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EXPANDING JUDICIAL REVIEW TO ENCOURAGE EMPLOYERS AND EMPLOYEES TO ENTER THE ARBITRATION ARENA

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INTRODUCTION

While working at an Atlantic City convention for Great Western Mortgage Corp., Michele Peacock was the victim of sexual harassment by a Great Western executive. The executive tried to force her into bed to get to know her better. Ms. Peacock quit her job and sued Great Western. Although a court would likely have granted her relief for sexual harassment, she will not receive a trial. Before hiring her, Great Western required that Ms. Peacock sign a contract with a mandatory arbitration agreement. Any dispute that might arise between herself and Great Western would be settled through binding arbitration. She prospectively waived her right to a judicial remedy by signing the agreement.

Through the use of such agreements, American dispute resolution has evolved from a predominantly judicial run system to a system that now utilizes a variety of methods, including Alternative Dispute Resolution (ADR). Due to the number of people filing

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* J.D. Candidate, 1998.
2. Great W. Mortgage Corp., 110 F.3d at 225.
3. Id.
4. Furchgott, supra note 1, at 1.
5. Great W. Mortgage Corp., 110 F.3d at 224.
6. Id. at 224-25.
7. Furchgott, supra note 1, at 1.
8. The United States Constitution gives the power to interpret the law only to judges. U.S. CONST. ART. III. Since judges at one time exclusively held the ability to resolve disputes, a judicial monopoly existed. A monopoly is a privilege vested in one or more persons consisting in the exclusive right or power to carry on a particular business. BLACK'S LAW DICTIONARY 1007 (6th ed. 1990).
9. ADR consists of procedures, other than standard litigation, used to settle disputes. BLACK'S LAW DICTIONARY 78 (6th ed. 1990). ADR includes many different methods for settling disputes. EDWARD J. COSTELLO, JR.,
suits, courts have become overburdened, forcing the courts either to create or submit to new procedures and methods for resolving disputes. In search of ways to alleviate this overburden, legislatures, governmental agencies, and courts have promoted and utilized various forms of ADR.

Although many different forms of ADR are now in use, contracting parties use arbitration more often than any other form. Unlike other forms of dispute resolution, arbitration avoids the formalities, delays, and expenses of traditional litigation, while maintaining the trial like adversarial forum. Through binding arbitration, arbitrators now resolve issues that would otherwise be

CONTROLLING CONFLICT 21 (1996). All alternative methods to litigation are included within the scope of ADR. Id. A non-inclusive list consists of arbitration, mediation, conciliation, negotiation, fact finding and mini-trials. Id. at 105. Arbitration is a process in which a neutral third party renders a binding decision that is binding after a hearing. Id. Mediation is a "private, informal . . . process" used to resolve disputes by the skills of a neutral third party called a mediator. BLACK'S LAW DICTIONARY 981 (6th ed. 1990). A mediator does not have "power to impose a decision . . ." Id. Conciliation allows parties to settle disputes in an "unantagonistic manner." It is used before trial or arbitration. Id. at 289. Negotiation is a resolution "process of submission and consideration of offers until" the parties reach an agreement. Id. at 1036. In fact finding, a board "or committee appointed by [either] business [or] government . . . investigate[s] and report[s] the facts" of a given situation in order to help the parties reach a settlement. Id. at 592. A mini-trial is "a private, voluntary, informal . . . process" in which attorneys for each [party] make a brief presentation of their best case before [an official having] authority to settle." Id. at 997.


11. See supra note 9 and accompanying text for an explanation of different methods for resolving disputes.


Expanding Judicial Review

decided by federal or state judges. An arbitrator or group of arbitrators assume the functions which judges traditionally have performed.

Through compulsory arbitration clauses in employment contracts, arbitrators resolve statutory disputes which arise out of the employment relationship. In order to resolve employment disputes, arbitrators must interpret the meaning and application of federal statutes. In such cases, an employee's statutory rights protecting himself or herself from discrimination based on age, gender, race, and physical capabilities can be defined and adjudicated by an arbitrator without any court supervision.

Moreover, the Supreme Court has yet to decide whether an arbitrator's interpretation of an employee's statutory rights can evade judicial review, even though the arbitrator decides questions of law. The Federal Arbitration Act (FAA) grants courts limited authority to review arbitral awards. Traditionally, the Supreme

15. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 261 (1987). See John P. McIver & Susan Keilitz, Court Annexed Arbitration: An Introduction, 14 JUST. SYS. J. 123 (1991) (stating that many states have non-binding mandatory arbitration policies which allow arbitrators to decide cases in place of a trial judge).


17. See McLaughlin, supra note 13, at 915 (stating that the arbitrability of claims has risen due to the disappearance of "public policy" exceptions).

18. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (deciding whether a mandatory arbitration clause applied to a claim under the Age Discrimination in Employment Act of 1967 (ADEA)).


21. Id.


25. Federal Arbitration Act, 9 U.S.C. § 10 (1994) [hereinafter FAA]. Section 10 of the FAA provides in part that a United States court can vacate an arbitral award:

(1) Where the award was procured by corruption, fraud, or undue means.
Court has interpreted this authority to encompass only procedural errors. Thus, an arbitrator may erroneously interpret the substantive law and his or her decision will stand uncorrected. The losing party will then suffer hardships from the uncorrected errors. Hardships for employers and employees may also stem from the disadvantaged positions arbitration places on the parties, or from defects in the bargain for the employment contract. Since arbitrators make decisions that judges would usually make, an arbitrator's decision should be subject to adequate judicial review. For adequate judicial review to exist, courts will have to expand their authority to review an arbitrator's decisions on questions of law.

In the context of employment contract disputes, courts should expand their authority to adequately review arbitration awards. Currently, courts have set the standard for review of arbitral awards too high by merely vacating, modifying, or correcting awards when they display either "a manifest disregard for the law," or a violation of section 10 of the FAA. These standards of review give courts too little power to correct an arbitrator's errone-

(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 misconduct by which the rights of any party have been prejudiced.
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id.

27. Malin, supra note 16, at 101-02. A United States District Court is considerably restrained in vacating an arbitrator's award. See supra note 25 and accompanying text stating the current method to vacate arbitral awards. The same is true concerning the modification or correction of an arbitrator's award. See FAA, 9 U.S.C. § 11 (1994) (listing only three procedural reasons for which a court may modify an arbitral award).
28. See, e.g., Malin, supra note 16, at 101-02 (suggesting that an error by an arbitrator in interpreting Title VII of the Civil Rights Act can unjustly give an employer a competitive advantage which is not subject to correction through judicial review).
30. See Scodro, supra note 26, at 1937-38 (explaining the bases upon which courts have reviewed arbitral awards); FAA, 9 U.S.C. § 10 (1994). See also Hoffman, supra note 16, at 134 (arguing that unless the arbitral award demonstrates a manifest disregard for the law, an arbitrator's error of law is not ordinarily vacated).
ous interpretations of law, which has traditionally been a duty of the judiciary.

Part I of this Comment discusses the historical use of arbitration in American law, and the enactment of a national comprehensive arbitration act. Part II examines early United States Supreme Court decisions concerning the validity of compulsory arbitration clauses. Part III then analyzes the Supreme Court's decision to allow compulsory arbitration of statutory employment claims. Part IV discusses the disadvantages to employers and employees and the defects in the law when courts enforce compulsory arbitration clauses in employment contracts. Finally, Part V proposes that if courts decide to enforce such clauses, the courts should allow discretionary judicial review to correct errors from binding arbitration.

I. THE EMERGENCE OF ARBITRATION AS ONE FORM OF ADR

A. Arbitration in Early American Law

Like most American law, American arbitration law finds its origins in the English common law. Arbitration was first used in the United States to settle disputes between employers and employees. The origins of modern employment arbitration in the United States stem from the use of alternative forms of dispute resolution in New England and New York during the mid-1600s. The colonial courts arranged for the arbitration of disputes concerning wage rates and quality of work. As arbitration practice continued in the United States, the courts or the litigating parties typically selected “good men” as arbitrators.

34. Id.
35. Id. On at least one reported occasion, the “good men” appointed were actually women. Id. at n.14.
36. Id. For example, in Massachusetts during the 1700s, judicial labor arbitration was used: At a church meeting at Wareham on Buzzard’s Bay, held in 1761, a complaint was lodged by Benjamin Norris against Benjamin Fearing, in which Norris contended that both parties had agreed to submit a dispute regarding compensation for a fishing voyage to the Reverend Rug-
The development of commercial and financial industries at the beginning of the twentieth century contributed to the growth of arbitration. The utilization of arbitration in commercial and financial industries such as railroads, coal mines, newspapers, and clothing led to a nationwide acceptance of arbitration as a legitimate form of dispute resolution. The federal government, with the approval of emerging industries, began to enact laws that not only sanctioned arbitration, but positively encouraged it.

In 1920, New York led the reform in arbitration law by enacting the first comprehensive statute enforcing pre-dispute arbitration agreements. Arbitration became a profession rather than an avocation. A national arbitration act was the next step.
B. A National Comprehensive Arbitration Act

In 1920, the American Bar Association (ABA) directed its Committee on Commerce, Trade and Commercial Law to report and draft a bill for Congress on commercial arbitration. After few amendments and no opposition, the House and the Senate unanimously passed the bill. The result was the United States Arbitration Act. In 1947, Congress re-enacted and codified the United States Arbitration Act to create the FAA.

Prior to the enactment of a national comprehensive arbitration act, courts generally declared agreements to arbitrate future disputes unenforceable and revocable. The FAA changed this policy. The intention of the FAA was to provide a means to resolve disagreements arising under commercial contracts containing clauses to settle future disputes. Courts can now enforce an arbitration clause like any other clause in a contract.

The FAA covers all arbitration agreements in “contract[s] evidencing . . . transaction[s] involving commerce.” However, nothing in the FAA applies “to contracts of employment of seamen, railroad employees, or any class of workers engaged in foreign or

47. MACNEIL, supra note 14, at 85-88. The committee drafted a Uniform State Act on Arbitration and a tentative draft of a federal act, Arbitration of Disputes in Admiralty and Interstate and Foreign Commerce. Id. The ABA approved the Uniform State Act and its referral to the National Conference of Commissioners on Uniform State Laws. Id. After about four years of proposals and revisions, the ABA presented a national arbitration bill before the United States Congress. See generally id. 83-91 (discussing the ABA’s work in creating, developing, lobbying, amending, and persuading the passage of the United States Arbitration Act (USAA)).


49. S. REP. No. 68-536, at 1.


52. MACNEIL, supra note 14, at 84-85.


54. MACNEIL, supra note 14, at 100-01 n.31 (citing 65 CONG. REC. H11080 (1924)). Prof. Macneil cites the House Congressional Record where Congressman Miller explains the purpose of the bill before the House floor debate. Id.

55. Id.

56. 9 U.S.C. § 2. Section 2 of the FAA states:

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.

Id.
interstate commerce. The FAA provides for stays of proceedings in the federal district courts where the suit is pending arbitration. When one party fails, neglects, or refuses to comply with an arbitration agreement, the FAA provides for orders compelling arbitration. Moreover, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract itself or an allegation of waiver, delay, or a like defense to arbitrability."

The FAA has undergone few changes since its codification in 1947. Because of the FAA's support, a trend of promoting arbitration by private businesses, as well as by federal and state governments, has emerged. Every state has enacted a statute governing the use of arbitration agreements. More businesses are utilizing employment contracts with mandatory arbitration clauses. These clauses require employees to settle all their disputes through binding arbitration. Since arbitration clauses were beginning to have a greater impact on society, the United States Supreme Court began granting certiorari in cases raising arbitra-

57. Id. at § 1. Section 1 of the FAA states in part:

Commerce, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the district of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

59. Id. at § 4.
61. See 9 U.S.C. §§ 1-16. The FAA continues to regulate arbitration agreements in contracts which are subject to federal jurisdiction as confirmed by the United Supreme Court. See also Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 279 (1932) (upholding the constitutionality of the FAA). Congress amended the FAA in 1988 to include section 15 stating the inapplicability of the Act of State doctrine and section 16 governing appeals. 9 U.S.C. §§ 15-16.
63. Furchgott, supra note 1, at 1. According to the results of a 1995 poll, 30% of United States companies with 20 or more employees planned to increase their use of employment contracts. Id. By using employment contracts, employers can insulate themselves from an employee's discrimination suit through the use of compulsory arbitration clauses. Id.
64. Id.
II. EARLY SUPREME COURT DECISIONS CONCERNING COMPULSORY ARBITRATION CLAUSES

Along with a strong federal policy favoring arbitration, decisions by the United States Supreme Court have promoted the use of arbitration agreements. Although the Supreme Court has clearly stated that arbitration agreements pursuant to the FAA are constitutional, the Court has questioned the use of broad agreements to arbitrate future disputes. The next two sections discuss early Supreme Court decisions analyzing whether broad arbitration agreements are against public policy.

A. The Public Policy Defense

Not until twenty-seven years after Congress created the FAA did the Supreme Court begin to analyze the validity of broad arbitration agreements involving statutory rights. In Wilko v. Swan, the Court had to decide whether a party could waive their right to judicial remedies provided by the Securities Act of 1933 through written agreements to arbitrate future disputes. Wilko brought suit against a brokerage firm claiming misrepresentation and omission of information under the Securities Act. However, an

65. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (stating that a claim under the ADEA was subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485-86 (1989) (upholding pre-dispute agreements to arbitrate claims under the Securities Act); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 223 (1987) (holding that the Securities Exchange Act and RICO claims were arbitrable under pre-dispute arbitration agreements); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 617 (1985) (subjecting antitrust disputes to arbitration under the FAA); Moses, 460 U.S. at 24 (stating that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration).

66. See, e.g., Marine Transit Corp., 284 U.S. at 279 (upholding the use of the FAA in federal courts, but not in state courts).


68. See Wilko, 346 U.S. at 438 (1953) (holding that broad arbitration agreements were not enforceable).

69. Id. at 430. Wilko was a securities buyer who entered into an agreement with a brokerage firm to buy 1,600 shares of a company's common stock. Id. at 428-29. Through a merger contract with a larger company, the stock was to be worth more, enticing financial interest to buy the stocks. Id. After the firm allegedly mishandled Wilko's stocks, Wilko sold the stocks for a loss. Id. at 429.

70. Id. at 428. The Securities Act of 1933 allowed a person who received untrue statements of material facts or did not receive material facts to sue either at law or in equity in any court having jurisdiction. 15 U.S.C. § 8-9
agreement between the two parties contained a clause requiring the parties to settle all future controversies through arbitration. This clause conflicted with a provision in the Securities Act which stated that any person claiming a violation could sue in federal court.

The Court balanced Congress' intent in passing the Securities Act with the purpose behind the FAA's enactment. In so doing, the Court reasoned that when a securities buyer agrees to waive the right to sue in court before any controversy or dispute occurs, the buyer gives up more than would a party contracting in other business transactions. The Court stated that at the time the buyer negotiated the contract, the buyer surrendered an advantage that the Securities Act provided. At that time, the buyer was less able to judge the magnitude of the advantage. By waiving the right to a judicial remedy for a remedy through arbitration, the Court noted that an arbitrator makes an award for one party without having to explain the reasons for the award. An award then may prevail without judicial review for errors, causing public policy to be undermined.

(1997).


73. Wilko v. Swan, 346 U.S. 427, 430 (1953). Congress' intent behind the Securities Act was to protect investors from fraud. Id. Whereas, the FAA was passed to give arbitration agreements the same status as other contract provisions and to avoid the delay and cost of litigation. Id. at 431-32. See Securities Act of 1933, 15 U.S.C. § 12 (2) (1994); FAA, 9 U.S.C. §§ 1-16 (1994).

74. Wilko, 346 U.S. at 435.

75. Id.

76. Id. The Securities Act creates a special right for buyers to recover in court for misrepresentations. Id. at 431. When a buyer is held to arbitrate all future disputes, an arbitrator then must determine whether a violation of the statute exists, and apply the statute without any judicial instruction on the law. Id. at 433-34. Nothing in Wilko's arbitration agreement requires the arbitrators to make an award according to the established law. Id. Wilko seems to suggest that the parties could have contracted to require their arbitrator to follow a certain set of laws, state or federal. Id.

77. Id. at 436. Many articles now suggest that the parties contracting to arbitrate should create a provision requiring the arbitrators to write opinions explaining their awards. See Developments in the Law - Employment Discrimination, 109 HARV. L. REV. 1670, 1690-91 (1996) (suggesting arbitrators explain their decisions in written opinions); Michele L. Giovagnoli, To Be or Not to Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena, 64 UMKC L. REV. 547, 578 (1996) (discussing contracting parties' agreement to have arbitrator explain his or her decision); Bales, supra note 10, at 610 (stating that arbitrators should give written explanations regarding their awards).

78. Wilko, 346 U.S. at 438. When arbitration agreements try to settle statutory disputes, courts must reconcile the conflicting policies behind the statute and the FAA. Id. Invalidating the arbitration agreement helps to implement the Securities Act's intention to protect buyers from fraud. Id. The
The Wilko decision created the "public policy defense" against the enforcement of arbitration agreements under the FAA concerning statutory claims.\textsuperscript{79} The "public policy defense" relied on three principles: "(1) a judicial forum was superior to arbitration for enforcing statutory rights; (2) compulsory arbitration constituted a waiver of one's statutory right to a judicial forum in contravention of public policy; and (3) the informality of arbitration made it difficult for courts to correct errors in statutory interpretation."\textsuperscript{80} These three principles eventually faded through the Mitsubishi Trilogy.

B. The Mitsubishi Trilogy

In three Supreme Court decisions, commonly known as the Mitsubishi Trilogy,\textsuperscript{81} the Court struck down each of the "public policy defenses" to further the federal policy favoring arbitration.\textsuperscript{82} According to Wilko, although there was a federal policy favoring arbitration, the federal policy protecting against a statutory violation was controlling.\textsuperscript{83} However, Wilko also foresaw a time when courts would allow arbitration in controversies based on statutory violations.\textsuperscript{84} Through the Mitsubishi Trilogy, the Court decided that the time had come for arbitration in statutory disputes.

1. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.

In 1985, the Supreme Court addressed which claims are subject to arbitration under the Sherman Act in Mitsubishi Motors
Corp. v. Soler Chrysler-Plymouth, Inc. For the first time, the Supreme Court decided that the FAA did not restrict arbitration of statutory claims. The Court concluded that judicial suspicion concerning the desirability and competence of arbitral forums inhibited the development of arbitration as an alternative form of dispute resolution. But, since a liberal federal policy favored the enforcement of arbitration agreements, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. The Court could find no reason to depart from that policy when a party raises statutory claims.

Although the Court allowed some statutory claims to be arbitrated, the Court did not decide that all controversies implicating statutory rights are suitable for arbitration. 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

85. 473 U.S. at 638. In that case, the court held that parties can arbitrate antitrust disputes under the FAA. Id. Soler Chrysler-Plymouth, Inc. (Soler), a dealership, entered into a Distributor Agreement with Chrysler International, S.A. (CISA) to distribute Mitsubishi vehicles. Id. at 617. That same day, Soler, CISA, and Mitsubishi Motors Corp. (Mitsubishi) signed a Sales Procedure Agreement which referred to the Distributor Agreement. Id. Mitsubishi sold vehicles to Soler with additional conditions and terms for resale. Id. The Sales Agreement contained an arbitration clause requiring all controversies between parties to be settled by arbitration. Id. Under the contract, all disputes were to be settled by arbitration in Japan according to the Japan Commercial Arbitration Association rules. Id. Soler argued to no avail that the Japanese rules and regulations could not rule on a United States federal statute. Id. at 623. However, if the Japanese arbitrators did not decide the issue concerning the federal statute, a party can reinitiate suit in federal court. Id. at 637. The controversy in this case developed when the new-car market began to slack. Id. at 617. Soler requested that Mitsubishi delay or cancel shipment of several orders. Id. Mitsubishi denied the request and Soler defaulted on payments. Id. at 617-18.


87. Id. at 628-27.

88. Id. at 625 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).


90. Mitsubishi, 473 U.S. at 627. Congress may expressly prohibit arbitration use for certain statutory rights. See generally Wilko v. Swan, 346 U.S. 427 (1953) (holding that a special right in the Securities Act gave securities buyers access to federal courts even with an arbitration agreement). A court must look to the Congressional intent behind the statute in question to decide whether rights under the statute are suitable for arbitration. Mitsubishi, 473 U.S. at 627.
an arbitral, rather than a judicial forum.\textsuperscript{91} Therefore, unless Congress intended to preclude a person from waiving judicial remedies to statutory rights, courts were to force parties, who bargained for the arbitration clauses, to arbitrate their disputes.\textsuperscript{92} However, in only two years, the Court narrowed this rule to allow claims to be arbitrated even though Congress enacted a statute that preserved a person's judicial remedies.

2. \textit{Shearson/American Express, Inc. v. McMahon}

Shortly after \textit{Mitsubishi}, the Court heard \textit{Shearson/American Express, Inc. v. McMahon}.\textsuperscript{93} \textit{Shearson} decided that the arbitration of statutory claims arising under the Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act (RICO) can proceed according to a compulsory pre-dispute arbitration agreement.\textsuperscript{94} The Court stated that Congress created the FAA to reverse judicial hostility towards agreements to arbitrate.\textsuperscript{95} The enforcement of arbitration agreements is not set aside when a person, bound by an agreement, raises a statutory rights claim.\textsuperscript{96} The Court reiterated that the time has past when the desirability and competence of arbitration is questioned.\textsuperscript{97}

\textsuperscript{91} \textit{Mitsubishi}, 473 U.S. at 628.

\textsuperscript{92} \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 628 (1985). A defect in the bargaining process will render the contract or part of the contract unenforceable. MICHAEL L. CLOSEN ET AL., CONTRACTS 255 (1992). Courts must apply a two-step process to determine whether congress precluded a waiver of judicial remedies: "[F]irst determin[e] whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, consider[] whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." \textit{Mitsubishi}, 473 U.S. at 628. The Court concluded that parties may agree, before any controversy materializes between them, whether to adjudicate their controversies in an arbitral or judicial forum. \textit{Id.}

\textsuperscript{93} \textit{482 U.S. 220 (1987)}.

\textsuperscript{94} \textit{Id. at 222}. McMahon and his wife entered into an agreement with Shearson/American Express, Inc. (Shearson), a brokerage firm, to trade securities. \textit{Id. at 222-23}. The agreement contained a compulsory arbitration clause requiring arbitration of all disputes arising between the two parties. \textit{Id. at 223}. \textit{See Rodriguez de Quijas v. Shearson/American Express, Inc.}, 490 U.S. 477, 478 (1989) (upholding an arbitration clause); \textit{Mitsubishi}, 473 U.S. at 617 (stating that pre-dispute agreements to arbitrate claims under The Securities Exchange Act are valid). Having lost a substantial amount of money from their business venture, the McMahons alleged that Shearson engaged in fraudulently excessive trading with their accounts in violation of the Securities Exchange Act and RICO. \textit{McMahon}, 482 U.S. at 223.


\textsuperscript{96} \textit{McMahon}, 482 U.S. at 226.

\textsuperscript{97} \textit{Id.} The FAA allows the enforcement of agreements to arbitrate statutory claims when the statutes do not state otherwise. \textit{Id.} Congress must have intended to preclude a party's waiver of judicial remedies. \textit{Id. at 227}.
Although the Wilko Court's general suspicion regarding arbitration was valid at one time, the Court found that suspicion does not hold true for today's arbitration procedures. The Court narrowed Wilko to the point of almost making it ineffectual by limiting the decision to arbitration of statutory rights under the Securities Act. Since the plaintiffs in McMahon made the bargain to arbitrate, they were held to that bargain. The Court concluded that the potential complexities arising from that bargain should not invalidate the agreement to arbitrate.


The last case of the Mitsubishi Trilogy is Rodriguez de Quijas v. Shearson/American Express, Inc. The Supreme Court decided that securities claims under the Securities Act were subject to a compulsory arbitration agreement. A contracting party could waive their right to judicial remedies concerning their securities claims. The United States Supreme Court expressly overruled Wilko, stating that arbitration does not inherently undermine any of the substantive rights of the Securities Act. The Court held that the prevailing view is to endorse federal statutes favoring arbitration as a method for resolving disputes.

98. Id. at 226. When Wilko was decided, the Securities and Exchange Commission's (SEC) general authority did not include any authority over arbitration rules of self-regulatory organizations. Id. at 233.

99. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232-33 (1987). The Court interpreted Wilko to say that a party's waiver of a judicial forum was unenforceable because arbitration was inadequate to enforce statutory rights under section 12 of the Securities Act. Id. Wilko stated the Securities Act gave a party a special right to seek a judicial remedy. Wilko v. Swan, 346 U.S. 427, 431 (1953). Wilko should be understood as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue. McMahon, 482 U.S. at 228-29.

100. McMahon, 482 U.S. at 242.

101. Id. at 239.


103. Id. at 478.

104. Id. Rodriguez invested about $400,000 in securities with Shearson. Id. The parties signed a standard customer agreement that contained a predispute arbitration agreement. Id. After losing his investments, Rodriguez sued Shearson alleging violations under the Securities Act and the Securities Exchange Act for unauthorized and fraudulent transactions. Id. at 478-79. A federal district court allowed the claims under the Securities Exchange Act to go to arbitration, but not the Securities Act claims. Id. The Court in Wilko stated that Congress intended the Securities Act to create a special right which invalidated arbitration of issues arising under the Act. Wilko, 346 U.S. at 438. The district court stated that under Wilko, a court must decide claims arising under the Securities Act. Rodriguez, 490 U.S. at 479.

105. Id. at 485. Wilko, as decided by the Rodriguez Court, was incorrectly decided because it did not follow the federal policy promoting arbitration. Id. at 484.

By overruling Wilko, the Court affected almost a half-century of decisions that followed a policy favoring judicial rather than arbitral resolution of statutory disputes. Supreme Court decisions subsequent to Wilko have essentially struck down all the principles behind the "public policy defense". The Supreme Court adopted a liberal federal policy favoring arbitration. The Court's new jurisprudence opened the door for the adjudication of all federal statutes under compulsory arbitration agreements.

III. COMPULSORY ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS

Prior to 1991, the courts exclusively held the power to interpret the meaning of any and all disputed employment statutes. However in 1991, the Supreme Court decided Gilmer v. Interstate/Johnson Lane Corp. The case addressed the issue of whether a claim brought under the Age Discrimination in Employment Act of 1967 (ADEA) is subject to compulsory arbitration. Having decided Rodriguez only two years previously, the broader right to select a forum for resolving disputes. Rodriguez, 490 U.S. at 483. However, if the agreements were created through fraud or overwhelming economic power, a court may invalidate the agreement. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985). The Supreme Court's past characterization of arbitration in Wilko reflects the old judicial hostility towards arbitration which view has eroded over the years. Id. Prior Supreme Court's decisions intensified the erosion. Id. (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985), Moses, 460 U.S. 1 (1983)).

107. Rodriguez, 490 U.S. at 483. In Wilko, the Supreme Court recognized the trend of promoting arbitration, but still required certain statutory rights to be only resolved by the judiciary. Wilko, 346 U.S. at 438. However, since the Court overruled Wilko in Rodriguez, the Court has allowed the interpretation that no statutory rights are only to be resolved by the judiciary unless Congress says.

108. Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 484 (1989)(citing Wilko, 346 U.S. at 439 (Frankfurter, J., dissenting). A judicial forum is no longer considered superior to arbitration for enforcing statutory rights. See Mitsubishi, 473 U.S. at 636. Compulsory arbitration can constitute a waiver of one's statutory right to a judicial forum. Rodriguez, 490 U.S. at 483; McMahon, 482 U.S. at 226-27. Courts have limited access to review an arbitral award which is sufficient. Id. at 232.


110. Id. at 23. Interstate/Johnson Lane Corp. (Interstate) hired Gilmer as a Manager of Financial Services. Id. As a condition of employment, Gilmer registered as a securities representative with several stock exchanges by completing a required application. Id. Through the registration application as mandated by the stock exchanges, Gilmer signed an agreement to arbitrate any controversy arising out of his employment as a registered representative or termination of employment. Id. The arbitration agreement was not contained in the employment contract between Gilmer and Interstate, but was part of the registration application with the stock exchanges. Id. The Court clearly stated that the issue in Gilmer did not concern arbitration under an
Court had to determine the scope of an arbitrator's power to interpret any and all disputed employment statutes. There were two ways the Court could have decided this issue. The Court could have allowed arbitration of any statutory claim arising from a compulsory arbitration agreement. Or, the Court could have limited its decision to ADEA claims as it previously did with Securities Act claims.

*Gilmer* evinces a culmination of the Supreme Court's prior decisions concerning compulsory arbitration of statutory claims pursuant to the FAA. The Court reasoned that the purpose of the FAA is to put arbitration agreements on the same level as other contract provisions. Contracting parties must bargain for arbitration agreements without coercion. Without Congress precluding a waiver of judicial remedies under the disputed statute, the Court required the parties to arbitrate their statutory disputes. The Court concluded that if the congressional intent is
not clear, arbitral forums should continue to resolve the substantive rights afforded by the disputed statute.\footnote{117}

In promoting a policy favoring arbitration, the Court held that all statutory claims are subject to compulsory arbitration agreements.\footnote{118} However, under section 1 of the FAA, arbitration agreements made under employment contracts could be excluded from the FAA's coverage.\footnote{119} Section 1 provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."\footnote{120} Since \textit{Gilmer} did not decide the scope of the FAA's exclusion provision, a broad interpretation of the 1925 provision could exclude all employment contracts of workers engaged in interstate commerce from the FAA's coverage.\footnote{121}

Currently, courts are bound by the FAA to interpret contractual arbitration agreements as presumptively valid, irrevocable, and enforceable.\footnote{122} If courts exclude employment contracts from the FAA's coverage, the courts are then free to adjudicate the employment arbitration agreements on a case by case basis without the judicial review restrictions of the FAA.\footnote{123} If courts do not interpret the FAA to bar employment contracts, they should alternatively expand judicial review concerning arbitral awards interpreting employment statutes.

But for compulsory arbitration agreements, the court system would traditionally resolve all statutory employment disputes. Although the Supreme Court has stated that a limited judicial review of arbitral awards is adequate,\footnote{124} the Court has not decided this issue as it pertains to employment contracts. Pre-dispute arbitration agreements threaten employees with termination for not prospectively giving up their right to judicial remedies. In conjunction with promoting a liberal federal policy favoring arbitration, courts should encourage a discretionary judicial review of arbitral awards to correct errors arising exclusively from employment contract disputes.

\begin{footnotes}
\item[117] \textit{Id.} See \textit{Moses}, 460 U.S. at 24.
\item[118] \textit{Gilmer}, 500 U.S. at 29. Unless Congress explicitly precludes arbitration of a statutory claim, statutory rights can be subject to arbitration. \textit{Id.}
\item[119] 9 U.S.C. § 1 (1994). In a dissenting opinion in \textit{Gilmer}, Justice Stevens argues that all arbitration clauses in employment contracts are exempt from the FAA's coverage. \textit{Gilmer}, 500 U.S. at 31 (Stevens, J., dissenting).
\item[120] 9 U.S.C. § 1.
\item[122] 9 U.S.C. § 1.
\item[124] \textit{Gilmer}, 500 U.S. at 32 n.4 (citing Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987)).
\end{footnotes}
IV. COMPULSORY ARBITRATION AGREEMENTS IN EMPLOYMENT CONTRACTS

This Part examines why courts should allow discretionary judicial review of arbitral awards from compulsory arbitration agreements in employment contracts. Section A discusses the disadvantages to employers and employees caused by compulsory arbitration. Section B sets forth two defects, duress and unconscionability, in the bargaining process between the employer and employee which could be minimized through adequate judicial review.

A. Disadvantages To Employers and Employees

Although past Supreme Court decisions favor a general arbitration policy, the Court has not specifically approved of compulsory arbitration agreements between employers and employees under an employment contract.125 Before the Court decides the issue, it should first recognize the disadvantages of advocating the use of compulsory arbitration agreements in employment contracts. Indeed, several disadvantages exist for both the employer and the employee.

From an employer's point of view, the avoidance of formalties, delays and expenses of ordinary litigation may encourage employees to raise frivolous disputes against the employer.126 Compulsory arbitration gives an employee easier access to a forum for resolving disputes.127 An employer will then have to defend against many more employee claims of which few may be important enough to invest the time or money.128 When hiring many employees, an employer may be forced to spend more money to defend against employees' claims than it would absent any arbitration provision.

Pre-dispute mandatory arbitration agreements also disadvantage employees. Employees may believe that compulsory arbitration takes away their individual rights and reduces the amount of money normally recoverable for an employer's discriminatory violations.129 Employers may be giving their employees a reason to unionize by forcing arbitration.130 This would counteract the effi-
cient adjudication policy behind compulsory arbitration agreements since unionized employees are not required to accept awards through compulsory arbitration. Also, employers can force unwilling employees to sign pre-dispute mandatory arbitration agreements if a disparity in bargaining power exists between an employer and employee because the employee may only have a high school education or just some college education.

Disadvantages exist for both employers and employees because of a limited judicial review of an arbitrator’s award. Past case law allows arbitrators to decide statutory disputes. Arbitrators now resolve questions of law, traditionally the role of the judiciary, without any instruction from the courts. Under the current practice, many errors will stand uncorrected. In addition, arbitrators are free to make awards without disclosing their reasoning. The use of arbitration agreements may adversely affect the workplace relationship.

Courts can choose not to enforce compulsory arbitration agreements in employment contracts because the Supreme Court has not yet decided this issue. The legal uncertainty surrounding this area of law could prove costly to employers and employees by forcing more disputes. A court may interpret the FAA’s exclusion provision broadly to exclude all employment contracts from the FAA’s coverage. Also, a court can decide not to enforce compulsory arbitration agreements based on any plausible legal argument even though defects in the bargain for the contract may exist.

B. Defects In The Bargain

When a future employee is threatened with losing a job for not prospectively agreeing to arbitrate all claims against the employer, the bargaining process between the employer and employee is defective, rendering the contract, or parts of the contract unen-

133. Bales, supra note 10, at 611-12.
134. Gilmer, 500 U.S. at 34 n.5; Mitsubishi, 473 U.S. at 626.
137. Developments in the Law -- Employment Discrimination, supra note 77, at 1676-1677; Lewton, supra note 81, at 1019.
138. Gilmer, 500 U.S. at 40 (Stevens, J., dissenting).
139. See Lewton, supra note 81, at 1031-32 (discussing the fact that compulsory arbitration remains subject to any plausible legal argument).
The existence of a bargained-for-exchange is the principal basis which courts look to enforce contracts. Although a liberal federal policy favoring arbitration prevails, courts may decide not to enforce compulsory arbitration agreements that are not bargained for by the parties. When employees enter into an employment contract, they must act freely without coercion. If coerced, the bargaining process is defective according to two theories of contract law: duress and unconscionability.

Duress is a condition where one party is induced by an improper threat of another to make a contract under circumstances which deprive the former party the opportunity to exercise free will. The law recognizes duress by economic coercion. When deciding if a contract is tainted by duress, a court looks to the time the contract was formed to decide if a party was deprived of free will in entering the agreement.

Employers are using employment contracts that contain pre-dispute arbitration clauses. Prospective employees are faced with the choice of either signing the contracts containing such clauses, or refusing to sign them and finding other employment. The threat of unemployment or inferior employment may induce people to sign such contacts. A prospective employee is coerced into giving up a right to judicial remedies at a time when the employee is less able to judge the value of that right. The employee's understanding of the value of having the right to judicial remedies can be impaired by the employee's need of a job and money, or by the employee's lack of education. The right to judicial

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140. A successful bargained-for-exchange requires that the contracting parties be free and competent in order to achieve their own self-interest. CLOSEN ET. AL., supra note 92, at 255.  
141. Id.  
142. E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CONTRACTS 349 (5th ed. 1995) (stating that a person coerced into conferring a benefit to another may have a legal cause of action).  
143. Id.  
144. Id. at 386.  
145. CLOSEN ET. AL., supra note 92, at 272.  
146. FARNSWORTH & YOUNG, supra note 142, at 349.  
147. CLOSEN ET. AL., supra note 92, at 272.  
148. Furchgott, supra note 1, at 1.  
149. Wade Lambert, Legal Beat, Employee Pacts to Arbitrate Sought by Firms, WALL ST. J., Oct. 22, 1992, at B1. Such agreements send the message that: "If you come here to work, you give up your right to enforce your public right to be free of discrimination." Id.  
150. See CLOSEN ET. AL., supra note 92, at 272 (stating that courts recognize economic coercion or business compulsion as a threat leading to duress).  
151. See Hoffman, supra note 16, at 154-55 (explaining that the consideration given at the time of signing an agreement to resolve future disputes does not match the benefits received because the need for the right to a judicial remedy has not yet occurred).
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remedies aims to protect employees from coercion. Under economic coercion, an employer threatens a prospective employee with economic hardship through loss of job for not relinquishing a right to judicial remedies.

Proponents of compulsory arbitration clauses argue that duress cannot exist when an employer and employee sign a contract containing one of these clauses. "It is not duress to threaten to do what there is a legal right to do." When an employer bargains with a prospective employee, an employer may threaten any kind of rightful act while bargaining. However, unlawful conduct can lead to creating duress between contracting parties.

A wrongful threat can materialize to become unlawful conduct creating duress. The fundamental issue in a duress case is whether the employer's statement that induced the prospective employee to sign the contract is the kind of statement the courts should discourage by deeming it a wrongful threat. Although a prospective employer may at times threaten an employee into signing a contract without violating a law, an unjust and inequitable threat is wrongful. By requiring an employee to choose between signing an employment contract that prospectively waives a right to a judicial remedy or finding a job elsewhere, the employee is forced into an unjust and inequitable position. Before the prospective employee understands the magnitude of the right, he or she is forced to waive it.

In addition to duress, unconscionability also creates a defect in the employment bargaining process when contracting for a predispute compulsory arbitration clause. A court has discretion to apply the unconscionability doctrine to protect a weaker party from being victimized by an overreaching stronger party. Unconscionability can apply when one or more terms of a contract unreasonably put the weaker contracting party at a disadvantage.
or when the court finds the stronger party's practices to preclude the weaker party from making a meaningful bargaining choice. 164

An employer usually occupies a stronger bargaining position than a prospective employee. 165 This is especially true where the employee lacks latitude in the bargaining process. 166 By requiring an employee to waive access to the judiciary in order to gain employment, the employee forgoes a legal right. 167 That right was given to that employee by way of the U.S. Constitution or statute. By possessing this legal right, the employee receives an advantage. 168 Therefore, when the employer requires the employee to sign a compulsory pre-dispute arbitration agreement, the prospective employee is then at a disadvantage.

The counter argument is that a prospective employee should be presumed to be on an even bargaining plain as the employer. 169 When an employee enters a contract, the employee is held to what was bargained. 170 After all, freedom to contract is a fundamental concept of our legal system. 171

However, the freedom to contract is thwarted when a contract provision is designed to absolve one party from the consequences of his own unlawful acts. 172 Although arbitration can help to mend an employer's discriminatory acts toward an employee, arbitrators do not have the same guidance and oversight as judges. 173 Arbitrators may also show bias against employees. 174 Therefore, by requiring a compulsory pre-dispute arbitration agreement in employment contracts, an employer attempts to avoid the traditional

164. Id. Unconscionability under this theory is labeled procedural unconscionability. Id.
166. See CLOSEN ET. AL., supra note 92, at 255 (explaining that during the bargaining process parties exchange promises contingent on the advantage each party is able to trade to the other).
169. FARNSWORTH & YOUNG, supra note 142, at 398. Unconscionability occurs when a contract allows for an absence of meaningful choice on the part of one party, along with contract terms which are unreasonably favorable to the other party. Id.
170. Id. at 324; CLOSEN ET. AL., supra note 92, at 255.
171. FARNSWORTH & YOUNG, supra note 142, at 389 (citing O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill.2d 436 (1958)).
172. CLOSEN ET. AL., supra note 92, at 315.
173. See Malin, supra note 16, at 101 (recognizing that the public justice system does not monitor arbitrators as it does judges).
judicial consequences of his wrongful acts. 175

When choosing between signing an arbitration agreement or losing a job, the prospective employee does not have a meaningful choice. 176 By having to choose between two alternatives, the prospective employee must submit to the employer's unreasonable hiring practices. 177 According to the doctrine of unconscionability a defect exists in this bargained-for-exchange.

A federal policy favoring arbitration should continue in order to encourage the use of arbitration. However, employment arbitration has become handicapped through the use of compulsory arbitration agreements. These kinds of agreements allow for disadvantages and potential defects in the bargained-for-exchanged between employers and employees. If a court can adequately review the arbitration process, employers and employees will be better served when using compulsory arbitration agreements in employment contracts.

V. EXPANDING JUDICIAL REVIEW OF ARBITRAL AWARDS

In conjunction with promoting a liberal federal policy favoring arbitration, courts should allow a discretionary judicial review of arbitral awards. The courts currently have a limited ability to review an arbitral award. 178 Only when an arbitrator evinces "a manifest disregard for the law" or violates the FAA's section 10 may the court then correct errors created through the arbitration process. 179 Since the arbitrator's role has expanded, the courts' ability to review the arbitrator's award should also expand. Specifically, the courts should be able to review arbitral awards of statutory claims arising from compulsory arbitration agreements in employment contracts.

Since the Supreme Court expanded the kinds of claims that are subject to arbitration, the Court has given arbitrators a role in resolving statutory employment disputes. 180 As a result of this new role, arbitrators may confront legal issues that the courts have not

175. Id.
176. See generally Hoffman, supra note 16, at 154 (stating that compulsory arbitration agreements induce inadequate consideration).
177. Compulsory arbitration agreements are illegally coercive when employees feel that they have to sign the agreement to keep or get a job. Lambert, supra note 158.
179. See supra note 30 and accompanying text for an explanation of "a manifest disregard for the law" standard. See also 9 U.S.C. § 10 (1994) (regulating the courts ability to vacate arbitral awards).
180. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (stating that contracting parties to an arbitration agreement can raise statutory rights claims).
yet settled. Arbitrators can issue awards which are inconsistent with the developed substantive law thereby greatly undermining established precedent. Also, a court is deprived of the opportunity to develop precedent in an area where the law is inconsistent. Arbitrators may not possess the resources to research the current state of the law concerning a statute, and may therefore incorrectly apply the statute. Without the guidance of the judiciary, the parties are “at risk of being subject to different substantive law than a court would apply.” A court's adequate review of arbitral awards will correct errors that are bound to occur by arbitrators in uncharted territory.

The Supreme Court has recently characterized arbitral tribunals as capable of handling the legal complexities involved with resolving employment statutory claims. The assumption is that arbitrators will follow judicial precedent defining the laws in question. However, arbitrators may deviate from that precedent. The extent of the deviation may vary according to the source, form and status of the legal rule. Arbitrators will give more consideration to law that is clearly defined as opposed to unsettled law based upon controversial views as to what the public policy should be. Although it is optimistic to assume that arbitrators will follow the law in deciding statutory employment claims, what happens when an arbitrator substantially deviates from the law but not to the point of a manifest disregard?

The case of Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker demonstrates the inefficiency in applying the manifest disregard standard to arbitral awards of statutory claims. Through a securities contract, Bobker, the plaintiff, ordered Mer-
rill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) to sell all 4,000 shares of stock Bobker purchased.\textsuperscript{194} Merrill Lynch tendered the shares.\textsuperscript{195} A few days later, Bobker then ordered Merrill Lynch to "sell short" 2,000 shares of the same stock.\textsuperscript{196} The dispute arose after Merrill Lynch executed the sale and then reneged.\textsuperscript{197} Bobker compelled arbitration to recover the lost profits due to Merrill Lynch's refusal to act.\textsuperscript{198} Merrill Lynch argued that by selling short 2,000 shares they would have violated Rule 10b-4 of the SEC.\textsuperscript{199} Without a written explanation for their decision, the arbitrators awarded Bobker $12,500.\textsuperscript{200}

Merrill Lynch petitioned the federal district court to vacate the award.\textsuperscript{201} The district court decided that if Merrill Lynch had sold short 2,000 shares of stock, they would have violated Rule 10b-4.\textsuperscript{202} Upon reviewing the arbitrators actions, the court found that the arbitrators were aware of the rule and ignored it.\textsuperscript{203} The district court then vacated the award on the grounds that the arbitrators displayed a manifest disregard for the law.\textsuperscript{204} The court of appeals reversed.\textsuperscript{205}

After reviewing the minutes of the arbitration, the appellate court stated that because the arbitrators raised doubts concerning the validity of the rule, the award did not display a manifest disregard for the law.\textsuperscript{206} The appellate court's decision suggests that as long as arbitrators merely read the statute, irrespective of whether the statute is actually applicable, the arbitrators' award will stand against the manifest disregard standard.\textsuperscript{207} An expanded "judicial review will encourage arbitrators to apply the law correctly."\textsuperscript{208}

If federal courts do not adopt the manifest disregard standard, they must rely on the FAA's regulations.\textsuperscript{209} Under the FAA, a court cannot review an arbitral award unless the award was either "procured by corruption, fraud, or undue means," or so imper-
fectly executed that the award was not mutual, final, or definite. The FAA does not allow judicial intervention when an arbitrator is faced with a dispute of first impression. The courts also cannot review an arbitral award to ensure that the award follows precedent. Under the FAA, an arbitrator can disregard well established laws as long as an award is mutual, final or definite. Expanding a court’s ability to review arbitral awards, exclusively in areas of employment disputes, will bring uniformity and fair play to dispute resolutions in the arbitration arena.

An argument against the expansion of judicial review states that if the courts expand their ability to review arbitral awards, the number of cases to be decided will steam roll the courts. However, when correcting problems with the arbitration process, the courts need not review all arbitration decisions. Judges should have discretion to review arbitral awards in the employment context. Incorrect arbitral awards concerning statutory discrimination claims arising from compulsory arbitration agreements in employment contracts have distressing effects upon the employer or employee. A discretionary review would create an incentive for arbitrators to apply statutes correctly, and allow judges to control the level of the court’s review.

CONCLUSION

This Comment does not suggest that the federal policy promoting arbitration should be thwarted. On the contrary, this Comment suggests that by expanding judicial review to discrimination claims arising from compulsory arbitration agreements in employment contracts, employers and employees will be encouraged to use arbitration. When prospective employees are required to choose between their right to a judicial remedy and an opportunity for employment, the prospective employee is placed at a disadvantage. This disadvantage along with others arising from compulsory arbitration can be minimized through discretionary judicial review. Even though the number of arbitrated employment statutory claims may increase, a discretionary judicial review will protect the courts from being overburdened. The courts

211. Scodro, supra note 30, at 1928.
212. Id. at 1944.
216. Id.
217. See Hoffman, supra note 16, at 155 (citing a report from the Commission on the Future of Worker-Management Relations that recommends that "binding arbitration agreements should not be enforceable as a condition of employment").
can then assume their traditional roles of ensuring that statutes are applied correctly.