162. *Id.*

163. *Id.* at 1462.

case in which the evidence to support the award was marginal.”¹⁶⁴

But more importantly, in still another example of judicial morphallaxis, the Eleventh Circuit found that “there [was] nothing in the record to *refute the suggestion* that the law was disregarded.”¹⁶⁵ The court vacated the award and remanded it to the district court for referral to a new arbitration panel.

In addition courts’ general refusal to invoke the “manifest disregard” standard, no jurisdiction has found “mere error of law” as a basis for vacating arbitration decisions.¹⁶⁶ The most likely reason for this is that, despite adoption of the “manifest disregard” standard by several circuits, there is still uncertainty about to how to determine whether, in rendering an award, an arbitrator has violated it.¹⁶⁷ The first serious judicial effort at developing a definition is contained in the Second Circuit’s decision in *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*. After first noting that the standard had never been defined,¹⁶⁸ the court articulated its view on the issue:

[The arbitrator’s] error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve 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.¹⁶⁹

Although this is a long way from insisting that arbitrators comply strictly with the law, the *Bobker* decision does seem to prohibit those who know the law from openly ignoring it.¹⁷⁰

In effect, the reported decisions reflect two different interpretations of the “manifest disregard of the law” standard. The first is to require that “arbitrators comply with the law, while recognizing

164. *Id.*

165. *Id.* (emphasis added).

166. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). The dissent in *Wilko* provides yet another “relatively forceful” interpretation of the concept of “manifest disregard of the law” standard. *Id.* at 439-40. The dissent states that arbitrators were “bound to decide in accordance with the provision” of a specific securities statute Section 12(2) of the 1933 Act. *Id.* at 440. The dissenting justices would apparently not allow arbitrators much freedom to deviate from a strict reading of the law. See Lipton, *supra* note 49, at 5.

167. *Wilko*, 346 U.S. at 436-37.

168. 808 F.2d 930, 933 (2d Cir. 1986).

169. *Id.* In other words, the Second Circuit holds for there to be manifest disregard of the law by arbitrators, the arbitrators must know and understand the legal principles pertaining to an issue then ignore these principles. See Lipton, *supra* note 49, at 5.

170. See *Bobker*, 808 F.2d at 933.

that mere errors of law will not constitute a basis for vacating an arbitration award.”¹⁷¹ The second does not hold arbitrators to strict compliance with the law, but requires merely that their decisions not be “offensive” to it.¹⁷² As a practical matter, which interpretation is most often adopted is not very important, since under either version of the standard, it is very difficult for courts to determine when it has been violated.¹⁷³ Moreover, arbitration award are rarely vacated or modified because of *any* kind of finding akin to “manifest disregard of the law.”¹⁷⁴ The primary reason is that, outside the collective bargaining context, arbitrators rarely provide written explanations of their decisions.¹⁷⁵ Without a written record, courts can examine only the award itself or perhaps any transcripts of the hearing to determine whether there has been a “manifest disregard of the law.”¹⁷⁶

Frequently courts express their frustration in determining “manifest disregard of the law” with statements such as:

We note simply that the arbitrators gave no explanation whatsoever regarding the award. Since nothing on the face of the record indicates that the arbitrators were aware of some legal standard which they ignored in fashioning their award, we [the court] certainly cannot say that the district court abused its discretion in confirming the

171. *Id.* at 933-34.

172. *Id.*

173. See Lipton, *supra* note 49, at 5.

174. See *id.* In a survey of over forty neutrally-selected post 1988 securities cases involving “manifest disregard of the law,” there was not a single instance uncovered of a judicial finding of “manifest disregard of the law.” In two of the surveyed cases, both in the Southern District of New York, *Tinaway v. Merrill Lynch and Co.*, 692 F. Supp. 220 (S.D.N.Y. 1988), and *In re Fahnestock & Co., Inc.*, No. Civ. 1792 (PKL), 1990 U.S. Dist. LEXIS 11024 at *8 (S.D.N.Y., Aug, 23, 1990), the court, on rehearing a previously decided case, dismissed plaintiff’s claim for punitive damages, but, not because of “manifest disregard of the law.” See David A. Lipton, *Should Arbitrators Follow the Law? (. . . and if they should, how can they be so encouraged?)*, CRITICAL ISSUES IN ARBITRATION CONFERENCE, ANA Section of Litigation: Arbitration Committee, 3 (New York, NY, Nov. 5, 1993). In a third surveyed case, an arbitration panel’s award was overturned because the Eleventh Circuit Court of Appeals concluded that the arbitrator’s award was “arbitrary and capricious.” See *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992).

175. See Lipton, *supra* note 49, at 5.

176. See *id.* for example, out of twenty-one cases in the above mentioned survey, in only one case was the court’s determination regarding the existence of “manifest disregard of the law” based upon the existence of a written arbitration opinion.

award.¹⁷⁷

The analysis becomes even more confusing with cases involving the National Association of Security Dealers (NASD). Without a written opinion or at least some type of written findings of fact and conclusions of law, there are only three ways for the court to determine whether there has been a “manifest disregard of the law:”

1) a finding that the award is inconsistent with the nature of the claim (e.g., punitive damages awarded pursuant to

177. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 903 F.2d 1410, 1413 (1987). Similarly, in *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 530-32 (D.C. Cir. 1989), the court found that:

[T]he arbitrators did not explain how they reached [the figure for the award]. The parties agree that the New York Stock Exchange rules require no explanation; it appears to be standard practice for arbitrators under those rules to give none. . . . We reject the idea that a lump-sum award can be rejected for want of explanation . . . in the absence of facts making it appear probable that the arbitrators committed an error justifying vacation of the award.

In *Rotfeld v. Boenning & Scattergood, Inc.*, No. 91-3659, at *7, 1991 U.S. Dist. LEXIS 11618 (E.D. Pa. 1991), the court noted its inability to assess the existence of “manifest disregard of the law” The court stated that:

Unfortunately, the [arbitration] panel did not disclose which set of facts it chose to believe. In the event that the panel accepted [the plaintiff’s] set of facts as true, there has either been a gross miscalculation of damages or a manifest disregard of the relevant law.

Id.

And, in yet another case, the “manifest disregard of the law” was challenged but denied. *See Merrill Lynch v. Burke*, 741 F. Supp. 191, 193-94 (1991). The district court stated that:

[T]he arbitrators here made no findings, stated no evidence, and made no reference to any legal standard. . . . This court cannot say from the record before it, or from the lack of a record before it, that the arbitrators exceeded their powers or totally disregarded the applicable law for an award of punitive damages.

Id.

In the Ninth Circuit, the court twice stated a willingness to vacate an award for “manifest disregard of the law.” *See Western Employers Ins. v. Jefferies & Co.*, 958 F.2d 258, 261 (9th Cir. 1992) and *Local Joint Executive Bd. v. Riverboat Casino, Inc.*, 817 F.2d 524, 527 (9th Cir. 1987). In *Jefferies*, an arbitration award was vacated because the arbitrators did not provide the claimant with “findings of fact and conclusions of law.” 958 F.2d at 262. (stating that the arbitration contract covering the securities dispute clearly required such findings and conclusions). Even though the *Jefferies* court did not find “manifest disregard of the law,” it did conclude that the arbitrators had exceeded their authority in not providing the contractually agreed upon form of award and thus the award was susceptible to being vacated under the Federal Arbitration Act. *See id.* (citing to 9 U.S.C. § 10(d) (1994)).

federal securities law);¹⁷⁸

2) a finding that the record indicates a manifest disregard of the law (for example, arbitrators saying that the background of a customer was irrelevant to a suitability claim); or if

3) the court asks the panel to go back and explain its award and the court then determines that the reasons of the panel are in manifest disregard of the law.¹⁷⁹

A written report or opinion, completed by the arbitrator, would make it much easier for the court to determine if the “manifest disregard of the law” standard has been violated.¹⁸⁰

Even if the law does require arbitrators to apply the law in rendering their awards, the big problem would be the practical means of enforcing such a requirement.¹⁸¹ The current scope of judicial review does not include vacating an award because the arbitrator ignored the law.¹⁸²

In 1923 the New York Superior Court rationalized this view, observing that most arbitrators “are usually laymen, inexperienced in the technical rules of law, but usually possessed with a fund of common sense which enables them to do substantial justice between the parties. To require an arbitrator to follow the fixed rules of law in arriving at his award would operate to defeat the object of the proceedings.”¹⁸³

We opine that the prevalence of “lay” arbitrators has diminished since 1923. The current minimal standard for arbitrators is too low.¹⁸⁴ “When an arbitrator is called upon to interpret a clause

178. One example of this would be pursuant to a 1934 Act, § 10 (b) (1994), claim.

179. Lipton, *supra* note 49, at 6.

180. *See id.* If you want to avoid this problem, the decision in *Pacific Gas and Electric Co. v. The Superior Court of Sutter County*, 19 Cal. Rptr. 2d 295, 295 (1993), may provide some guidance. The case states that the parties to the arbitration may want to do the following:

1. Clarify in the arbitration clause that not only is the arbitrator constrained to follow the law but also that the scope of judicial review includes questions of law;
2. Clarify in the arbitration clause specifically what remedies the arbitrator is empowered to grant; and
3. Be sure to state everything clearly in the arbitration agreement.

See id. at 302-10.

181. *See id.*

182. *See id.*

183. *Everett v. Brown*, 198 N.Y.S. 462, 465 (1923).

184. The parties should be free to chose an arbitrator with whom they are

contained in a commercial contract, or a term in a collective bargaining agreement, she is interpreting "private" law — law contractually created by the parties to govern the parties and no one else."¹⁸⁵ "Under these circumstances, it is appropriate to permit the parties to agree in advance that the arbitrator's decision will not be appealable because the arbitrator misinterpreted the contract or misconstrued the underlying facts."¹⁸⁶ "It is assumed that the parties knew that they were agreeing to limited judicial review when they signed the arbitration agreement, and that, since any arbitral mistake affects only the parties themselves, the parties should be held to their bargain."¹⁸⁷

C. "Fair Hearing" Test¹⁸⁸

One of the oldest case law requirements for supporting agreements to arbitrate as well as the enforcement of awards stipulates that the process must afford the parties a "fair hearing." In its 1854 *Burchell v. Marsh* decision,¹⁸⁹ the Supreme Court stated that, "[i]f the [arbitration] award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."¹⁹⁰

In *Forsythe International S.A. v. Gibbs Oil Co. of Texas*¹⁹¹ the court stated that "[i]n reviewing the district court's vacatur, we posit the same question addressed by the district court: whether the arbitration proceedings were fundamentally unfair."¹⁹² In *Hoteles Condado*

comfortable without regard for qualifications. When the parties have not previously agreed, however, the default nomination should be an arbitrator of high competence.

185. See BALES, *supra* note 46, at 135.

186. See *id.*

187. See *id.* Under contract law, there is a basic presumption that states—basically—"a deal's a deal."

188. The "fair hearing" consideration is one in which cases involving both commercial and labor arbitrations are often cited together. One reason for this may be the historical practice in labor arbitration of hearing transcripts and extensive written awards. Nevertheless, some of the leading "collision" cases discussed *infra*, point out that a "fair hearing" of a grievance based on the same facts as would constitute a statutory cause of action (e.g., challenging a discharge for being without "just cause" because it was a product of illegal race discrimination) may not pass judicial muster.

189. 58 U.S. 344, 344 (1854).

190. *Id.* at 349.

191. 915 F.2d 1017, 1017 (5th Cir. 1990).

192. *Id.* at 1020.

Beach v. Union De Tronquistas Local 901,¹⁹³ the First Circuit held that “[v]acatur is appropriate only when the exclusion of relevant evidence ‘so affects the right of a party that it may be said that he was deprived of a fair hearing.’”¹⁹⁴ In *National Post Office Mailhandlers v. United States Postal Service*,¹⁹⁵ the court stated that “the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing.”¹⁹⁶ In *Bell Aerospace Co. Division of Textron v. Local 516*,¹⁹⁷ the Court stated that “an arbitrator need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing.”¹⁹⁸

Courts appear to agree that the parties deserve the following: (1) a fundamentally fair hearing; (2) adequate notice of the hearing; (3) an opportunity to be heard; (4) an opportunity to present relevant and material evidence; (5) an opportunity to make their argument before the arbitrator; and, (6) an impartial arbitrator.¹⁹⁹ “[A] hearing is fundamentally fair if it meets the ‘minimal requirements of fairness’—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.”²⁰⁰

D. *Illegality / Public Policy*

The standards of the “illegality” and “public policy” overlap and the two are often discussed together by the courts. In *United*

193. 763 F.2d 34, 34 (1st Cir. 1985).

194. *Id.* at 40 (citation omitted).

195. 751 F.2d 834, 834 (6th Cir. 1985).

196. *Id.* at 841.

197. 500 F.2d 921, 921 (2d Cir. 1974).

198. *Id.* at 923.

199. See BALES, *supra* note 46, at 135 n.123, (citing *Bowles Fin. Group v. Sheele, Nicholas & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994)). See also *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir.) (stating “the Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues.”), *cert. denied*, 506 U.S. 870 (1992); *Employers Ins. of Wausau v. National Union Fire Co.*, 933 F.2d 1481, 1491 (9th Cir. 1991) (explaining that fair hearing is based on notice, opportunity to be heard and to present evidence, and lack of biased decision making); *Sunshine Mining Co. v. United Steelworkers of Am.*, 823 F.2d 1289, 1295 (9th Cir. 1987) (stating that “[a] hearing is fundamentally fair if it meets the ‘minimal requirements of fairness’ – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.”) (citing *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965)); *Hoteles Condado Beach*, 763 F.2d at 38-39 (finding that arbitrator must give each party an adequate opportunity to present evidence and arguments).

200. *Sunshine Mining Co.*, 823 F.2d at 1295.

Paperworks International Union v. Misco, Inc.,²⁰¹ the Supreme Court suggested that the two standards should be independent.²⁰² “A court’s refusal to enforce an arbitrator’s award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.”²⁰³ The Court continued by stating that courts will not aid an “immoral or illegal act.”²⁰⁴

The “public policy” standard for arbitration awards was first indirectly established in *Hurd v. Hodge*.²⁰⁵ The *Hurd* Court held that the courts’ power to enforce private agreements must be subject to “limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.”²⁰⁶ The Supreme Court directly addressed the “public policy” exception to arbitration awards in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*.²⁰⁷ In *Grace* the employer violated the collective bargaining agreement it had with the union.²⁰⁸ The Supreme Court concluded:

As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . [T]he question of public policy is ultimately one for resolution by the courts. If the contract as interpreted [by the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”²⁰⁹

E. FAA Preemption Analysis

A completely different aspect of the role of the FAA and a most significant analytical framework emerged from the U.S. Su-

201. 484 U.S. 29 (1987).

202. *See id.* at 42.

203. *Id.*

204. *See id.*

205. 334 U.S. 24, 24 (1948).

206. *Id.* at 35 (citing *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

207. 461 U.S. 757, 757 (1983).

208. *See id.* at 760.

209. *Id.* at 766 (quoting *Muschany*, 324 U.S. at 66 (citations omitted)).

preme Court's 1984 decision in *Southland Corporation v. Keating*,²¹⁰ Chief Justice Burger delivered the opinion of the Court, which held that the California Franchise Investment Law's invalidation of an agreement between franchisers and franchisee to arbitrate disputes arising under the state statute impermissibly conflicted with the FAA and violated the Supremacy Clause of the Constitution:

In enacting Section 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.²¹¹

Southland was followed by *Perry v. Thomas*²¹² which under the preemption theory, invalidated a provision of the California Labor Code which provided that certain wage collection actions could be maintained in court, notwithstanding the existence of an agreement to arbitrate such claims.²¹³

*Allied-Bruce Terminix Cos., Inc. v. Dobson*²¹⁴ involved a contract that invalidated an Alabama law making predispute arbitration agreements unenforceable.²¹⁵ The contract in question was between an Alabama homeowner and a termite exterminating company based in another state.²¹⁶

Whereas the *Southland*, *Perry*, and *Terminix* decisions established that the FAA prohibits state efforts to invalidate agreements to arbitrate certain categories of disputes, *Doctor's Associates, Inc. v. Casarotto*²¹⁷ went even further in expanding the scope of the FAA's preemptive effect.²¹⁸ In *Casarotto*, the Court held that even a mere requirement that an arbitration clause be "typed in underlined capital letters on the first page of the contract" was inconsistent with the FAA and therefore preempted.²¹⁹

210. 465 U.S. 1, 1 (1984).

211. *Id.* at 10.

212. 482 U.S. 483, 483 (1987).

213. *See id.* at 491-92.

214. 513 U.S. 265, 267 (1995).

215. *See id.* at 268-69.

216. *See Dobson*, 513 U.S. at 268.

217. 517 U.S. 681 (1996).

218. *Id.* at 686.

219. *See Casarotto*, 517 U.S. at 683; *see also Sternlight, supra* note 12, at 667.

Professor Sternlight's observations are that "[a]summing the Court's decision in *Doctor's Association* is neither overturned by Congress nor later reversed as constitutionally misguided, state legislatures will be permitted to protect consumers and others from unfair binding arbitration clauses only to the extent they regulate

The various approaches discussed in this section all have the same essential objective: achieving a greater congruence between arbitration outcomes and substantive legal principles. Each of them - (1) making distinctions based on whether the rights involved have statutory origins; (2) requiring arbitrators to follow the law; (3) adopting policies and procedures to ensure a fair hearing; (4) analyzing the issues in terms of "illegality" or amorphous "public policy;" and (5) defaulting, finally to simplistic embrace of the FAA's preemptive character - are merely fragments in a patchwork effort to reconcile the irreconcilable and create the "Grand Unified theory." They are not sufficient to deal effectively with the kinds of emerging concerns discussed in Section IV.

IV. MORPHOGENESIS CONTINUED: CONSUMER AND NON-COLLECTIVE BARGAINING AGREEMENT OF EMPLOYMENT DISPUTES

The two primary paths of U.S. arbitration law development — commercial and labor — have been haphazardly intersected by new trails blazed by the courts through the legal wilderness, just as hikers who become lost in the forest search first for the comfort of a familiar path with which to join, despite a paucity of accurate information about its origin or destination.

A. Consumer Services Disputes

1. Health Care

Health care represents an area of rapid growth in service provider versus consumer arbitration programs. California-based Kaiser Permanente, the largest HMO in the country, requires subscribers in its home state and three others to arbitrate claims arising from their health care relationship. In *Engalla v. Permanente Medical Group, Inc.*,²²⁰ a Kaiser patient and HMO subscriber brought a claim for misdiagnosis and failure to treat respiratory conditions that eventually proved to be terminal lung cancer.²²¹ The patient died the day after Kaiser's own arbitrator and a neutral arbitrator were appointed.²²² At trial, plaintiffs argued that Kaiser intention-

purely local transactions, or draft legislation that addresses arbitration jointly with other concerns." *Id.* at 668.

220. 938 P.2d 903, 907 (Cal. 1997).

221. *See id.* at 908.

222. *See id.* The patient died 144 days after the demand for arbitration, thus

ally delayed the appointment of a neutral arbitrator so as to reduce its exposure, and that the system shows a pattern of delay.²²³ Despite the plan's own procedural rule which required appointment of arbitrators within 60 days, the appointment process was actually taking, on average, 674 days and claim resolution, on average, 863 days.²²⁴ The trial court invalidated the arbitration agreement as "unconscionable and a violation of public policy."²²⁵ But the California Court of Appeals reversed, ruling that Engalla's claims were subject to the arbitration agreement because no grounds existed for rescinding it.²²⁶ The fact that the arbitration program "is designed, written, mandated and administered by Kaiser" was of utmost significance in this case.²²⁷ "The fact that Kaiser has designed and administers its arbitration program from an adversarial perspective is not disclosed to Kaiser members or subscribers."²²⁸

Reversing the court of appeals, the California Supreme Court found that the arbitration agreement was not facially unconscionable,²²⁹ noting that "the alleged problem" was "the gap between [Kaiser's] contractual representations and the actual workings of its arbitration program."²³⁰ The court went on to observe that it "is the doctrines of fraud and waiver, rather than of unconscionability, that most appropriately address this discrepancy between the contractual representation and the reality."²³¹ Concluding that sufficient evidence had been adduced to support a finding upholding

reducing the family's potential recovery by \$250,000. *See Kaiser Fields Pointed Questions from California Supreme Court Justices*, 8 WORLD ARB. & MEDIATION REP. 77-78 (1997).

223. *See Engalla*, 938 P.2d at 913.

224. *Id.* at 913.

225. *Id.* at 915.

226. *Id.* at 908.

227. *Id.* at 909. The court found that under the program:

Kaiser collects funds from claimants and holds and disburses them as necessary to pay the neutral arbitrator and expenses approved by him or her. It monitors administrative matters pertinent to the progress of each case, including, for example, the identity and dates of appointment of arbitrators. It does not, however, employ or contract with any independent person or entity to provide such administrative services, or any oversight or evaluation of the arbitration program or its performance. Rather, administrative functions are performed by outside counsel retained to defend Kaiser in an adversarial capacity.

Id.

228. *Id.*

229. *See id.*

230. *Id.* at 925.

231. *Id.*

the Engallas' allegations, including the question of whether Kaiser, by its delay or by other acts or omissions, waived its right to compel arbitration, the court remanded the case to the trial court for resolution of these key factual issues.²³²

In *Broemmer v. Abortion Services of Phoenix, Ltd.*,²³³ the Arizona Supreme Court invalidated as an unenforceable contract of adhesion a document denominated "Agreement to Arbitrate" signed by a patient before undergoing a clinical abortion at defendant's facility.²³⁴ The court observed that the adhesive nature of the agreement was "not, of itself, determinative of its enforceability,"²³⁵ but found that its provisions did not "fall within the reasonable expectations of the weaker or 'adhering' party."²³⁶ The court focused on four points: (1) Plaintiff Broemmer had been presented with the "standardized contract" "offered on a 'take it or leave it' basis," as a condition of treatment;²³⁷ (2) the defendant medical facility, drafter of the agreement, had "inserted additional terms potentially advantageous to itself requiring any [A.A.A. appointed arbitrator to] be a licensed medical doctor specializing in obstetrics/gynecology;"²³⁸ (3) clinic staff neither explained the terms of the agreement to plaintiff "nor indicated [to her] that she was free to refuse to sign, telling her only that she "had to complete the three forms;"²³⁹ and, (4) the [p]laintiff was under great emotional stress, had only a high school education, was not experienced in commercial matters," and was "still not sure 'what arbitration is.'"²⁴⁰ Interestingly, the only reference to the Arizona version of the UAA²⁴¹ was in the dissent, which would have upheld the agreement based on the statute, a position consistent with the great body of federal law.²⁴²

232. *Id.*

233. 840 P.2d 1013, 1014 (Ariz. 1992).

234. *See id.* at 1015.

235. *Id.* at 1016 (quoting *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (1981)). "[A] contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules - legislative or judicial - operate to render it otherwise." *Id.*

236. *Id.* at 1016.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1017.

241. *See* ARIZ. REV. STAT. § 12-1501.

242. *See Broemmer*, 840 P.2d at 1019. The Supreme Court has upheld arbitration agreements under the Federal Arbitration Act in a variety of contexts. *See, e.g., Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 221 (1987)

2. Banking

In *Badie v. Bank of America*,²⁴³ the Appellate Department of the California Superior Court decided, in an unpublished opinion that: (1) that the contract between Bank of America and its retail deposit account customers and credit card customers did allow modifications which would include the addition of an arbitration provision; (2) the modification to add the arbitration clause was effectively communicated by notices which the bank sent to customers, and (3) that the manner of delivery was sufficient to make the communication effective.²⁴⁴ Further, the court, ruled that this modification did not violate the covenant of good faith and fair dealing.²⁴⁵

Although the *Badie* court determined that the contracts between the bank and its customers were contracts of adhesion, the bank's modification to add the arbitration clause was not unconscionable because both the clause and its provisions were within the reasonable expectations of the bank's customers.²⁴⁶ The court determined that there was no proof that the bank made any false representation or nondisclosure or that it engaged in what could be determined to be an unfair business practice.²⁴⁷

B. Non-Collective Bargaining Agreement / Non-Securities Employment

Cole v. Burns International Security Services,²⁴⁸ addresses the need for a more focused and analytical approach to the enforcement of mandatory arbitration agreements and the judicial review of arbitration awards. *Cole* arose out of the termination of the plaintiff's employment as a security guard who had been employed by LaSalle

(dealing with the Securities Exchange Act of 1934 and RICO claims); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 478 (1989) (dealing with the Securities Act of 1933); and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 22 (1991) (dealing with Age Discrimination in Employment Act claim).

243. No. 944916, 1994 WL 660730 (Cal. App. Dep't. Super Ct. Aug. 18, 1994.)

244. *See id.* at * 1.

245. *See id.* The doctrine of good faith and fair dealing governs unilateral modifications of contract terms. *Id.* Under the doctrine of *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503 (Cal. 1985), the bank retained the unilateral right to change the terms of the agreement which it entered into with its customers. *Id.*

246. *See Badie v. Bank of America*, No. 944916, 1994 WL 660730, at *1, (Cal. App. Dep't Super. Ct. Aug 18, 1994).

247. *See id.*

248. 105 F.3d 1465 (D.C. Cir. 1997).

and Partners.²⁴⁹ In 1991, the defendant Burns took over LaSalle's contract to provide security services at Union Station.²⁵⁰ As a condition of obtaining employment with Burns, all former LaSalle employees were required to sign a "Pre-Dispute Resolution Agreement."²⁵¹ The applicants first agreed that in any lawsuit brought by "either party" related to "your recruitment, employment with, or termination of employment" the plaintiff "agrees to waive his, her, or its right to a trial by jury, and further agrees that no demand, request or motion will be made for trial by jury."²⁵² Second, should the applicant "seek relief in court the *Company* may, within 60 days of service of the complaint, at *its option*, require all or part of the dispute to be arbitrated by one arbitrator in accordance with the rules of the American Arbitration Association." Third, the "option to arbitrate" was to be "governed" by the FAA, and was "fully enforceable." Fourth, the subject matter of the arbitration covered "all matters directly or indirectly related to [the applicant's] recruitment, employment or termination of employment by the Company; including, but not limited to, claims involving laws against discrimination . . . , but excluding Workers Compensation Claims."²⁵³

The document advises that "[t]he right to a trial, and to a trial by jury, is of value"; and further suggests, in bold type, that the applicant might wish to consult an attorney before signing.²⁵⁴ Notably, the agreement also lectures: "YOU WILL NOT BE OFFERED EMPLOYMENT UNTIL THIS FORM IS SIGNED AND RETURNED BY YOU."²⁵⁵

After he was terminated in October, 1993, Burns brought an action in the United States District Court for the District of Columbia, alleging: (1) racial discrimination and harassment; (2) retaliation for having written a letter of complaint regarding sexual harassment of a subordinate employee by a Burns supervisor; and (3) intentional infliction of emotional distress.²⁵⁶ Relying on the pre-employment agreement, Burns moved to compel arbitration

249. *See id.* at 1469.

250. *See id.*

251. *See id.*

252. *See id.*

253. *Id.* at 1469 (emphasis added).

254. *Id.*

255. *Id.*

256. *See id.* at 1469-70.

and to dismiss plaintiff Cole's complaint.²⁵⁷ Opposing the motion, Cole argued that the pre-employment agreement was not covered by the FAA, and that it was an unconscionable, unenforceable contract of adhesion.²⁵⁸ The trial court rejected these arguments, dismissed the complaint and granted Burns' motion to compel arbitration.²⁵⁹

The D.C. Circuit noted that the "heart of the problem in this case" is the enforceability of conditions of employment which require individual employees to use arbitration in place of a judicial forum when resolving statutory claims.²⁶⁰ The court also rejected an argument that the FAA's exclusion of contracts of employment of workers engaged in foreign or interstate commerce should exempt Cole from having to arbitrate his claims.²⁶¹

The *Cole* Court upheld the arbitration agreement, with judicially-imposed modifications. Clearly bothered by the potential for injustice created by the employer's practice, it articulated a virtual primer on the construction and application of agreements mandating the arbitration of disputes involving statutory employment rights.²⁶² In an insightful observation, the court noted that:

[I]t is crucial to emphasize the distinction between arbitration in the context of collective bargaining and mandatory arbitration of statutory claims outside of the context of a union contract. . . . [B]ecause traditional labor arbitration is so celebrated in the United States, it is easy for the uninitiated to fall prey to the suggestion that the legal precepts governing the enforcement and review of arbitration emanating from collective bargaining should be equally applicable to arbitration of all employment disputes. This is a mischievous idea, one that we categorically reject.²⁶³

The court discussed the special nature and context of labor

257. *See id.* at 1470.

258. *See id.*

259. *See id.*

260. *Id.* at 1472.

261. *See id.* at 1472. An in-depth examination of this issue, raised in various other cases, is beyond the scope of this article. For a full discussion, *see* Sternlight, *supra* note 12 (analyzing the history of the Federal Arbitration Act and its interpretation). "Given the very different purposes, sources and dynamics of grievance arbitration under collective agreements, that model cannot be imposed unquestioningly upon the post-*Gilmer* world of public-law arbitration." *Id.*

262. *Cole*, 105 F.3d at 1473.

263. *Id.*

arbitration, noting the essential reason for the great judicial deference accorded that process: "It is the arbitrator's construction [of the collective bargaining agreement] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."²⁶⁴

The D.C. Circuit expressed its view that "[t]he fundamental distinction between [privately created] contractual rights . . . and statutory rights, which are created, defined, and subject to modification only by Congress and the courts, suggests the need for a public, rather than private, mechanism of enforcement for statutory rights."²⁶⁵ Aside from what the court referred to as this "abstract" level of concern, it found the arbitration of "public law issues" also "troubling . . . because the structural protections inherent" in labor arbitration are not present.²⁶⁶ Unlike the situation in *Cole*, in which only the employer will be a "repeat player" in the arbitration program, the status of both the union and employer as regular participants in the process provides them with the same level of knowledge about arbitrator selection.²⁶⁷ Other "structural concerns" addressed by the court in *Cole* included:

(1) *Privacy*—Privacy is not a concern in labor arbitration, where the issues are rarely of concern to anyone other than the parties; but public judicial redress of statutory claims "creates binding precedent that prevents a recurrence of statutory violations."²⁶⁸

(2) *Fee Obligations*—Unions participate in negotiating the terms of labor arbitration agreements; in cases like *Cole*, the individual contracts often are presented on a take-it-or-leave-it basis, thus permitting employers to "structure arbitration in ways that may systematically disadvantage employees." An example of this danger, says the court, would be a plan which requires employees to pay arbitration fees, "in order to discourage or prevent them from bringing claims."²⁶⁹

264. *Id.* at 1474 (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

265. *Id.*

266. *Id.*

267. *See id.*

268. *Cole v. Burns Int'l Sec. Servs.* 105 F.3d 1465, 1477 (D.C. Cir. 1997).

269. *Id.* *See also* Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REFORM 249, 262 (1983).

(3) *Legal Issue Competence*—Generally, labor arbitrators, many of whom are not lawyers, do not engage “in the same kind of legal analysis performed by judges. [They] often cite to and rely on treatises . . . on leading cases . . . without citing to subsequent lower courts or less publicized cases, . . . [thus basing the decision] on broad stroke principles to the exclusion of cases more analogous to the claim being decided. Nor do arbitrators always analyze an intentional discrimination case within the judicially accepted three-prong framework articulated by the Supreme Court in *McDonnell Douglas*.”²⁷⁰

In this connection, Judge Edwards cited his own paper, *Arbitration of Employment Discrimination Cases* presented at the 28th annual Meeting of the National Academy of Arbitrators, which reported that at least sixteen percent of arbitrators have never read any judicial opinions involving Title VII; forty-nine percent do not read labor advance sheets to keep abreast of developments under Title VII; and of those arbitrators who have never read a judicial opinion on employment discrimination and who do not read advance sheets, fifty percent nonetheless feel professionally competent to decide legal issues in cases involving employment discrimination.²⁷¹

These concerns notwithstanding, the *Cole* court concluded that *Gilmer* clearly established that “as a general rule, statutory claims are fully subject to binding arbitration, at least outside of the context of collective bargaining.”²⁷² In an uncharacteristic display of micromanagement, the court went on to note that *Mitsubishi* still requires that “[t]he prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum . . . [thus enabling] the statute [to] continue to serve both its remedial and deterrent function.”²⁷³ For support, the court declared, “[o]bviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes.”²⁷⁴

270. *Cole*, 105 F.3d at 1477-78. See also *Green v. McDonnell Douglas*, 411 U.S. 792 (1973).

271. *Cole*, 105 F.3d at 1478 (citing Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, PROC. OF THE 28TH ANNUAL MEETING OF THE NAT'L ACAD. OF ARB. 59, 71-72 (1976)).

272. *Cole v. Burns, Int'l Sec. Servs.* 105 F.3d at 1477

273. *Gilmer v. Interstate/Johnson-Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

274. See *Cole*, 105 F.3d at 1482 (citing Robert A. Gorman, *The Gilmer Decision* &

Perhaps in an apparent effort to justify its conclusion that *Gilmer* required enforcement of the arbitration agreement in *Cole*, the D.C. Circuit's holding mandates details of program interpretation and administration.²⁷⁵ These details sound more like the provisions of a consent decree than the determination of an appeal:

(1) An employee cannot be required as a condition of employment to waive access to a neutral forum in which statutory employment claims may be heard—for instance, giving up the right to bring a Title VII claim in *any* forum.²⁷⁶

(2) The arbitration arrangement must provide for neutral arbitrators. The court specifically blessed the American Arbitration Association (AAA) as the designated appointment agency.²⁷⁷

(3) The program must provide for more than minimal discovery, must require a written award and must provide for all of the types of relief that would otherwise be available in court.²⁷⁸ With unusual precision, the D.C. Circuit specifically consecrated, as the approved antitoxin against the unstable condition of statutory employment claim arbitration, AAA Employment Arbitration Rule 7 (which empowers arbitrator to order depositions, interrogatories, document production or other discovery as “consider[ed] necessary to a full and fair exploration of the issues in dispute”); Rule 32(b) (a written award requires written reasons therefore required); Rule 32 (c) (an arbitrator is authorized to grant any remedy or relief “deem[ed] just and equitable, including, but not limited to, any remedy or relief [available to the parties in] court.”).²⁷⁹

(4) The employee cannot be required to pay unreasonable costs or *any* arbitrators' fees. In this regard, the Court

The Private Arbitration of Public Law Disputes, 1995 U. ILL. L. REV. 635, 644 (posing a hypothetical example of an unenforceable agreement to arbitrate as one which requires employees to waive their right to be free from Title VII—prohibited discrimination)).

275. *See id.*

276. *Id.* (noting the Ninth Circuit's refusal in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1246-48 (9th Cir. 1994) to enforce an arbitration agreement under which the employee waived remedies provided by federal statute and shortened the statute of limitations for filing).

277. *Cole v. Burns Intern. Security Services*, 105 F.3d 1465, 1480 (D.C. Cir. 1997).

278. *See id.*

279. *See id.* at 1480-81.

deemed as a good start AAA Rule 35 (initiating party must pay \$500 filing fee (subject to apportionment in the award) and an administrative fee of \$150 per hearing day (with provision for hardship deferral or reduction); Rule 36 (expenses shared equally unless otherwise agreed or ordered in award); and Rule 37 (arbitrator's compensation to be as agreed with the parties or, absent agreement, as otherwise directed in the award); AAA to set arbitrator's fee (but no provision for method of allocation of fees.)²⁸⁰ Inasmuch as the only other Rule addressing the question of arbitrators' compensation—Rule 32—also fails to prescribe how such costs are to be allocated, the Court simply decreed that “an arbitrator's compensation and expenses must be paid by the employer alone.”²⁸¹

The court's efforts to reconcile the *Gilmer* mandated arbitration with its own detailed conception of a fair process is a reflection of its concerns.

The opinion concludes that the employee cannot be required to pay *any* part of the arbitrator's fees: “Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum.”²⁸² Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.²⁸³ Accordingly, the Court found that the AAA rules did *not* meet this requirement, apparently because of their silence regarding the allocation of arbitrator's compensation.²⁸⁴ Thus, the D.C. Circuit created a paradox: *Gilmer* required enforcement of the *Cole* agreement, but the *agreement by its terms* did not meet the D.C. Circuit's detailed standards for fairness.²⁸⁵ The solution was simple: by judicial fiat, rewrite the contract.²⁸⁶

The court observed that “where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful.”²⁸⁷ Coupling this principle with the

280. See *id.* at 1480.

281. See *id.* at 1481.

282. By analogizing to court filing fees, the court determined that the AAA administrative fees “are not problematic.” *Id.* at 1484.

283. See *id.*

284. *Id.*

285. See *id.* at 1483 n.11.

286. See *id.* at 1475.

287. *Id.* at 1485-86 (citing 1010 Potomac Assoc. v. Grocery Mfrs. of Am., Inc.,

rule that ambiguous contract provisions are construed against the drafter,²⁸⁸ the court decided “[t]herefore, *in order to uphold the validity of the parties’ contract, we interpret the arbitration agreement between Cole and Burns as requiring Burns to pay all arbitrator’s fees in connection with the resolution of Cole’s claim.*”²⁸⁹

Finally, the court literally served notice by advising the parties that in the D.C. Circuit arbitration awards emanating from a system such as Burns’ *will* be subject to judicial review:

The value and finality of an employer’s arbitration system will not be undermined by focused review of arbitral legal determinations. Most employment discrimination claims are entirely factual in nature and involved well-settled legal principles As a result, in the vast majority of cases, judicial review of legal determinations to ensure compliance with public law should have no adverse impact on the arbitration process. Nonetheless, there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator’s award to ensure that its resolution of public law issues is correct. . . . Because meaningful judicial review of public law issues is available, Cole’s agreement to arbitrate is not unconscionable or otherwise unenforceable.²⁹⁰

The *Cole* opinion underscores the thesis of this article: laws regarding enforcement of arbitration agreements and judicial review of awards must recognize the relevance of subject matter.

C. *Intersections and Collisions*

Setting aside for the moment all attempts, from whichever philosophical camp, to rationally analyze these developments, it is clear is that the process of decisional mutation we have reviewed has produced a series of intersections and collisions between the FAA and other policy considerations that illustrate the futility of

485 A.2d 199, 205 (D.C. 1984) (stating a contract “must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms.”); *Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 366 (D.C. 1984); see also RESTATEMENT OF CONTRACTS § 236 (1925). “It is also accepted that ambiguous provisions are construed against the drafter of the contract.” *Id.* at 1486.

288. *Home Savings and Loan v. Aetna Cas. and Sur. Co.*, 817 P.2d 341, 347 (Utah 1991).

289. *Cole*, 105 F.3d at 1486 (emphasis added).

290. *Id.* at 1487 (citations and footnotes omitted).

the search for a judicially created “Grand Unified Theory of Arbitration Law.”

1. *The FAA, Collective Bargaining and Federal Legislation on Employment Discrimination*

The seminal “collision” case was *Alexander v. Gardner-Denver Co.*,²⁹¹ in which the Supreme Court dealt with the question of whether the historical deference accorded to labor arbitration should extend to a claim of race discrimination under Title VII of the Civil Rights Act of 1964.²⁹² That case arose out of an employee’s discharge for poor work performance.²⁹³ His union filed a grievance asserting that the discharge was without “just cause” as required by the collective bargaining agreement.²⁹⁴ The claim that the discharge also constituted race discrimination was not asserted until the employee later filed a charge with the Equal Employment Opportunity Commission.²⁹⁵ The race claim was heard and considered by the arbitrator, who rejected all the employee’s and union’s arguments and upheld the discharge.²⁹⁶ The employee then brought a Title VII action in federal court, arguing that the adverse arbitration decision should not preclude litigation of the race claim.²⁹⁷ The Supreme Court held that the arbitrator’s authority was limited to the determination only of *contractual* claims created by the collective bargaining agreement,²⁹⁸ and that the public policy underlying Title VII mandated that the employee’s *statutory* claim was entitled to a *de novo* court hearing.²⁹⁹ The Court concluded from the statute’s legislative history that Congress intended to preserve the right to judicial resolution of the statutory claim and that the union could not waive this right in collective bargaining.³⁰⁰ The Court observed in a footnote that the arbitration award could be admitted as evidence in the discrimination suit and accorded the appropriate weight.³⁰¹

291. 415 U.S. 36 (1974).

292. *See id.* at 38; *see also* 42 U.S.C. § 2000 e-2 (1994).

293. *See Alexander*, 415 U.S. at 36.

294. *See id.* at 39-40.

295. *See id.* at 42.

296. *See id.*

297. *See id.*

298. *See id.* at 43.

299. *See id.* at 59-60.

300. *See id.* at 51-52.

301. *See id.* at 60 n.21.

The opinion distinguished Title VII rights from those otherwise legally protected, noting that a "private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."³⁰²

A recent three-way collision occurred at the intersection of the FAA, federal employment discrimination statutes and the historical principles governing the judicial review of labor arbitration awards. On March 20, 1997, the Seventh Circuit decided *Pryner v. Tractor Supply Co.*³⁰³ and *Sobierajski v. Thoesen Tractor & Equipment Co.*³⁰⁴ In a major break from the long line of *Mitsubishi*-inspired cases,³⁰⁵ the court concluded that when a doubt exists about the arbitrability of a statutory discrimination claim the issue should be resolved in favor of the *right to sue*.³⁰⁶ The court failed to even mention the option of "deferring to any strong federal policy favoring arbitration."³⁰⁷ It found the 1991 Civil Rights Act's new provision for jury trials in Title VII cases to be a "strong expression of federal policy that should be enforced."³⁰⁸

In *Pryner*, the plaintiff employees invoked collective bargaining agreement grievance procedures after they were discharged by their former employer.³⁰⁹ Asserting their employer's disciplinary action was not for "just cause," the employees maintained they were discharged for reasons that would constitute violations of Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).³¹⁰ One of the grievances was abandoned by one employee.³¹¹ When the remaining union griev-

302. *Id.* at 45 (citing *Hutchings v. United States Ind.*, 428 F.2d 303, 310 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968)). This essential concept of "public policy" exceptions to FAA arbitrability has come under criticism. See Stempel, *supra* note 2, at 285 (stating that "treating the enforcement of arbitration agreements disparately according to the nature of the dispute rather than the quality of the parties' consent to the agreement constitutes judicial misuse of public policy considerations and cheapens legitimate use of public values as an aid to interpretation").

303. 109 F.3d 354 (7th Cir. 1997).

304. 679 N.E.2d 386 (Ill. 1997).

305. Which supported the FAA's establishment of a federal policy favoring arbitration in almost every circumstance.

306. See *Pryner*, 109 F.3d at 365. See also 8 WORLD ARB. & MEDIATION REP., No. 4, at 91 (1997).

307. 8 WORLD ARB. & MEDIATION REP., No. 4, at 91 (1997).

308. *Id.*

309. See *Pryner*, 109 F.3d at 354-55.

310. See *id.* at 356.

311. See *id.*

ance could not be settled the other employee demanded arbitration.³¹² The court extensively discussed the conflict between the union's role as advocate for the collective interests of all bargaining unit employees and the individual employees' newly won right to trial by jury of discrimination claims.³¹³ It concluded that such employees' statutory rights could not be protected adequately in labor arbitration, holding that "the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by agreement."³¹⁴ Echoing the observations of the Ninth Circuit in *Lai*, the court concluded that amendments to discrimination statutes encouraging the use of ADR processes, including arbitration, were an expression of a policy favoring binding arbitration, only "where appropriate."³¹⁵

2. *The FAA, Collective Bargaining and The Fair Labor Standards Act (FLSA)*

The next collision was a three-way encounter between the traditional judicial deference shown to arbitration awards in the context of collective bargaining, the FAA, and the Fair Labor Standards Act (FLSA),³¹⁶ which sets minimum wages, requires premium pay for overtime work and restricts child labor.

Barrentine v. Arkansas-Best Freight System, Inc.,³¹⁷ arose out of a dispute between the employer trucking company and two of its driver employees.³¹⁸ It was the employer's practice to require drivers, upon arriving at the terminal to begin a trip, to punch in and perform certain preliminary office work for which they were compensated at an hourly rate.³¹⁹ Upon completion of these tasks, the drivers were to punch out, locate their trucks, and conduct a required pre-trip safety inspection.³²⁰ If the vehicle passed, the drivers commenced their hauls and were paid under a different compensation scheme.³²¹ However, if the truck failed the inspection,

312. *See id.*

313. *See id.* at 360-61.

314. *Id.* at 363.

315. *Id.* *See supra* note 123 and accompanying text.

316. 29 U.S.C. §§ 201-19 (1994).

317. 450 U.S. 728, 728 (1981).

318. *See id.* at 731.

319. *See id.* at 730 n.1.

320. *See id.*

321. *See id.*

the drivers were to take it to the company's repair shop and punch in a second time.³²² Typically, 15 to 30 minutes elapsed between drivers' punching out after finishing their office work and their punching in a second time in the event of failed inspection.³²³ It was the company's practice not to compensate drivers for this block of time.³²⁴ Pursuant to the provisions of the collective bargaining agreement between the company and Teamsters Local 878, Lloyd Barrentine and another driver filed a grievance against Arkansas-Best.³²⁵ The grievance was heard by a joint grievance committee consisting of three representatives of the union and three representatives of the employer who, under the contract, acted as arbitrators to provide final and binding decisions.³²⁶ The grievance committee rejected the drivers' claim that the time was compensable under the collective bargaining agreement.³²⁷ The employees then brought a lawsuit seeking to recover compensation under the overtime provisions of the FLSA.³²⁸ The key issue was whether the action of the grievance committee required that the lawsuit should be dismissed under the principles of claim preclusion.³²⁹ The United States District Court for the Eastern District of Arkansas rendered judgment for the employer, the Eighth Circuit affirmed, and certiorari was granted.³³⁰

The Supreme Court observed that Barrentine's claim had been for breach of the collective bargaining agreement, and held that inasmuch as the authority of the joint committee was limited to interpreting and applying the terms and provisions of that agreement, it did not extend to an FLSA claim.³³¹ Accordingly, the lawsuit was not barred.³³² The Court noted two reasons why an employee's right to a minimum wage and overtime pay under the FLSA might be lost if submission of his wage claim to arbitration precluded him from later suing in federal court: (1) even if the claim were meritorious, the union could legitimately decide not to

322. *See id.*

323. *See id.*

324. *See id.*

325. *See id.* at 730.

326. *See id.* at 731.

327. *See id.*

328. *See id.* at 732-33.

329. *See id.* at 729-30.

330. *See id.* at 733-34.

331. *See id.* at 737.

332. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981).

vigorously support it in arbitration, and (2) because arbitrators are required to effectuate the intent of the parties, rather than to enforce the statute, they could render awards inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.³³³ In addition, the Court observed that arbitrators are often powerless to grant the broad range of relief available in federal court.³³⁴ Rather, arbitrators are confined to awarding only compensation authorized by the collective bargaining agreement.³³⁵

Fourteen years later, in *Tran v. Alphonse Hotel Corp.*³³⁶ the Second Circuit considered the question of whether a union-represented plaintiff who failed to exhaust the grievance and arbitration procedure as the forum for his FLSA claims was for that reason barred from bringing an action on those claims in federal district court.³³⁷ Quoting extensively from *Barrentine*,³³⁸ the Court held squarely that: "in so far as the wage hour claims of plaintiff are concerned, plaintiff was not required to seek grievance and arbitration and was and is entitled to have those claims considered on the merits in the district court."³³⁹ Without discussion or explanation, the *Tran* Court held that "[A]ll claims of plaintiff other than those stated under the FLSA should have been the subject of a timely demand under the arbitration clause of the . . . union contract."³⁴⁰

333. *See id.* at 742-43.

334. *See id.* at 745 (noting it is unlikely that an arbitrator will be authorized to award liquidated damages, attorney's fees, or costs).

335. *See id.*

336. 54 F.3d 115, 115 (2d Cir. 1995).

337. *See id.* at 116-17.

338. 450 U.S. 728, 728 (1981).

339. *Tran v. Tran*, 54 F.3d 115, 118 (2d Cir. 1995). The plaintiff also sought redress for alleged violations of certain state statutory and common law claims in the district court. *See id.* The district court also refused to allow the plaintiff to amend his complaint to state an additional claim under the Federal Labor Management Relations Act. *See id.* 29 U.S.C. § 185(a) (1994).

340. *Tran*, 54 F.3d at 118.

3. *The FAA, Collective Bargaining and The Civil Rights Act of 1871*³⁴¹

The Supreme Court dealt with still another policy intersection and collision in *McDonald v. City of West Branch*.³⁴² There, McDonald, a police officer, brought an action in the U.S. District Court for the Eastern District of Michigan, alleging that his termination from employment with the City violated the Civil Rights Act of 1871.³⁴³

As McDonald was a member of a collective bargaining unit, his discharge was processed through the contractual grievance and arbitration procedure.³⁴⁴ The arbitrator upheld the discharge, finding it was for just cause.³⁴⁵ McDonald then filed suit against the City, the police chief and certain other officials, alleging that he was discharged for exercising his First Amendment rights of freedom of speech, association and to petition the government for redress of grievances.³⁴⁶ The jury rendered a verdict against the police chief alone, who appealed, arguing that the Federal Full Faith and Credit Statute³⁴⁷ required the arbitrator's decision to be accorded *res judicata* and collateral estoppel effect and the suit dismissed.³⁴⁸ The Sixth Circuit reversed and remanded, and certiorari was granted.³⁴⁹

Justice Brennan recalled the Court's rejection of both a judicially-created rule of preclusion in *Barrentine*³⁵⁰ and a rule of deferral in *Gardner-Denver*.³⁵¹ Both decisions were essentially grounded on the conclusion that the statutes at issue in those cases were in-

341. 42 U.S.C. § 1983 (1994). Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action in law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. *Id.*

342. 466 U.S. 284, 284 (1984).

343. *Id.* at 285-86.

344. *See McDonald v. City of West Branch*, 466 U.S. 284, 285-86 (1984).

345. *See id.* at 286.

346. *See id.*

347. 28 U.S.C. § 1738 (1994).

348. *See McDonald*, 466 U.S. at 287.

349. *See id.* at 285.

350. *Barentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 728 (1981).

351. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 36 (1974).

tended by Congress “to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings. . . .”³⁵² The Court held that, inasmuch as there was a misalignment of the interests of the union and of the employee, no rule of preclusion should deprive McDonald of his right to sue on a Section 1983 claim.³⁵³ This conclusion was driven by the Court’s observations that (1) the arbitrator lacked expertise in the substantive statutory law; and (2) the arbitrator’s authority, having been derived solely from the contract, may not extend to the enforcement of Section 1983.³⁵⁴ Therefore, there was an imperfect alignment of the interests of the union and of the employee.

4. Other FAA Employment Rights “Collisions”

The collisions and intersections discussed above are merely examples of numerous decisions which illustrate the incoherent and inconsistent approach being used by the federal courts to attempt to reconcile numerous important Congressionally enshrined employment rights with their elevation of the FAA to a status it is neither logically nor philosophically capable of holding.³⁵⁵ Among the other statutory rights involved in these cases are those created by Employee Retirement Income Security Act (ERISA),³⁵⁶ the Racketeer Influenced and Corrupt Organizations (RICO Act)³⁵⁷ and those discussed by Professor Stempel.³⁵⁸

V. CONCLUSION: THE “ANDROMEDA STRAIN” REVISITED

Despite Professor Sternlight’s lamentation regarding the Supreme Court’s elevation of the FAA to its currently supreme status,

352. *McDonald v. City of West Branch*, 466 U.S. 284, 289 (1984) (citing *Barentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-46 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-60 (1974)).

353. *See McDonald*, 466 U.S. at 292.

354. *See id.* at 290.

355. Professor Sternlight has characterized the current federal policy favoring arbitration as a judicially-created “myth,” first enunciated by Justice Brennan in *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 1 (1983). *See Sternlight, supra* note 12, at 660. A myth that has resulted in the eradication of public policy exclusion. *Id.* at 668-72. Sternlight goes on to assert that the “favored” process has now become the one “preferred” by the Supreme Court, a development unsupported by legitimate policy arguments. *Id.* at 660-697. For a contrary view, *see Stempel, supra* note 2, at 283-335.

356. 29 U.S.C. §§ 1001-1461 (1994).

357. 18 U.S.C. §§ 1961-1968 (1994).

358. *See Stempel, supra* note 2.

the statute is in no danger of being declared heretical.³⁵⁹ Neither does the Court seem inclined to abandon all of the so-called “public policy” exceptions to the enforcement of pre-dispute arbitration agreements and the awards that are their by-product in favor of an “intent of the parties” test which Professor Stempel advocates.³⁶⁰

At this evolutionary stage of the judicial morphallaxis, the courts cannot pull themselves out of this vortex of competing and conflicting interests to re-focus on a coherent and consistent approach which realizes that subject matter matters. But the current mutated state of the law should prompt Congress and state legislatures to enact a wholesale revision of the FAA and UAA— and there is a related historical precedent that can serve as a valuable guide.

Arbitration dates back to the British Law Merchant, which had a specialized set of rules that governed commercial disputes in eleventh century England.³⁶¹ Aside from the desire for speedy resolution, the primary factor that motivated business people to voluntarily prefer and adhere to this system as an alternative to the courts was the desire of merchants to have disputes resolved according to their own commercial customs and practices.³⁶²

The arbitration process created in this context, however, needed some substantive rules on which to act. The same *lex mercatoria*³⁶³ is at the root of the family tree of the law of commercial transactions we now call the Uniform Commercial Code (UCC).³⁶⁴

359. See Sternlight, *supra* note 12, at 674.

360. See *id.*

361. See Stempel, *supra* note 2, at 270.

362. See *id.*

363. See *Bank of Conway v. Stary*, 200 N.W. 505, 508-09 (N.D. 1924) (defining *lex mercatoria*).

[*Lex mercatoria* is] a system of law that does not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usage of trade which general convenience and a common sense of justice have established to regulate the dealings of merchants and mariners in all commercial countries of the civilized world. This . . . common law of merchants is of more universal authority than the common law of England.

See *id.* at 508 (citations omitted).

364. The Uniform Commercial Code is an Act:

Relating to Certain Commercial Transactions in or regarding Personal Property and Contracts and other Documents concerning them, including Sales, Commercial Paper, Bank Deposits and Collections, Letter of Credit, Bulk Transfers, Warehouse Receipts, Bills of Lading, other Documents of Title, Investment Securities, and Secured Transactions,

The UCC is the contemporarily restated and systematized expression of that collection of customs of the “international community of merchants, shipowners, marine insurance underwriters, and bankers of many countries” that formulated the essential law of documentary sales.³⁶⁵

But the Law Merchant itself went into a confused state of mutation as a result of its absorption by the official British Courts during the late Eighteenth Century. This development produced a renewed interest in commercial arbitration to escape the degradation of the old informal system’s economy, efficiency, and expedition.³⁶⁶

By 1893, the aggregation of common law and *lex mercatoria* was reduced to statute in Great Britain.³⁶⁷ In the United States, the National Conference of Commissioners of Uniform State Laws (NCCUSL) undertook a similar codification effort that eventually resulted in drafting a number of uniform acts regarding commercial law reform.³⁶⁸ Unlike what has happened with judicial efforts to create the Grand Unified Theory of Arbitration Law, the NCCUSL’s efforts produced a comprehensive, albeit not yet fully integrated, set of commercial law codes.³⁶⁹

The updated and integrated re-codification we know today as the Uniform Commercial Code (UCC) purports to deal with situations which may ordinarily arise in the handling of a commercial

including certain Sales of Accounts, Chattel Paper, and Contract Rights; Providing for Public Notice to Third Parties in Certain Circumstances; Regulating Procedure, Evidence and Damages in Certain Court Actions Involving such Transactions, Contracts or Documents; to Make Uniform the Law with Respect Thereto; and Repealing Inconsistent Legislation.

U.C.C. § 1-103 (1996).

“Unless displaced by the particular provisions of this Act, the principles of law and equity, including the *law merchant* . . . shall supplement its provisions.” *Id.* (emphasis added).

365. Susie A. Malloy, *The Inter-American Convention On The Law Applicable To International Contracts: Another Piece Of The Puzzle Of The Law Applicable To International Contracts*, 19 FORDHAM INT’L L.J. 662, 690 n.130 (1995).

366. *See id.* at 691 nn.133-34 (noting the UCC began with the law of merchants).

367. *See id.* at 691 n.133.

368. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1 (3d ed. 1988).

369. *See id.* UNIF. NEGOTIABLE INSTRUMENTS LAW (1896); UNIF. WAREHOUSE RECEIPTS ACT (1906); UNIF. SALES ACT 1906); UNIF. BILLS OF LADING ACT (1909); UNIF. STOCK TRANSFER ACT (1918); UNIF. CONDITIONED SALES ACT (1918); UNIF. TRUST RECEIPTS ACT (1933).

transaction.³⁷⁰ Preparation of the UCC began in 1942 as a joint project of the American Law Institute (ALI) and the NCCUSL.³⁷¹

In 1995, the NCCUSL appointed a Study Committee to look into revising the UAA for the first time in its 40-plus year history.³⁷² In the Spring of 1997, a 10-commissioner Drafting Committee commenced its work. The Drafting Committee may well see its task only as fine-tuning the mechanics of a statute designed simply to provide for the specific enforcement of arbitration agreements and awards. We have observed that in arbitration, subject matter is important. Perhaps the Committee should adopt a more ambitious agenda by creating a new, comprehensive, and integrated "Uniform Arbitration Code" (UAC), to be modeled after the UCC.

Rather than maintaining the current UAA format and focusing the discussions on "issues" such as the arbitrability of disputes or discovery procedures, we suggest the Drafting Committee use a different approach by organizing the new Code around *transaction dynamics*, in a way similar to the UCC. A few examples of the kinds of dynamics and the types of concerns generated by four decades of judicial morphallaxis are:

Dynamic	Concern
Relative equality of bargaining; power/ relationship dependency	Contracts of adhesion; where transaction avoidance is an unrealistic or impractical strategy for avoiding arbitration agreement
Realistic availability of non-arbitration relief; options available at the time	Purpose/role of legislative-created rights, causes of action, remedies; arbitrators following the law
Asymmetry of information/sophistication/ resources/interests in a complex society	"Repeat players"; contracts of adhesion; knowing waiver; discovery; breadth or remedies; joinder of parties; class actions
Relatively essential nature of goods/services dealt with by the contract containing the arbitration agreement	Where transaction avoidance is unrealistic or impractical (e.g., health care, banking, insurance, employment); public policy/trade regulation

370. See *id.* (discussing the scope of the Uniform Commercial Code).

371. See *id.* Between 1944 and 1951, the first draft of the code was completed. *Id.*

372. See Thomas J. Stipanowich, *Uniform Law Commissioners Tackle The Uniform Arbitration Act*, THE NEUTRAL CORNER, Sept. 1997, at 5-6.

Dynamic	Concern
Degree of information exchange consistent with concepts of fundamental fairness	Motion practice/discovery; class actions
Relative private/public impact/interest	Statutory rights/remedies; interface with common law tort actions; public policies regarding maintenance/creation of normative societal expectations and actions; arbitrators following the law
Arbitration as facilitative of important national commercial/economic objectives	International versus domestic nature of transaction; interaction of commercial activity with foreign political and economic policy
Federalism balance: national policy favoring arbitration versus States' interest in regulating it	State regulation or arbitration; local culture, values, politics
Relative significance/intensiveness of factual versus legal issues	Statutory rights; legislative regulation of societal activities (e.g., employment, trade, product liability); arbitrators following the law

Such an approach could help restore arbitration to its intended status, as expressed in the classic definition quoted by Elkouri and Elkouri:

[A] simple proceeding voluntarily chosen by the parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.³⁷³

A failure by the Drafting Committee to position its activities in a context of sufficient breadth and depth may well result in an unrecoverable loss of those attributes that are its *raison d'être* – speed, efficiency, economy, expertise, and finality. The Committee runs the risk of overreacting to interest-groups and creating, not a valuable product of the Grand Unified Theory of Arbitration Law, but a new kind of mutation, a cross between what many jurisdictions' call the "Rent-a-Judge" process³⁷⁴ and a watered-down litigation

373. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 2 (3d ed. 1982); See also *Gater v. Ariz. Brewing Co.*, 95 P.2d 49, 50 (Ariz. 1939).

374. See, e.g., MINN. R. GEN. PRAC. 114.02 (a)(2) (1997).

procedure containing such features as artificially-constrained, one-size-fits-none discovery and the right to appeal from a “reasoned opinion.”

But doing the right thing should come naturally to ten reflective commissioners. Interestingly enough, the Associate Chief Reporter of the Editorial Board which oversaw the preparation of the 1952 edition of the UCC was Professor Soia Mentschikoff—whose other well-known area of expertise is arbitration.³⁷⁵ Thus, the NCCUSL already has the cross-disciplinary ancestral genes for the creation of the new species of arbitration law we advocate. Success at this level may well pave the way for the development of a more useful “Federal Code of Arbitration” (FCA) to supplant the now obviously overly simplistic FAA.

Consensual Special Magistrate. A forum in which a dispute is presented to a neutral third party in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal.

See id.

375. See WHITE & SUMMERS, *supra* note 368, § 1.