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Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review

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MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS AND THE NEED FOR MEANINGFUL JUDICIAL REVIEW

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INTRODUCTION

Alternative Dispute Resolution is becoming increasingly popular as parties look for a more efficient conflict resolution mechanism.¹ Alternative Dispute Resolution (“ADR”) creates a forum for resolving

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1. See THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 49 [hereinafter DUNLOP REPORT] (discussing the appeal of arbitration as an efficient means of conflict resolution), at <http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DunlopCommissionFutureWorkerManagementFinalReport.pdf> (last visited October 17, 2004).

disputes outside of the traditional courtroom setting.² Because arbitration is less formal than judicial proceedings and is run by arbitrators who are not required to adhere strictly to the law, it is less expensive and less time consuming than court proceedings.³

In arbitration, parties to a dispute agree to circumvent the traditional judicial process and submit their claim to a third party to decide on a remedy.⁴ Increasingly, mandatory arbitration clauses are surfacing in employment contracts as employers seek an easier manner to resolve conflicts with their employees.⁵ Many times, mandatory arbitration clauses are a “take it or leave it” condition of employment.⁶ In 1991, the Supreme Court ruled in *Gilmer v. Interstate/Johnson Lane Corporation* that mandatory arbitration clauses in employment contracts are enforceable even when they include a waiver of the right to bring a statutory claim in court.⁷

Unfortunately, the very features that attract parties to ADR undermine the protection of an individual’s statutory rights.⁸ Because ADR is less formal and is not held to the same standards as judicial proceedings, there is a risk that laws may be misapplied, or not applied at all, and that justice will be exchanged for efficiency.⁹

2. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (holding that arbitration is an effective forum for resolving statutory claims); see also *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997) (noting that arbitration is an alternate forum to the courts for resolving disputes).

3. See generally DUNLOP REPORT, *supra* note 1, at 49-51 (stating that arbitration should be more attractive to employers for dispute resolution because it is less costly and less formal than the courts).

4. See *Gilmer*, 500 U.S. at 26 (explaining the nature of the arbitrational system).

5. See generally EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (“EEOC”), POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT 1-2 (released July 10, 1997) (responding to the increase in arbitration claims and warning against undermining substantive rights in arbitration).

6. See *Cole*, 105 F.3d at 1477 (finding that many employees are not able to negotiate the terms of their employment contract).

7. See *Gilmer*, 500 U.S. at 35 (concluding that Congress did not intend to bar arbitration of statutory claims, such as those brought under the Age Discrimination in Employment Act).

8. See DUNLOP REPORT, *supra* note 1, at 49-50 (explaining attraction of arbitration to employers); see also *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (discussing the conflict between efficiency and statutory rights), *overruled by* *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

9. See DUNLOP REPORT, *supra* note 1, at 52-58 (recommending minimum quality standards be set in place to protect individual rights). The report recommends that the private arbitration system be held to six minimum standards. *Id.* These standards include: (1) arbitrators must be neutral and aware of the current law; (2) employees must be allowed access to information to help argue claim; (3) costs must be shared but ideally, the employee’s contribution should be capped; (4) employees must be allowed representation; (5) remedies must be comparable to those available in litigation; (6) judicial review must be rigorous enough to guarantee that the existing

Arbitration is a mechanism for determining the intentions of the parties upon entering a contract, not for determining how to apply established law.¹⁰ Traditionally, parties choose arbitrators based on their knowledge of a particular field upon which the contract is based; the arbitrators may not be familiar with the applicable law.¹¹ Nevertheless, the Supreme Court has held that arbitration is an appropriate forum for resolving statutory claims and that the Federal Arbitration Act (“FAA”) applies to employment contracts.¹²

This Comment will investigate mandatory arbitration clauses in employment contracts, more specifically the role of judicial review in examining the arbitration decisions of individual statutory claims. Part I will provide a brief overview of the history of arbitration and how Supreme Court jurisprudence has interpreted the FAA.¹³ Part II will discuss the benefits and dangers of arbitration, in particular the risk of forgoing an individual’s substantive rights.¹⁴ Part III will consider judicial review of arbitration decisions, specifically the current circuit split over the definition of “manifest disregard of the law.”¹⁵ Part IV will discuss the development of arbitration in the employment context; in particular, it will examine the reasoning behind the courts’ deference to arbitration decisions and suggest that this logic does not apply to the arbitration of statutory claims arising from an individual employment contract.¹⁶ Additionally, Part IV suggests that the correct interpretation of “manifest disregard of the law” must include the correct application and interpretation of existing law. This interpretation will ensure that arbitration does not deny individuals their substantive rights merely because they have subjected a legal claim to arbitration.¹⁷

law was applied. *Id.*

10. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (recognizing the role of arbitrator as “proctor of the bargain”).

11. See generally *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 290 (1984) (noting that parties chose arbitrators for their expertise in a particular field and not necessarily for their ability to answer complicated legal questions).

12. See *Gilmer*, 500 U.S. at 28 (concluding that arbitration is an appropriate forum for resolving statutory disputes); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 110 (2001) (noting that the FAA does not exempt contracts of employment except for transportation workers).

13. See *infra* notes 18-59 and accompanying text.

14. See *infra* notes 60-96 and accompanying text.

15. See *infra* notes 97-120 and accompanying text.

16. See *infra* notes 121-71 and accompanying text.

17. See *Cole*, 105 F.3d at 1478 (noting that an individual retains his or her substantive rights despite choosing another forum for dispute resolution).

I. THE FEDERAL ARBITRATION ACT AND THE SUPREME COURT

In 1925, Congress enacted the FAA to counter the long-standing judicial hostility towards arbitration and to “place arbitration agreements upon the same footing as other contracts.”¹⁸ The FAA was established so that arbitration agreements would be considered valid contracts, which would be upheld “save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁹ In order to guarantee that the courts would uphold arbitrators’ decisions, the FAA only allows a reviewing court to overturn a decision where the award was obtained through fraud, corruption, misconduct, or if the arbitrator exceeded his or her powers.²⁰ Additionally, circuit courts now recognize “manifest disregard of the law” as a judicially-created ground for vacating an arbitration award.²¹ As a result, courts that had traditionally been skeptical that arbitration could provide effective legal relief now extend great deference to arbitration awards.²²

The Supreme Court has played the strongest role in giving life to the FAA.²³ Initially, the Supreme Court was skeptical of arbitration,

18. *Gilmer*, 500 U.S. at 24 (explaining that hostility to arbitration agreements had existed at English common law and had been adopted by American courts); *see also* *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (discussing the historical development of arbitration agreements in employment contracts).

19. 9 U.S.C. § 2 (1994).

20. *See* 9 U.S.C. § 10(a)(1-4):

(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; or

(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.

21. *See generally Wilco*, 346 U.S. at 438 (discussing in dicta judicial review based on “manifest disregard of the law”).

22. *See Gilmer*, 500 U.S. at 34 (upholding an agreement to arbitrate because it is past the time for judicial suspicion of arbitration forums).

23. *See Gardner-Denver*, 415 U.S. at 48 (finding arbitration should not preclude the use of a court for statutory claims); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (noting the federal policy in favor of arbitration clauses in contracts and of upholding such clauses); *Gilmer*, 500 U.S. at 28 (concluding that arbitration is a legitimate forum for hearing statutory claims so long as substantive rights are upheld); *Circuit City*, 532 U.S. at 130 (upholding arbitration clauses in employment contracts). The Court in *Circuit City* applied the principal of *ejusdem generis* to determine that Congress did not intend for the FAA to exclude employment contracts. *Id.* at 114-15. The Court found that 9

but over time its position developed to favor the FAA and to recognize arbitration as a legitimate dispute resolution forum.²⁴ Early arbitration jurisprudence concerning statutory rights challenged arbitration as an appropriate manner to resolve disputes, finding that the importance of legal rights outweighed the interest of a “prompt, economical, and adequate solution to controversies through arbitration.”²⁵ Today, courts recognize arbitration agreements as not only a tolerated, but as a desired system of dispute resolution.²⁶ Overloaded court dockets—exacerbated by the increase in individual statutory rights and the expense of litigation—have led the courts to uphold arbitration agreements so long as the decision protects the individual’s substantive rights.²⁷

A. *Alexander v. Gardner-Denver Co.*

In *Alexander v. Gardner-Denver*, the Supreme Court found that a compulsory arbitration clause in a collective bargaining agreement did not preclude a Title VII federal claim.²⁸ It was in *Gardner-Denver* that the Court clearly articulated the inferiority of arbitration forums to the courtroom.²⁹ In *Gardner-Denver*, the Court found that an individual statutory claim is not precluded from the courts even though the employee agreed to an arbitration clause through the collective bargaining agreement.³⁰ The Court reasoned that the federal courts were assigned the plenary power for Title VII claims and that in pursuing such claims, a private individual is furthering a public good.³¹ As such, contractual rights arising from collective

U.S.C. § 1 should be narrowly construed to exclude only those employment contracts involved in maritime transactions. *Id.*

24. See *Circuit City*, 532 U.S. at 130 (following the historical development of arbitration in American jurisprudence).

25. *Wilco*, 346 U.S. at 438 (finding that efficiency does not outweigh statutory rights concerning the sale of securities).

26. See generally EEOC, *supra* note 5, at 11 (explaining that arbitration is a desirable system of dispute resolution that is time and expense saving, so long as the individual agrees to post-dispute voluntary arbitration).

27. See generally DUNLOP REPORT, *supra* note 1, at 49 (noting that the number of employment grievances has increased 400% in the last two decades and that in litigation, for every dollar paid to an employee, at least another dollar is paid to an attorney).

28. See *Garden-Denver*, 415 U.S. at 48-49 (inferring that Title VII supplements, rather than supplants, existing laws relating to employment discrimination).

29. See generally *id.* at 57 (insisting that the role of the judge is significantly different from the role of the arbitrator).

30. See *id.* at 59-60 (finding that even though a claim had already been subjected to arbitration and an award had been issued, a statutory claim should not be precluded from being heard in the courts).

31. See *id.* at 44-45 (explaining how provisions of Title VII, when read together,

bargaining agreements and statutory rights are distinct and can be brought in two separate forums.³²

The Court found that arbitration was an inappropriate forum for determining statutory claims because the arbitrator is concerned with discovering the intent of the parties to a contract, and may not be concerned with the requirements of enacted legislation.³³ Although arbitration is often efficient and inexpensive, the Court reasoned that these informal proceedings were not the correct forum for deciding statutory claims.³⁴ The Court found statutory rights are not waived through arbitration, nor are they waivable in general, because the public good outweighs the private interest.³⁵ The Court also reasoned that arbitration was not the appropriate forum for resolving statutory claims because: (i) arbitrators are more likely to apply the “law of the shop” as opposed to the “law of the land;” (ii) arbitrators do not have to put their decisions in writing; and (iii) the fact finding process is significantly less involved than in the court system.³⁶ Importantly, the Court held that since Congress empowered the federal courts to litigate Title VII claims, then subjecting such statutory claims to arbitration was “inconsistent with that goal.”³⁷ The Court further recognized that the forum for resolving a dispute has a strong effect on the rights vindicated.³⁸ It was in *Gardner-Denver* that the Court made clear the distinction between contractual rights arising from a collective bargaining agreement and individual claims

endow courts with plenary enforcement powers).

32. See *id.* at 56 (holding that the right to arbitrate and the right to have statutory claims heard by the court are legally independent of each other and equally available to aggrieved parties).

33. See *id.* at 52 (discussing arbitrator’s task to effectuate intent of parties).

34. See *id.* at 53-54 (detailing the weaknesses of arbitration). The Court reasoned that “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.” *Id.* at 56.

35. See *id.* at 45 (emphasizing the dual role of Title VII claims in private litigation). The Court found that allowing a private litigant to argue a Title VII claim both affords the private litigant the opportunity to redress injuries personal to him or her and emphasizes the importance Congress placed on preventing discriminatory employment practices. *Id.*

36. See *id.* at 57-58 (explaining why arbitration is not an appropriate forum for resolving statutory disputes). In further support of its findings, the Court specifically noted that the fact finding process is not at the same level as in judicial proceedings: “the record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, often are severely limited or unavailable.” *Id.*

37. See *id.* at 56 (expressing that the goals of arbitration are distinct from the goals of the courts).

38. See *id.* (recognizing that forum choice inevitably affects the substantive vindication of rights).

resulting from statutory rights.³⁹ The logic applied in *Gardner-Denver* still applies today, as Congress has enacted no further protections to ensure that arbitration forums are vindicating an individual's legal claim.⁴⁰ Although the Court today recognizes arbitration as an appropriate forum for adjudicating an individual's statutory claim, it has not expressly overruled *Gardner-Denver*; in later decisions the Court has found arbitration appropriate, as it provides a neutral forum for dispute resolution, so long as individual substantive rights are protected.⁴¹

B. Gilmer v. Interstate/Johnson Lane Corp.

Seventeen years later, the Court's attitude towards arbitration was distinctively different as it upheld an arbitration agreement arising from an individual statutory claim.⁴² In *Gilmer*, the Supreme Court examined whether, despite *Gardner-Denver*, an Age Discrimination in Employment Act of 1967 ("ADEA") claim could be subject to the compulsory arbitration clause of an employment contract.⁴³ The Court found that it could.⁴⁴ The Court reasoned that the FAA's purpose was to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."⁴⁵ The Court also reasoned that in deciding whether to uphold the arbitration clause, it must recognize the "liberal federal policy favoring arbitration agreements."⁴⁶

39. *See id.* at 56-57 (holding that arbitration is final on contractual disputes arising from collective bargaining agreements, but does not preclude a statutory claim from being heard by the courts).

40. *See Gilmer*, 500 U.S. at 30-31 (finding that the New York Stock Exchange Rules provided an individual arbitrating a statutory claim with enough protections).

41. *See id.* at 27-28 (noting arbitration is merely an alternate forum for dispute resolution).

42. *See id.* at 24-26 (explaining that the time for judicial hostility towards arbitration is over and emphasizing that strategy claims may be the subject of an arbitration agreement).

43. *See id.* at 35 (finding that ADEA claims are resolvable through arbitration).

44. *See id.* (holding that ADEA claims can be subject to arbitration agreements).

45. *Id.* at 24 (stating that the primary provision of the FAA allows parties to add arbitration agreements to contracts; these agreements will be upheld unless there are grounds in law or equity for revocation of the contract); *see also Cole*, 105 F.3d at 1478 (discussing the development of arbitration clauses in employment contracts and the courts' treatment of such clauses).

46. *Gilmer*, 500 U.S. at 25 (noting the liberal policy towards upholding arbitration agreements) (citing *Mitsubishi Motors*, 473 U.S. at 625 (upholding an order to arbitrate under the Arbitration Act regarding an antitrust dispute between an auto dealer and manufacturer)). *See generally* 9 U.S.C. § 4 (1994) (empowering the courts to compel arbitration).

The Court held, however, that arbitration may not be appropriate for all statutory claims and that in determining whether arbitration is suitable, courts should look to the text of the statute, its legislative history, and whether or not there is an “inherent conflict” between the statutory purpose and arbitration.⁴⁷ Although in *Gilmer*, the Court ruled that statutory claims could be covered by mandatory arbitration agreements, the Court’s reasoning was based on the idea that arbitration was not an inferior forum for resolving disputes, but merely a different forum for addressing conflicts.⁴⁸ Therefore, “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.”⁴⁹

The Court held that arbitration was an adequate forum for deciding *Gilmer*’s statutory complaint, finding that substantive rights were not undermined simply because an individual agreed to submit a claim to arbitration.⁵⁰ *Gilmer* specifically argued that the courts should not uphold the arbitration clause because the arbitrators might be biased, there is limited discovery, the arbitrators do not issue written opinions, and there is unequal bargaining power between the employee and the employer.⁵¹ The Court found *Gilmer*’s arguments unpersuasive, reasoning that since the New York Stock Exchange rules (1) protected against biased panels; (2) allowed for enough document discovery; (3) mandated that names of the parties, a summary of the issues in controversy, and the award given be in writing; the arbitration sufficiently protected the individual’s rights.⁵² Concerning unequal bargaining power, the Court determined that because *Gilmer* was an experienced businessman, he should have

47. See *Gilmer*, 500 U.S. at 26 (holding that if parties made an agreement to arbitrate, those parties should be held to that agreement, unless Congress specifically addressed the statutory claim under which the disagreement arose).

48. See *Mitsubishi Motors*, 473 U.S. at 628 (stating that arbitration does not negate the substantive rights given by the statute, but rather just offers the parties a more simple and expeditious process).

49. *Gilmer*, 500 U.S. at 26 (concluding that as long as litigants are still able to vindicate rights in the arbitration forum then the statute will continue to serve its dual purpose of remediation and deterrence).

50. See *id.* at 30 (noting that arbitration does not necessarily undercut a plaintiff’s complaint). The Court found that this generalization rests on “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.” *Id.* (quoting *Rodriguez de Quijas*, 490 U.S. at 481). The Court also found that this reasoning is “far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.” *Id.*

51. See *id.* at 30-33 (rejecting *Gilmer*’s argument that arbitration is inappropriate for statutory claims).

52. See *id.* (finding that the New York Stock Exchange Rules offered enough protections to adequately shelter an employee’s substantive rights).

known the terms of the contract he signed.⁵³

In *Gilmer*, the Court did not expressly overrule *Gardner-Denver*, it merely distinguished between collective bargaining arbitration clauses and arbitration clauses based in individual employment contracts.⁵⁴ In *Gardner-Denver*, the Court found that arbitration clauses in collective bargaining agreements did not bar the courts from hearing a statutory claim, reasoning that arbitration was an improper forum for resolving such claims.⁵⁵ In *Gilmer*, the Court held that arbitration is an appropriate forum for resolving statutory disputes when the parties have agreed to arbitration in an individual employment contract.⁵⁶ *Gilmer* is also distinguishable from *Gardner-Denver* because the FAA applied in *Gilmer*, but not in *Gardner-Denver*.⁵⁷ The Supreme Court, in *Gilmer*, did not rule specifically on whether arbitration clauses applied to employment contracts.⁵⁸ However, ten years later, in *Circuit City Stores, Inc. v. Adams*, the Court expressly ruled that the FAA does not exclude employment contracts.⁵⁹

53. See *id.* at 33 (warning that although not a factor in this case, courts must consider possible fraud or coercion in evaluating the validity of the arbitration agreement).

54. See *id.* at 33-34 (upholding the idea that arbitration is appropriate for individual statutory claims).

55. See *Gardner-Denver*, 415 U.S. at 56 (finding that the choice of forum in dispute resolution affects the substantive vindication of rights).

56. See *Gilmer*, 500 U.S. at 26 (holding that, so long as arbitration protects substantive rights and is appropriate for the particular statute involved, arbitration is a suitable forum for hearing statutory claims); see also Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1215-16 (2002) (explaining courts' willingness to uphold pre-dispute mandatory arbitration clauses since *Gilmer's* ruling that arbitration is an appropriate forum for statutory complaint resolution). Following *Gilmer*, courts have enforced arbitration agreements under Title VII, the American Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Equal Pay Act, and Section 1981. *Id.*

57. See *id.* at 33-35 (reasoning that the FAA applies to *Gilmer*, but not to *Gardner-Denver* because the FAA is concerned with upholding agreements to arbitrate, while *Gardner-Denver* addressed whether a statutory claim is barred from the courts when it arises from a collective bargaining agreement); see also *Dean Witter Reynolds*, 470 U.S. at 220-21 (explaining that Congress created the FAA to enforce private agreements to arbitrate).

58. See *Gilmer*, 500 U.S. at 23-25 (examining the role of arbitration in enforcing statutory rights and declining to articulate whether arbitration applied to employment contracts).

59. See 9 U.S.C. § 1 (1994) (excluding "maritime transaction" and "commerce" from the FAA); see also *Circuit City*, 532 U.S. at 114-15 (deciding that according to the principals of *ejusdem generis*, employment contracts are not excluded from the FAA). The Supreme Court in *Circuit City* subsequently narrowly defined "commerce" to include only those industries directly involved in commerce. *Id.*

II. DANGERS OF ARBITRATION AND RISK OF FORGOING SUBSTANTIVE RIGHTS

As more statutory rights are being created and interpreted to provide individuals with more protections on the job, the courts have become inundated with claims against employers.⁶⁰ Employees file over 200,000 employment discrimination cases each year and the numbers of claims are increasing by twenty-three percent each year.⁶¹ In response to overcrowded dockets, courts are upholding more and more agreements to arbitrate.⁶² Although arbitration has many benefits, the informal process for resolving disputes that attracts parties to the process can also negatively affect an individual's ability to have a harm vindicated.⁶³ Since the Supreme Court has ruled that mandatory arbitration clauses in employment contracts will be upheld except under very specific circumstances, employers are increasingly utilizing such contracts.⁶⁴ In this situation, as one of many contractual provisions that condition employment or continuing employment, employees typically agree to be bound to arbitration should a problem arise.⁶⁵

The courts view arbitration clauses as legitimate because they see the clauses as a bargained-for element of a contract.⁶⁶ A basic

60. See Michael P. Wolf, *Give 'Em Their Day in Court: The Argument Against Collective Agreements Mandating Arbitration to Resolve Employee Statutory Claims*, 56 J. Mo. B. 263, 266 (2000) (explaining that the increase in statutory rights have exacerbated the situation of over-crowded court dockets).

61. See *id.* (noting judges' frustration in regulating the frequent disputes between employers and employees). One court refers to itself as "almost a super personnel department" because of the number of employment disputes it is forced to hear. *Id.*

62. See *id.* (discussing judges' desire for alternative methods of adjudication and increasing support of the use of arbitration); see also *Mitsubishi Motors*, 473 U.S. at 626-27 (recognizing the benefits of arbitration in the adjudication of contract disputes). The Court specifically noted that we are "well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.*

63. See *Wilko*, 346 U.S. at 438 (ruling that the benefits of reduced time and costs do not outweigh protecting litigants' substantive rights).

64. See generally 9 U.S.C. § 10 (defining limited situations where overturning an arbitration award would be appropriate). See also *Gilmer*, 500 U.S. at 25 (finding arbitration to be an appropriate forum for statutory disputes); *Circuit City*, 532 U.S. at 109 (upholding arbitration clauses in employment contracts); DUNLOP REPORT, *supra* note 1, at 49-51 (discussing the appeal of arbitration clauses to employers).

65. See generally Reilly, *supra* note 56, at 1208-12 (noting that often times employees must agree to arbitrate disputes as a condition of current or future employment). The author also discusses the meaning of "knowing" and "voluntary" consent, suggesting that only meaningful choice and informed consent would achieve knowing and voluntary consent to sign an arbitration agreement. *Id.* The author further argues that employees often have misconceptions about the law: equating unfair as illegal. *Id.* at 1227.

66. See *Gilmer*, 500 U.S. at 33 (noting that the legislative intent behind the FAA

provision of contract law is that a contract will be upheld because it is an agreement between two equal parties who voluntarily agree to be bound by an understanding.⁶⁷ Problems arise with arbitration clauses when the parties to a contract are not on equal footing.⁶⁸

Frequently an arbitration clause is hidden within the standard boilerplate of the contract, and the employee is presented with a “take it or leave it” situation.⁶⁹ Employees can either sign the contract, often times not understanding the legal ramifications of an arbitration clause, or forgo a job offer.⁷⁰ Whether mandatory arbitration clauses in employment contracts are contracts of adhesion or should be void for public policy has been the subject of much debate.⁷¹ The Supreme Court upheld a mandatory arbitration clause in *Gilmer*, but the Court sustained the agreement specifically because *Gilmer* was an experienced businessman and because the New York Stock Exchange’s arbitration rules provided for some procedural protections.⁷² Currently, only the Ninth Circuit has found that mandatory arbitration clauses, as a condition of employment, are procedurally and substantially unconscionable.⁷³

The manner in which employees and employers enter into arbitration agreements is important because currently there are few protections to ensure that a dispute subject to arbitration is resolved

was to put arbitration agreements on the same level as other contracts).

67. See *id.* (expressing the importance of upholding contracts).

68. See Reilly, *supra* note 56, at 1224-27 (finding that often times an employee does not knowingly and voluntarily agree to all the terms in his or her employment contract because many employees do not understand the ramifications of an arbitration agreement).

69. See *id.* at 1225 (warning that employees often do not know what rights they forgo by agreeing to arbitrate); *Cole*, 105 F.3d at 1478-79 (noting that many mandatory arbitration clauses are a condition of employment).

70. See Reilly, *supra* note 56, at 1225 (examining the employees’ lack of understanding of the legal rights they waive by agreeing to arbitrate potential disputes).

71. See *Cole*, 105 F.3d at 1469 (holding that arbitration agreements are not inherently unconscionable). *But see* *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1188 (9th Cir. 1998) (ruling that mandatory arbitration clauses are contrary to the congressional intent of Title VII).

72. See *Gilmer*, 500 U.S. at 32-33 (finding that there was equal bargaining power between the defendant’s business and the plaintiff). The Court found that enough safeguards exist because the private New York Stock Exchange arbitration rules protected against bias, allowed for adequate discovery, required arbitrators to provide awards in writing, and did not limit the available relief. *Id.* at 30-33.

73. See Reilly, *supra* note 56, at 1217 (noting that the Ninth Circuit is the only circuit court that does not uphold mandatory arbitration clauses in employment contracts); see also *Duffield*, 144 F.3d at 1188 (refusing to uphold a pre-dispute mandatory arbitration clause in an employment contract because it was against the intent of Congress in a Title VII claim).

fairly.⁷⁴ Arbitration is no longer viewed as just a means to address contract disputes, instead it has evolved into a forum for resolving statutory claims as well.⁷⁵ As the law stands, an arbitration structure exists where arbitrators are not required to be neutral, where opinions do not need to be written and where judicial review is virtually nonexistent.⁷⁶

Whereas in the court system many protections are in place to guarantee a neutral and competent judge, few legal protections exist to guarantee that an arbitrator is neutral and competent.⁷⁷ The structure of the arbitration system, to the contrary, lends itself to bias.⁷⁸ For example, employers are more likely to appear before arbitrators multiple times, thus arbitrators are more likely to see the employer as a source of future business.⁷⁹ The “repeat player” problem may lead arbitrators to be biased towards favoring employers in disputes in order to achieve future work.⁸⁰ This problem is exacerbated because it is difficult for employees to know the track record of arbitrators and to ascertain their reasoning behind a decision, as arbitrators are not required to explain their decisions in writing.⁸¹

74. See Reilly, *supra* note 56, 1216-17 (discussing the need for more accurate standards for determining if consent to arbitrate was “knowing” and “voluntary”); see also Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1068 (1998) (discussing the lack of legal standards that make it difficult to determine if the arbitration forum adequately vindicates statutory rights).

75. See *Gilmer*, 500 U.S. at 28 (ruling that arbitration is a legitimate forum so long as it protects an individual’s substantive rights).

76. See Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. & EMP. L.J. 381, 410 (1996) (arguing that arbitration awards should be subject to stronger judicial review). Currently, the grounds for overturning an arbitration decision have no bearing on whether an arbitrator’s decision was correct according to law or facts. *Id.* at 421-22; see also S. Kathleen Isbell, *Compulsory Arbitration of Employment Agreements: Beneficent Shield or Sword of Oppression? Armendariz v. Foundation Health Psychcare Services, Inc.*, 22 WHITTIER L. REV. 1107, 1146 (2001) (arguing that no court receives greater deference than the arbitration system).

77. See 9 U.S.C. § 10 (1994) (explaining that a court will only overturn an arbitrator’s decision for fraud, evident partiality, misconduct, or exceeding of powers); see also *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 761 (5th Cir. 1999) (applying “manifest disregard of the law” as a non-statutory ground for overturning an arbitrator’s award).

78. See Colin P. Johnson, *Has Arbitration Become a Wolf in Sheep’s Clothing?: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 HAMLIN L. REV. 511, 530-31 (2000) (discussing the potential risk of arbitrator’s bias).

79. See *id.* at 530 (explaining the phenomena of “repeat player” bias).

80. See *id.* (recognizing that employers are more likely to re-hire an arbitrator than an employee who has filed a claim against them).

81. See Haagen, *supra* note 74, at 1068 (discussing the difficulty in determining the intent of arbitrators when decisions are not required to be in writing).

Arbitrators are generally chosen for their expertise in a specific field and are often times not lawyers.⁸² For resolving a contract dispute, arbitrators can be effective in acting as a “reader” of the contract and possess the power to alter the contract as they see fit to make it work.⁸³ Problems arise however when mandatory arbitration clauses also cover statutory claims and non-lawyers are asked to make legal decisions concerning an individual’s legal rights.⁸⁴

In comparison, judges are sworn to uphold the Constitution and are expected to do so in a neutral manner.⁸⁵ Judicial review acts to ensure that the judges are interpreting and applying the law correctly and fairly.⁸⁶ Further, the Constitution charges the judiciary with the important task of interpreting statutes and in doing so defining and making the law.⁸⁷ While judges are subject to judicial review to ensure that their decisions correctly understand and apply the law, arbitrators are subject to minimal oversight.⁸⁸ Unfortunately, because of limited judicial review, mistakes by non-lawyers who must decide legal problems in arbitration may go unnoticed.⁸⁹ Arbitrators do not have to receive training in the law; yet they have the important responsibility of enforcing statutory rights.⁹⁰ Individuals may risk forgoing substantive rights when their statutory claims are subjected to an arbitrator who is not trained or necessarily aware of the applicable law.⁹¹ Judges, however, are trained in the law and should they misapply the law, are subject to judicial review to ensure a fair

82. See *Gardner-Denver*, 415 U.S. at 57 (noting that parties choose arbitrators because of their expertise in a particular field).

83. See Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977) (explaining the role of the arbitrator in contract dispute resolution). The *Cole* Court cited St. Antoine in deciding that the role of an arbitrator is to interpret the meaning of the contract. See *Cole*, 105 F.3d at 1475.

84. See *Gardner-Denver*, 415 U.S. at 53 (noting that the appropriate role of an arbitrator is to determine the intent of parties).

85. See Isbell, *supra* note 76, at 1143-44 (discussing the role of the judge and the arbitrator in adjudication).

86. See *id.* (explaining that arbitrators are not subject to the judicial review board).

87. See U.S. CONST. art. III (defining the powers of the judiciary); see also Wolf, *supra* note 60, at 267 (noting that the Supreme Court has never addressed the legality of the FAA in taking away from the Constitutionally defined powers of the judiciary).

88. See Isbell, *supra* note 76, at 1145-46 (explaining that arbitrators’ decisions are afforded more deference upon judicial review than the courts’ decisions).

89. See *id.* at 1146 (expressing disappointment over the limited judicial review afforded to arbitration decisions).

90. See *generally id.* (explaining that arbitrators are held to a far lower standard than judges).

91. See *Gilmer*, 500 U.S. at 26 (noting that one must trade the more procedural structure of the courtroom for the simplicity and informality of arbitration).

trial.⁹² If judges, who are trained and experienced in applying the law, are subject to judicial review, then at a minimum, arbitrators, who are trained in the law of the shop, should be subject to a level of review that takes into account whether the arbitrator correctly applied the law.⁹³ Not only does the individual bringing a statutory claim have an interest in proper enforcement of the laws, but the courts enforcing legislation such as Title VII also serve the greater public good.⁹⁴ This is not to say that individuals who have specialized expertise in a particular field are not qualified to resolve disputes, but only that an arbitration system that empowers these individuals, who do not have to be legally trained, with the judicial task of interpreting and applying the law should be subject to judicial oversight to ensure that the arbitrators did not misapply the law.⁹⁵ Therefore, courts should ensure that their level of judicial review is strong enough to ensure arbitrators have correctly applied the law.⁹⁶

III. MANIFEST DISREGARD OF THE LAW

Recognizing the deference extended to the FAA, courts apply limited judicial review to arbitration decisions.⁹⁷ Under the FAA, an arbitration award can be vacated for fraud, duress, corruption, misconduct, or if the arbitrator exceeded his or her authority.⁹⁸ Additionally, all the circuit courts have expanded the limited statutory grounds for judicial review to include whether an arbitration award was in “manifest disregard of the law.”⁹⁹ In *United States v. Farragut*,

92. See Isbell, *supra* note 76, at 1143-44 (explaining that judicial decisions are subject to judicial review yet arbitration awards are given greater deference).

93. See *id.* at 1143-45 (noting that parties generally choose arbitrators because of their knowledge of industrial norms, not the law).

94. See *Gardner-Denver*, 415 U.S. at 45 (discussing public good served through private statutory claims); see also Isbell, *supra* note 76, at 1135 (stressing the public good served by an individual bringing a statutory claim).

95. See Johnson, *supra* note 78, at 534-36 (questioning the logic of the reviewing court’s deferential stance when non-legally trained arbitrators are applying the law).

96. See *Cole*, 105 F.3d at 1480 (expanding on the current understanding of “manifest disregard of the law” to include the correct application of the law when individuals bring statutory claims).

97. See *Gilmer*, 500 U.S. at 26 (stressing that limited judicial review is necessary considering the liberal federal policy towards arbitration agreements). “Manifest disregard of the law” is not mentioned in the FAA; it is a common law extension of judicial review. See 9 U.S.C. § 10 (1994).

98. See 9 U.S.C. § 10 (stating that a court may overturn an arbitration award for fraud, duress, misconduct, or if an arbitrator exceeds the boundaries of his or her authority).

99. See *Williams*, 197 F.3d at 757-58 (noting that the reviewing court can overturn an arbitration award based on “manifest disregard of the law”). Courts have also recognized other judicially-created grounds for overturning an arbitration award, such as the award violated public policy, the award was arbitrary or irrational, or the

a Civil War era case, the Supreme Court first discussed overturning an arbitration award based on “manifest mistake of the law.”¹⁰⁰ Fifty years ago, the Supreme Court in *Wilko v. Swan* held that arbitration decisions not in “manifest disregard of the law” would not be subject to judicial review in the federal courts.¹⁰¹ The Court has never expressly defined the standard.¹⁰² Today, every circuit court recognizes “manifest disregard of the law” as a legitimate grounds for overturning an arbitration award, but the circuits are split on the correct interpretation of “manifest disregard of the law.”¹⁰³ Most circuit courts apply a limited reading of this standard that does not take into account mere legal error such as misunderstanding or misapplication of the law.¹⁰⁴ Only the D.C. Circuit Court and the

decision did not reflect the essence of the contract. *Id.*

100. 89 U.S. 406, 420 (1874) (upholding an agreement to arbitrate a maritime dispute).

101. See *Wilko*, 346 U.S. at 436-37 (establishing “manifest disregard of the law” as a standard for reviewing arbitration decisions); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (providing that “manifest disregard of the law” was officially adopted by the Supreme Court).

102. See *Williams*, 197 F.3d at 761 (noting that the Supreme Court has yet to define “manifest disregard of the law”).

103. See *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (11th Cir. 1997) (noting that every circuit except the Fifth Circuit has adopted “manifest disregard of the law” as a non-statutory grounds of judicial review). *But see Williams*, 197 F.3d at 759 (stating that the Supreme Court clearly adopted “manifest disregard of the law” as a standard of review in *First Options*).

104. See *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (holding that misinterpreting the law and errors in fact finding are not enough to overturn arbitration decision); *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 579 (7th Cir. 2001) (noting that legal error alone is not enough to overturn an arbitration award); *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8th Cir. 2001) (stating that a court cannot set aside an arbitration decisions just because a judge disagrees with the arbitrator’s interpretation); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 330 (1st Cir. 2000) (finding arbitration is a bargained-for element of a contract warranting limited judicial review even if concerning “serious error”); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000) (holding that an arbitrator must disregard a well defined and clearly applicable law before the court could overturn an arbitration decision); *Dawahare v. Spencer*, 210 F.3d 666, 670-71 (6th Cir. 2000) (finding that although an arbitrator may have misapplied the law on punitive damages, the arbitrator did not know the applicable law, and therefore did not “knowingly” disregard it). The court further explained that more extensive review of arbitration decisions would undermine the goals of arbitration to provide for fast and efficient dispute resolution. *Dawahare*, 210 F.3d at 671; *Green v. Ameritech Corp.*, 200 F.3d 967, 976 (6th Cir. 2000) (discussing the difficulty in determining if an arbitrator “knowingly” misapplies the law because decisions do not have to be in writing); *Montes*, 128 F.3d at 1461-62 (emphasizing the difference between mere legal error and the knowing misapplication the law); *Barnes v. Logan*, 122 F.3d 820, 821 (9th Cir. 1997) (maintaining that the reviewing court must uphold arbitration agreements unless they completely disregard the law); *Upshur Coals Corp. v. United Mine Workers of Am.*, District 31, 933 F.2d 225, 229 (4th Cir. 1991) (upholding an arbitration decision even when the law was misapplied); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 62 (3d Cir. 1986) (misapplying the law is not enough for a reviewing court to exercise judicial review).

Fifth Circuit understand “manifest disregard of the law” as requiring the arbitrator to correctly apply the law.¹⁰⁵

With the exception of the D.C. and Fifth Circuits, courts will only overturn a decision based on “manifest disregard of the law” if 1) the law is clear, unambiguous and well-defined; 2) the arbitrator was aware of the law; and 3) the arbitrator knowingly misapplied the law.¹⁰⁶ Mere error of law is not by itself enough to vacate an arbitration decision.¹⁰⁷ Even if an arbitrator misapplies a well defined and unambiguous law, the reviewing court will not overturn the award if it is not clearly shown that the arbitrator was plainly aware of the applicable law and proven that he or she then knowingly refused to apply the law.¹⁰⁸ Some courts have warned that arbitrators should not be so secure that they feel they can avoid judicial review by not discussing the law at all.¹⁰⁹ These courts have found that where the law is so obvious, they will infer that the arbitrator was aware of the law, yet disregarded it.¹¹⁰ If an attorney fails to notify the tribunal of the law, courts generally will not overturn an arbitration decision that does not apply the relevant law correctly.¹¹¹ At the same time, there

105. See *Cole*, 105 F.3d at 1467 (establishing an interpretation of “manifest disregard of the law” that includes the correct application of law); *Williams*, 197 F.3d at 760 (adopting the D.C. Circuit’s reasoning by requiring arbitrators in the Fifth Circuit to adhere to the statute in question). But see *George Watts & Son, Inc.*, 248 F.3d at 579 (limiting “manifest disregard of the law” to situations where the arbitration award requires the parties to break the law, or arbitrator oversteps the boundaries placed on it by the parties through the contract).

106. See *Greenberg*, 220 F.3d at 28 (expressing that an arbitrator must know of an unambiguous law and ignore it to constitute “manifest disregard of the law”).

107. See *Pike v. Freeman*, 266 F.3d 78, 86 (2d Cir. 2001) (finding that a serious error of law is not enough to vacate an arbitration award).

108. See *DiRussia v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 822 (2d Cir. 1997) (upholding an arbitration decision that denied the prevailing party attorney’s fees in clear violation of the Age Discrimination in Employment Act of 1967 and the New Jersey Law Against Discrimination). The reviewing court found that although the law was clear and unambiguous and that the prevailing party indicated several times during the arbitration that it was entitled to attorney’s fees and costs, because the prevailing party did not clearly notify the arbitrator that the law mandates such an award the arbitration decision was not in “manifest disregard of the law.” *Id.* at 822. For further discussion, see Norman Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 512 (1998), which discusses the Second Circuit’s treatment of “manifest disregard of the law.”

109. See generally *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 13 (2d Cir. 1997) (holding that when the law is so blatantly clear that the average person who would qualify to be an arbitrator should be aware of it, arbitrators are assumed to be familiar with the law).

110. See *Merrill Lynch v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1987) (stating that a “court may infer that arbitrators manifestly disregarded the law if it finds that the error made is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator”).

111. See *DiRussia*, 121 F.3d at 822 (finding that where the lawyer did not explicitly notify the arbitrator that attorney fees were mandatory under the ADEA, then the

are other courts that restrict “manifest disregard of the law” even further, overturning arbitration decisions only if the arbitrators instruct the parties to break the law or if the arbitrator is acting outside the scope of his or her authority by not adhering to the agreed upon arbitration terms of the contract.¹¹²

The courts applying the narrower interpretation of “manifest disregard of the law” explain that limited judicial review is necessary so as not to undermine the aims of arbitration in providing fast and efficient dispute resolution.¹¹³ These courts also believe limited review is required because they view arbitration clauses as a bargained-for element and are hesitant to interfere with what the parties agreed to in the contract.¹¹⁴

In 1997, the D.C. Circuit Court expanded “manifest disregard of the law” to include correctly applying and interpreting statutory law.¹¹⁵ The circuit court in *Cole v. Burns International Security Services* distinguished arbitration arising from collective bargaining agreements from arbitration arising from statutory claims.¹¹⁶ The court stressed the Supreme Court’s decision in *Gilmer*, noting that arbitration is merely an alternate forum for resolving disputes and that by agreeing to arbitrate an individual does not waive his or her substantive rights.¹¹⁷ Using the reasoning in *Gilmer*, the court concluded that even limited review must be strong enough to ensure that arbitration decisions are in compliance with the governing law.¹¹⁸ By expressly stating that individuals do not relinquish their substantive rights by agreeing to arbitrate, the court in *Cole* reasoned that the Supreme Court could not have intended arbitration to enable

court cannot find that the arbitrator acted in knowing disregard of the law).

112. See *George Watts & Son, Inc.*, 248 F.3d at 579 (warning that arbitration awards should only be overturned if the arbitrator does not adhere to the contract or instructs the parties to break the law).

113. See *id.* (stating that extending judicial review would undermine goals of arbitration). But see *Mitsubishi Motors*, 473 U.S. at 657 (Stevens J., dissenting) (noting that the nearly unlimited deference given to arbitration decisions amounts to “despotic decision making”).

114. See generally *Upshur Coals*, 933 F.3d at 231 (noting that judges should not replace an arbitrator’s decision with their own when parties have contracted for arbitration).

115. See *Cole*, 105 F.3d at 1488 (empowering the courts to review arbitration decision for correct interpretation of public law).

116. See *id.* at 1467 (distinguishing collective bargaining agreements from individual employment contracts).

117. See *id.* at 1482 (noting that at the very least a forum for resolving legal disputes must be neutral and protect substantive rights).

118. See *id.* at 1487 (finding that most employment dispute cases are fact based; therefore, judicial review to ensure arbitrator’s correctly interpreted law would not undermine the efficiency of arbitration).

arbitrators to incorrectly apply the law.¹¹⁹ The D.C. Circuit Court in *Cole* limited this heightened standard of “manifest disregard of the law” only to situations where individuals have to agree to arbitration as a condition of continuing or future employment.¹²⁰

IV. JUDICIAL DEFERENCE TO ARBITRATION DECISIONS

A. *Judicial Review and Arbitration Arising from Collective Bargaining Agreements*

The interests served arbitrating in the collective bargaining context are distinct from the interest served in arbitrating a statutory claim.¹²¹ Only recently have agreements to arbitrate been upheld in individual employment contracts; previously, arbitration was upheld only as an element of collective bargaining.¹²² The courts’ refusal to review the merits of arbitration awards developed in the context of collective bargaining.¹²³ In 1960, the Supreme Court decided three cases known as the “*Steelworkers Trilogy*,” that established the Court’s attitude towards arbitration decisions.¹²⁴ These cases explained that courts would enforce agreements to arbitrate and arbitration awards, and further held that the courts shall give these awards great deference.¹²⁵ The Court based its reasoning on statutory law and its

119. See *id.* (recognizing that judicial review must be “sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law”).

120. See *id.* at 1473 (finding that a court should review arbitration decisions based on whether or not the law was correctly applied in situations where individuals agree to arbitrate as a condition of employment). The court also stresses the distinction between arbitration arising from collective bargaining agreements and arbitration arising from individual employment contracts. *Id.*

121. See *Gardner-Denver*, 415 U.S. at 53 (noting a difference between role of the arbitrators and role of the judges).

122. See *Gilmer*, 500 U.S. at 29 (finding arbitration to be an effective forum for resolving statutory complaints); see also *Circuit City*, 532 U.S. at 130 (finding that the FAA does not exclude contracts of employment).

123. See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577-78 (1960) (explaining that an arbitration clause in collective bargaining agreements plays an important role in achieving industrial peace).

124. See *Wolf*, *supra* note 60, at 264 (explaining that the courts’ deference to arbitration clauses in collective bargaining agreements was established in the “*Steelworkers Trilogy*”). The “*Steelworkers Trilogy*” includes: *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83 (clarifying that when in question, courts should aim to uphold arbitration agreements); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960) (stressing that courts can not review the merits of an arbitration award under the guise of examining arbitrability); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960) (rationalizing that an arbitration award must be enforced if it draws from the essence of the contract).

125. See *Am. Mfg. Co.*, 363 U.S. at 567-68 (expressing the role of the judge concerning arbitration is to determine if a claim is based on the contract). If so, it is up to the arbitrator to resolve the dispute; it is not the role of the court to supplant

understanding of labor relations.¹²⁶ The federal attitude favoring arbitration of labor disputes is further apparent by the passage of the National Labor Relations Act in 1935 to encourage collective bargaining agreements and industrial self-governance.¹²⁷ The Act acknowledges that employees acting on their own have little, if any, bargaining power against their employer; therefore, the Act encourages individuals to function collectively for their economic well-being and for the benefit of national labor policy.¹²⁸ It is apparent that Congress envisioned an industrial self-governance achieved through the promotion of collective bargaining agreements.¹²⁹ Further, Congress passed the Labor Management Relations Act of 1947 to encourage labor disputes to be resolved through some method agreed upon by the parties.¹³⁰

Collective bargaining agreements are not contracts of employment; they are merely the “rules” that the employers and employees, through their elected union representatives, have agreed to operate under.¹³¹ In order to promote industrial stability, arbitration is viewed in the collective bargaining context as a quick and efficient manner for resolving labor disputes.¹³² Specifically, collective bargaining agreements uniquely encompass the entire employment relationship by calling “into being a new common law – the common law of a particular industry or of a particular plant.”¹³³

In arbitration, the arbitrators are free to draw from the spirit of the agreement and apply the “law of the shop” to meet the needs of the individual parties.¹³⁴ If arbitrators try to apply law not mentioned in

the arbitration decision with its own because arbitration was bargained-for. *Id.*

126. See *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37 (1987) (explaining that the court’s preference for private dispute resolution stems from the federal statutes concerning labor-management relations).

127. See National Labor Relations Act, 29 U.S.C. § 151 (1935) (noting that collective bargaining plays an essential role in promoting industrial peace).

128. See 29 U.S.C. § 151 (expressing that industrial strife is more likely when employers and employees do not work together).

129. See *United Paperworkers*, 484 U.S. at 37 (explaining that the statutes concerning labor relations reflect a favoring of private dispute resolution).

130. See Labor Management Relations Act, 29 U.S.C.A. § 173(d) (1947) (encouraging the use of an agreed upon private dispute resolution procedure in labor relations).

131. See *Warrior & Gulf*, 363 U.S. at 578 (explaining the role of collective bargaining agreements in establishing an employment relationship).

132. See *United Paperworkers*, 484 U.S. at 38 (noting that the speedy resolution of grievances would be undermined if the courts exercised review liberally); see also *Enterprise Wheel*, 363 U.S. at 596 (referring to arbitrators as “indispensable agencies in a continuous collective bargaining process”).

133. *Warrior & Gulf*, 363 U.S. at 579.

134. See *id.* at 579-80 (explaining that one can not mention all the governing rules

the contract, they are overstepping their authority, because they are charged by the parties with resolving any dispute according to the collective bargaining agreement.¹³⁵ Arbitrators are not charged with interpreting the requirements of legislation, they are charged with interpreting and applying the agreement.¹³⁶ Rightly so, it is not appropriate in this context for the courts to question the merits of the arbitration decision because to do so would be to undermine the purpose of collective bargaining agreements in avoiding industrial strife.¹³⁷

Courts grant great deference to arbitration arising from collective bargaining agreements because arbitration is viewed as a mechanism to resolve private industrial disputes that are best addressed by an individual highly familiar with that particular industry.¹³⁸ Arbitrators in this situation are desirable because they encouraged private dispute resolution of private contractual disputes.¹³⁹

B. *Collective v. Individual Rights*

The protections of individual rights in arbitration agreements arising from collective bargaining do not usually exist in individual employment contracts.¹⁴⁰ Judicial review of arbitration decisions developed in the context of collective bargaining where two relatively equal parties entered into a contract and one element of that contract was agreeing to arbitrate disputes.¹⁴¹ Where statutory claims are

of an industrial relationship in one document). The Court also explains that “[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties.” *Id.*

135. See *Barrentine v. Ark. Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981) (noting that an arbitrator has only the authority granted to him by the parties).

136. See *id.* (explaining that arbitrators are not charged with determining the legislators’ intentions through public laws, but rather the intent of the parties through their contract); see also *Enterprise Wheel*, 363 U.S. at 597 (stating that an award will not be enforced if the arbitrator bases his decision on what he thinks the legislation requires).

137. See *United Paperworkers*, 484 U.S. at 38 (stating that judges should not question the merits of an arbitration award because to do so would undermine the goals of arbitration in providing effective and efficient dispute resolution).

138. See *Warrior & Gulf*, 363 U.S. at 582 (noting that collective bargaining creates a system of private law and arbitration is a way to resolve disputes according to this private law).

139. See *id.* (reasoning that arbitration is the process that gives meaning to a collective bargaining agreement).

140. But see *Gilmer*, 500 U.S. at 29 (dismissing Gilmer’s argument that his substantive rights could not be protected in arbitration because the private NYSE rules did provide enough protections).

141. See *United Paperworkers*, 484 U.S. at 38 (advocating limited judicial review of arbitration decisions for the sake of industrial peace). The Court found that “the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award.” *Id.* at 36.

concerned, it is illogical for the courts to extend a greater deference to arbitrators who may not be trained in the law, than they extend to experienced judges who are charged with upholding the law.

Importantly, in collective bargaining agreements, the bargained-for element of a contract is more of a reality because arbitration agreements are entered into between two comparatively equal parties.¹⁴² Both unions and employers who enter into collective bargaining agreements have experience in negotiating such contracts and have relatively equivalent bargaining power in the process.¹⁴³ Because of this equal bargaining power, neither side is able to impose unilaterally an undesirable condition on the other.¹⁴⁴ Once arbitration is called for, both unions and employers have a say in choosing the arbitrator.¹⁴⁵ At the same time, the risk of an arbitrator being biased towards one side over another resulting from his or her desire for future work is reduced because both the employer and the unions offer the potential for future repeat business.¹⁴⁶ During contract renegotiations, if either of the parties is unhappy with the terms of the contract, they can bargain for new terms that address their particular concerns.¹⁴⁷ As such, the role of the judiciary in reviewing arbitration disputes is rightly limited because although a contractual, and hence legal, dispute has arisen, the parties are only asking an arbitrator to stand in their shoes and neutrally end the dispute in a quicker and less expensive manner than the courts.¹⁴⁸ It

142. See *generally* National Labor Relations Act, 29 U.S.C. § 151 (1935) (enacting legislation to equalize the bargaining power of employees and employers). The statute was created to address the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms . . .” 29 U.S.C. § 151.

143. See 29 U.S.C. § 151 (promoting collective bargaining to reduce inequalities in bargaining power).

144. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (recognizing the helplessness of a single employee who is dependent upon an employer). The Supreme Court also stressed the importance of unions in giving employees a chance to bargain on the same footing as employers. *Id.*

145. See *Cole*, 105 F.3d at 1475 (deeming that unions and employers are both “repeat customers” of arbitration and thus an arbitrator that favors one side will not be chosen in the future).

146. See *id.* (concluding that arbitrators do not have an incentive for favoring employers because unions also offer potential for future business).

147. See *id.* (noting that unions and employers can address problems in contract re-negotiations).

148. See *United Paperworkers*, 484 U.S. at 36 (discussing the role of the arbitrator in interpreting the contract in order to resolve grievances); see also *Upshur Coals*, 933 F.2d at 231 (hesitating to expand on recognized grounds for judicial review). The court in *Upshur Coals* found that arbitration is a bargained-for element of a contract meant to quickly and inexpensively resolve disputes and as such judicial review must be limited. *Id.*

is logical for the courts to defer to arbitrators in the application of this industrial law.¹⁴⁹

Unlike collective bargaining agreements, individuals frequently have far less bargaining power than their employer and are more likely to sign an employment contract on a “take it or leave it” basis.¹⁵⁰ Whereas arbitration clauses in employment contracts have a history in the context of collective bargaining agreements, only recently, as employers are looking to reduce the time and expenses of litigating in the courts, have such clauses begun to appear in individual employment contracts.¹⁵¹ Unions have experience in entering into collective bargaining agreements and every few years, renegotiating these contracts.¹⁵² It is the union’s job to understand what it is contracting on behalf of its members, to be aware of the differences between arbitration and the courts and to know what rights they are bargaining away when agreeing to arbitrate.¹⁵³ In arbitration, records are less complete, discovery is abbreviated, and, if allowed, cross-examinations and testimony under oath are also limited.¹⁵⁴ Frequently, individuals are not cognizant of the major differences between arbitration and judicial proceedings and what rights they are contracting away when signing an arbitration agreement.¹⁵⁵ Additionally, it is only recently that arbitration has been used to address not only contractual disputes, but also statutory disputes.¹⁵⁶

Statutory rights are created by Congress to serve the public good and are enforced by the courts.¹⁵⁷ Now that arbitrators are empowered to address purely statutory claims, the logic behind limited judicial review no longer applies.¹⁵⁸ In the setting of a

149. See *United Paperworkers*, 484 U.S. at 36 (warning that judges have no place in reviewing the merits of an arbitration claim).

150. See Reilly, *supra* note 56, at 1208-12 (arguing that employees frequently must accept arbitration agreements as a condition of employment).

151. See Johnson, *supra* note 78, at 521-22 (noting the recent increase in arbitration agreements in employment contracts).

152. See *Cole*, 105 F.3d at 1477 (expressing that unions are experienced in negotiating contracts).

153. See *id.* (warning that employers may be inclined to structure arbitration in their favor when including an arbitration clause in an individual contract of employment).

154. See *id.* at 1478 (discussing the rights an individual gives up by subjecting a claim to arbitration).

155. See *id.* (recognizing that frequently employees are unaware what rights they give up by agreeing to arbitrate any and all legal claims).

156. See *generally* EEOC, *supra* note 5 (discussing the increase in adjudication of statutory claims in arbitration forums).

157. See *Cole*, 105 F.3d at 1477 (noting that the public is entitled to protections of the laws).

158. See *id.* (questioning the appropriateness of non-legally trained arbitrators

contract dispute, arbitrators who are experts in a particular field are better equipped and appropriately charged with interpreting a contract according to industry norms.¹⁵⁹ In contractual disputes, an arbitrator need not be specifically trained in the law to effectively and fairly resolve a dispute.¹⁶⁰ Similarly, judicial review may not be appropriate to second-guess an experienced arbitrator.¹⁶¹ When dealing with statutory claims, however, an arbitrator is no longer being asked to “read” the contract according to industry standards in order to resolve a dispute; rather, the arbitrator is being asked to address purely legal issues.¹⁶² The arbitrator is charged to resolve a public matter privately.¹⁶³ In these circumstances, it is important that judicial review be broad enough to ensure individuals are not forgoing their substantive rights merely because they are subjecting their statutory claim to a different legal forum.¹⁶⁴ Like the Fifth and D.C. Circuits, courts should adopt an understanding of “manifest disregard of the law” that takes into account the correct interpretation of the law.¹⁶⁵ The D.C. Circuit limited its heightened standard of review to situations where arbitration clauses are agreed to as a condition of employment. The logic of ensuring that arbitrators correctly interpret the law applies to all statutory claims, not just the arbitration clauses agreed to as a condition of employment.¹⁶⁶ Courts

deciding purely legal issues). The court further states that the nearly unlimited deference given to arbitration arising from collective bargaining agreements is not suitable for statutory claims. *Id.*

159. *See id.* (questioning the arbitrator’s competence in addressing purely legal issues); *see also* Isbell, *supra* note 76, at 1146 (contrasting the difference between an arbitrator and a judge in resolving legal disputes).

160. *See* St. Antoine, *supra* note 83, at 1140 (noting that the role of the arbitrator is to interpret a contract).

161. *See Upshur Coals*, 933 F.2d at 231 (refusing to substitute judicial views for arbitrators through judicial review).

162. *See Cole*, 105 F.3d at 1477 (questioning the ability of non-legally trained arbitrators for resolving purely legal disputes).

163. *See id.* at 1488 (finding that “arbitrators must . . . be vigilant to protect the important rights embodied in the laws entrusted to their care”).

164. *See id.* at 1468 (holding that the reviewing court must ensure that the law was correctly applied by an arbitrator); *see Gilmer*, 500 U.S. at 32 n.4 (finding that an individual does not sacrifice substantive rights by arbitrating a dispute). The Court also found that even limited judicial review must be enough to protect substantive rights. *Id.*

165. *See Williams*, 197 F.3d at 761 (finding that courts must exercise judicial review to ensure that arbitrators complied with statutory requirements); *see also Cole*, 105 F.3d at 1487 (concluding that in accordance with the Supreme Court’s reasoning in *Gilmer*, the standard of review of arbitration claim must be sufficiently rigorous to protect individual statutory rights).

166. *See Cole*, 105 F.3d at 1487 (restricting interpretation of “manifest disregard of the law” that encompasses the correct interpretation and application of the law to situations where employees had to sign an arbitration agreement as a condition of employment); *Gilmer*, 500 U.S. at 26 (noting that individuals do not forgo their

should extend judicial review of arbitration decisions to any situation where an individual is bringing a statutory employment claim so as to ensure that his or her substantive rights are protected.¹⁶⁷

Additionally, in order to have substantive review, arbitration decisions should be explained in writing.¹⁶⁸ Any level of judicial review becomes meaningless if reviewing courts are not able to comprehend an arbitrator's reasoning.¹⁶⁹ Determining if arbitrators acted in "manifest disregard of the law" even under the current understanding of the law where an arbitration decision will be overturned if the arbitrator knowingly misapplied clear and unambiguous law, is nearly impossible when arbitration decisions are not in writing.¹⁷⁰ The awards do not need to be as explicit as judicial decisions, but at a minimum, arbitrators should explain what standards they applied and their rationale for doing so in reaching their conclusion.¹⁷¹

CONCLUSION

Arbitration provides a quicker and less expensive means of dispute resolution than the courts.¹⁷² As more statutory rights are created and judges are interpreting these statutes more broadly, courts are becoming over-crowded and overwhelmed.¹⁷³ At the same time, mere convenience does not outweigh the need to provide substantive relief of statutory claims.¹⁷⁴ Statutes are written to promote the

statutory rights just because they subject a claim to arbitration).

167. See *Williams*, 197 F.3d at 761 (explaining that courts are obligated to exercise judicial review sufficiently rigorous enough to protect an individual's substantive rights).

168. See *Mitsubishi Motors*, 473 U.S. at 656-57 (Stevens, J., dissenting) (arguing that arbitration decisions need to be in writing). Justice Stevens specifically argues in his dissent that because "arbitration awards are only reviewable for manifest disregard of the law and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable." *Id.*

169. See *Green*, 200 F.3d at 974 (questioning the ability of judges to determine if a law was applied in "manifest disregard of the law" when arbitration awards are not in writing).

170. See *Mitsubishi Motors*, 473 U.S. at 657 (Stevens J., dissenting) (criticizing the Court's lack of adequate review as allowing for "despotic decisionmaking").

171. See Haagen, *supra* note 74, at 1068 (recommending that courts adopt minimal adequacy standards, such as mandating that arbitration awards are in writing, so that individual's rights are protected).

172. See DUNLOP REPORT, *supra* note 1, at 49 (noting the appeal of arbitration in providing faster and less expensive resolution to a dispute than the courts).

173. See Wolf, *supra* note 60, at 266 (discussing the recent increase in statutory employment claims stemming from courts' expansion of the interpretation of statutory rights).

174. See *Gilmer*, 500 U.S. at 28 (finding that arbitration is an appropriate tribunal

public good and the courts exist to ensure that these laws are enforced.¹⁷⁵ The Supreme Court has said that arbitration is purely an alternate forum for adjudicating a statutory dispute and that one does not forgo his or her substantive rights because he or she has subjected a legal claim to arbitration.¹⁷⁶ In order for this to be true, courts must ensure that the laws created for the public good are not undermined in arbitration.¹⁷⁷

The deference extended to arbitration is logical in the collective bargaining context because collective bargaining agreements act to create a private industrial common law between employers and employees.¹⁷⁸ In order to reduce industrial strife and unrest, Congress and the courts encourage such arrangements.¹⁷⁹ If every dispute that arises over a collective bargaining agreement were to be litigated, industry would shut down in our country.¹⁸⁰ Under such agreements, private parties agree to let an arbitrator interpret the contract and act as they themselves could act in order to reach an effective and efficient resolution to the contractual dispute.¹⁸¹

Whereas arbitrators apply the “law of the shop,” judges apply the law of the land.¹⁸² Arbitration developed because, where more than the law was at issue, arbitrators were better suited to resolve complex labor-management issues.¹⁸³ The courts rightly defer to arbitrators in this situation because while judges are familiar with the law, more than the law is needed to resolve such complex labor disputes.¹⁸⁴

for sharing statutory claims so long as individual rights are protected).

175. See Isbell, *supra* note 76, at 1143-44 (comparing the role of the judge and the role of the arbitrator in dispute resolution).

176. See *Gilmer*, 500 U.S. at 28 (stressing that arbitration is merely an alternate forum for resolving a legal dispute).

177. See *Cole*, 105 F.3d at 1474 (noting the role of the arbitrator in applying the law of the shop and questioning the arbitrator’s ability to apply statutory rights).

178. See *Warrior & Gulf*, 363 U.S. at 578-82 (explaining the role of arbitration in providing quick resolution to collective bargaining disputes and therefore upholding industrial stability).

179. See National Labor Relations Act, 29 U.S.C. § 151 (1935) (explaining that collective bargaining is necessary so employers and employees negotiate with each other).

180. See 29 U.S.C. § 151 (stating that collective bargaining reduces the likelihood of industrial strife because employees and employers have to work together).

181. See DUNLOP REPORT, *supra* note 1, at 51 (explaining how arbitrators act as the private parties would to resolve a dispute).

182. See *Gardner-Denver*, 415 U.S. at 52-53 (discussing that arbitrators are chosen for their industrial expertise); see also Isbell, *supra* note 76, at 1143-44 (noting that arbitrators and judges play different roles in adjudication).

183. See *United Paperworkers*, 484 U.S. at 36-37 (explaining that arbitrators are asked to resolve a dispute based on the spirit of the contract).

184. See *id.* at 38 (finding that judges should not question the merits of arbitration decisions in the collective bargaining context because to do so would undermine

More and more courts are upholding arbitration agreements that arise from individual employment contracts, even when dealing with statutory claims.¹⁸⁵ Unlike collective bargaining agreements, where parties are relatively equal in bargaining power and familiar with arbitration, frequently individual employment claims are entered into a “take it or leave it” basis and individuals are not familiar with what rights they may be relinquishing.¹⁸⁶

As employers are including arbitration clauses in their employment contracts with increasing frequency, it is becoming more important that courts establish minimal standards.¹⁸⁷ In order to ensure that individuals are not giving up their substantive rights merely because they subject themselves to arbitration, courts need to provide meaningful review to ensure that the law is correctly interpreted and applied.¹⁸⁸ In order to have any judicial review, arbitration decisions need to be in writing to at least explain the reasoning behind an arbitrator’s decision.¹⁸⁹ Even if subjected to this higher standard of judicial review, arbitration is still able to serve its function of providing faster and less expensive relief than the courts.¹⁹⁰ If we are asking arbitrators to apply the law and adjudicate statutory complaints, we must also ensure that they do so correctly.¹⁹¹

efficient industrial dispute resolution).

185. See DUNLOP REPORT, *supra* note 1, at 49-50 (noting employers’ attraction to arbitration as a less expensive forum for dispute resolution).

186. See Reilly, *supra* note 56, at 1224-27 (discussing the often coercive nature in which arbitration agreements are entered into in the context of individual employment contracts).

187. See *Gilmer*, 500 U.S. at 28 (stressing that an individual does not sign away his or her statutory rights by agreeing to arbitrate a dispute).

188. See *Cole*, 105 F.3d at 1468 (holding that in the spirit of *Gilmer*, courts must apply a standard of review that protects individual’s statutory rights).

189. See *Green*, 200 F.3d at 977 (noting that judicial review is difficult because arbitration decisions do not have to be in writing).

190. See *Cole*, 105 F.3d at 1487 (explaining that because most employment disputes are fact based, a higher standard of review that holds arbitrators to correctly applying the law would not undermine the arbitration system).

191. See *Gilmer*, 500 U.S. at 28 (finding that substantive rights and access to a neutral forum must be protected in the arbitration of statutory disputes).