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The Enhanced Arbitration Appeal Amendment: A Proposal to Save American Jurisprudence from Arbitration, Modeled on the English Arbitration Act of 1996

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NOTE

THE ENHANCED ARBITRATION APPEAL AMENDMENT: A PROPOSAL TO SAVE AMERICAN JURISPRUDENCE FROM ARBITRATION, MODELED ON THE ENGLISH ARBITRATION ACT OF 1996

I. INTRODUCTION

Arbitration, once relegated to commercial parties and disdained by the courts, has realized an expansive place in our adjudicatory regime.[1] Even the local consumer who wishes to exterminate a termite infestation may find herself shunted to arbitration in a dispute with the exterminator.[2] Our modern arbitral system, and its restrictions on judicial review, reveals a simple truth: "Arbitration is power, and courts are forbidden to look behind it."[3]

This Note does not seek to resurrect discarded judicial hostility toward arbitration. This Note does, however, ask lawmakers and practitioners to reinvigorate a suspicion of arbitration—to ask why we send almost any claim to a binding, private, non-precedential resolution, and what effect this practice has on our jurisprudence.

To save our "way of law" from too much of a good thing, we must alter our approach to the judicial review of arbitral awards. Arbitration is not likely to lose its allure, but if it is to be an integral part of a remedial regime, arbitration must be brought into the fold.

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1. *See* Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1946-47 (1996); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. & COM. REG. 357, 370 (2002) (quoting Felton v. Mulligan, (1971) 124 C.L.R. 367, 385 (Austl.)) ("[B]y the early 1970s, Judge Windeyer of the High Court of Australia felt confident enough to state that: 'the grandiloquent phrases of the eighteenth century condemning ousting of the jurisdiction of courts cannot be accepted in this second half of the twentieth century as pronouncement[s] of a universal rule.'").

2. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268-69 (1995).

3. Heinrich Kronstein, *Arbitration Is Power*, 38 N.Y.U. L. REV. 661, 699 (1963).

Critics of arbitration have rarely "focused directly on whether arbitration in general . . . is consistent with public justice."[4] Rather, commentators have critiqued discrete effects of arbitration and recommended novel reforms using tools found within the American

4. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1664 (2005) [hereinafter Sternlight, *Creeping Mandatory Arbitration*].

experience.[5] The agitation for change is growing and developing considerable momentum.[6]

An exemplary model for change is England,[7] a nation with a long history of arbitration and a recently minted arbitration code—the English

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5. Christine Godsil Cooper, *Where Are We Going With* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 241 (1992) ("There must be a mechanism for the rediversion of issues of public policy and statutory construction back into the courts. This can be handled at the front end by removing such issues from arbitration, or at the back end by providing for judicial review of arbitration awards on such matters."); Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1081 (1969) (recommending the issuance of "written opinions including something like the findings of fact and conclusions of law presently contained in . . . court opinions"); Sternlight, *Creeping Mandatory Arbitration*, *supra* note 4, at 1673 (positing a "thought experiment" of the formation of a controlled arbitration system with governmentally appointed arbitrators); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 705, 710 (1996) [hereinafter Sternlight, *Panacea*] (recommending increased state control of arbitration, yet ultimately rejecting enhanced arbitral review by courts other than those avenues provided by the FAA); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 732 (2004) (recommending an amendment to restrict arbitration of adhesion contracts); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 741 (1999) (challenging the Supreme Court to either "(1) reverse its decisions that claims arising under otherwise mandatory rules are arbitrable or (2) require de novo judicial review of arbitrators' legal rulings on such claims"); Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1959-60 (1996) (proposing "an amendment to the FAA to provide for a procedure, analogous to federal-state certification, whereby parties can receive a federal court's decision on a novel point of law raised in arbitration"). Professor William Park, argues that,

> [a]t a later stage, the United States might consider replacing the existing grounds for judicial vacatur of awards with at least part of the analogous provisions in the English law. The clear emphasis on substantive excess of authority and serious procedural irregularity, contained in sections 67 and 68 of the English Act, provide more focused guidance for dealing with arbitral misbehaviour than the rather unsystematic scatter-gun approach of section 10 of the Federal Arbitration Act. In addition, at some point American consumers of arbitral services should probably be given the option to have an award reviewed for error of law, similar to the opportunity now provided under the English statute.

William W. Park, *The Interaction of Courts and Arbitrators in England: The 1996 Act as a Model for the United States?*, 1 INT'L ARB. L. REV. 54, 67 (1998). Similarly, Professor Jeffrey Stempel has recently argued for the adoption of appellate review: "To the extent possible, arbitration awards should receive appellate review as searching as that applied to court cases of similar magnitude and complexity." Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 267 (2007). Because this Note posits that all errors of law should not be reviewed through an appellate mechanism, and questions of fact should be not be reviewed by courts, this Note's recommendation, although enhancing the possibility of arbitral appeal, is tailored to produce precedent and enhance the common law.

6. *See generally* Jean R. Sternlight, *Introduction: Dreaming About Arbitration Reform*, 8 NEV. L.J. 1, 1 (2007) (introducing a major symposium devoted entirely to proposals for changes to the American arbitral regime).

7. England and Wales have been part of the same legal system since 1536. *See* Laws in Wales Acts 1535, 27 Hen. 8, c. 26 (partially repealed 1993). Although fully described as the law of

Arbitration Act of 1996 ("Arbitration Act 1996").[8] This Note proposes an amendment to the Federal Arbitration Act ("FAA"), modeled on the Arbitration Act 1996, to create an enhanced process of appeal from arbitration awards in certain circumstances.

Part II briefly outlines the history of arbitration in the United States and England, with an emphasis on significant changes that have fundamentally altered arbitration in both countries over the last thirty years. The problems of the American arbitration system are illustrated in Part III, focusing primarily on the fundamental inadequacy of expansive arbitration to continue the growth of the common law or provide clarity through precedential statutory interpretation. Part IV contains the recommendation to cure those ills: the Enhanced Arbitration Appellate Amendment ("EAAA") and its procedural process. Finally, Part V is devoted to potential arguments against the EAAA, rebuttals, and benefits of adopting this Note's recommendation.

II. ARBITRATION: A HISTORY AND THE RECENT CHARGE TOWARD OUR CURRENT REGIME

A. The Shared History of Arbitration in the United States and England

The United States inherited a legacy of law grown from common law roots.[9] England was the progenitor of American common law[10] and from those shared roots also came arbitration.[11] Through much of our history, we shared with England a distrust of a system that threatened to oust the courts of their jurisdiction.[12] During this period of judicial

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"England and Wales or Northern Ireland," for the sake of brevity and clarity, all references will be simplified as "English" or "England."

8. Arbitration Act 1996, c. 23.

9. Roscoe Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 18-19 (1914).

10. *See generally* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985) (tracing the evolution of common law in England and colonial America).

11. Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 796-97 (2002) (noting the similar features of American and English arbitration in the early twentieth century); Shelly Smith, Note, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1196 (2001). Arbitration is ancient. *See, e.g.*, Pittman, *supra*, at 793 (discussing the use of arbitration in the Medieval period).

12. The distaste of arbitration is said to stem from Lord Coke's decision in the Vynior's Case, (1609) 8 Co. Rep. 81b, 77 Eng. Rep. 597, 598-600 (K.B.). *See also* John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 222-25 (1986) (noting the ancient nature of arbitration and the antagonism of the English common law system beyond that of other formal legal systems); Drahozal & Friel, *supra* note 1, at 367 (quoting Horton v. Sayer, (1859) 4 H. & N. 643, 157 Eng.

hostility, lasting well into the twentieth century, it was not uncommon for arbitrators to "interact[] with the courts in rendering their awards."[13]

American judicial antipathy to arbitration, and the sharing of responsibilities between United States courts and their arbitral counterparts, changed dramatically in the twentieth century.[14] This movement, which also shifted the American practice away from the English, has been characterized by its most important feature: "[A]rbitrators [are] almost entirely insulated from judicial intervention."[15] The FAA codified this new understanding.[16]

B. Arbitration in the United States

1. The Genesis of the Federal Arbitration Act and Arbitration Thereafter

Prior to the adoption of the FAA in 1925, arbitration in the United States was a distrusted, maligned, and circumscribed practice.[17] The legislative history of the FAA has recently come under close academic

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Rep. 993, 996) ("Under traditional English common law, a contractual clause that purported to oust the jurisdiction of the courts was void as being contrary to public policy. As Pollock CB stated, 'the superior courts of law cannot be ousted of their jurisdiction by the mere agreement of the parties . . . .'"); Philip G. Phillips, *Rules of Law or* Laissez-Faire *in Commercial Arbitration*, 47 HARV. L. REV. 590, 591 (1934) ("Business arbitrations may be essential, but proper balance and strict control by the courts is imperative.").

13. Scodro, *supra* note 5, at 1940.

14. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (holding that an arbitration tribunal should decide questions of arbitrability in the first instance).

15. Scodro, *supra* note 5, at 1940.

16. The Federal Arbitration Act was originally titled the Unites States Arbitration Act. *See* Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-16 (2000)); *see also* Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 256 (1987); Phillips, *supra* note 12, at 596-97 (providing a humorous and extensive list of subjects once specially reserved for arbitration by piecemeal legislation).

17. *See, e.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956); Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (Story, J.); *see also* Drahozal & Friel, *supra* note 1, at 374.

scrutiny,[18] revealing an adoption process fraught with compromise and gloss.[19]

Julius Henry Cohen, a lawyer from New York, spearheaded the incarnation of the FAA that shuttled from committees to the floor of Congress and passed into law.[20] Cohen, a practitioner at the forefront of New York's arbitration work, was active in state associations and committees.[21] New York had one of the more expansive arbitration statutes, adopted in 1920.[22] The FAA, modeled on the New York statutes, was intended to improve the lot of American business by "cut[ting] the Gordian knot of the law's delay."[23] This philosophy was acknowledged in Cohen's comments before the Joint Hearings of the Senate and House Subcommittees.[24]

Despite the FAA's advance, arbitration in America initially remained a little used dispute resolution device.[25] Indeed, until the mid-1950s, arbitration was tied to the fundamental contractual relationship of commercial parties, existing only when parties sought commercial contracts containing arbitration clauses.[26] The understanding of these parties indicates that arbitration was "not considered [a] surrogate[] for adjudication in a court of law."[27] The narrow reach of arbitration would change dramatically in the ensuing decades, with the Supreme Court

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18. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101-10 (2006); Pittman, *supra* note 11, at 825-30; Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 340-42 (2007); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 986-87 (1999).

19. Moses, *supra* note 18, at 110; Szalai, *supra* note 18, at 342. *But see* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 107 (2002) (addressing legislative history of the FAA and arriving at the conclusion that the FAA was intended be applied to state courts).

20. Moses, *supra* note 18, at 102-10. The Supreme Court recently addressed the legislative history of the FAA. *See* Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1406 n.7 (2008).

21. Moses, *supra* note 18, at 101 (noting that Cohen served as general counsel for the New York State Chamber of Commerce).

22. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926) (citing 1920 N.Y. Laws ch. 295).

23. *Id.*; *see also* Moses, *supra* note 18, at 102.

24. *Arbitration of Interstate Commercial Disputes: J. Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 16 (1924) (statement of Julius Henry Cohen).

25. *See, e.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 986 (2d Cir. 1942); Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 67-68 (2001).

26. Hayford, *supra* note 25, at 67-68.

27. *Id.*

unleashing the binds, perceived and judicial, on arbitration.[28] The Supreme Court does not appear to ground its expansive arbitration decisions on the FAA's legislative history; as Justice O'Connor commented in *Allied-Bruce Terminix Cos. v. Dobson*,[29] "the Court has abandoned all pretenses of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."[30]

Modern American arbitration is almost unrecognizable from its disfavored ancestor. As summed up by Professor Thomas Carbonneau, arbitrators are now "entitled, as a matter of law, to rule upon securities, RICO, civil rights, and any other type of claim, no matter what the import to the public interest . . . ."[31] Modern arbitration under the FAA is far removed from the dispute resolution process envisioned between sophisticated commercial parties enjoying relative parity.[32] Simply put, "the bandwagon may be on a runaway course."[33] To check that runaway coach, courts are currently provided with few options under the FAA.

2. Standards of Review for Arbitration Awards under FAA Section 10(a)

The FAA secured the arbitral solution from courts of law jealous and protective of their jurisdiction. In doing so, however, the FAA also

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28. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006); Doctor's Assocs. v. Casarotto, 517 U.S. 681, 688 (1996); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636-37 (1985); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406-07 (1967).

29. 513 U.S. at 265.

30. *Id.* at 283 (O'Connor, J., concurring). In the recent case of *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct 1396 (2008), Justice Souter discussed the work of Congress prior to the adoption of the FAA. *Id.* at 1406 n.7. Justice Souter's footnote (which was not joined by Justice Scalia) may signal a return to legislative history when the Court is presented with a question under the FAA. Justice Souter's conclusion that the legislative history supports a limitation of party ability to contract for expanded judicial review beyond section 10(a) of the FAA will likely be open to intensive future critique, particularly when that conclusion is set parallel to arguments supporting the primacy of party autonomy. *See, e.g.*, Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 214 (2007).

31. Carbonneau, *supra* note 1, at 1955; *see also* Jay R. Sever, Comment, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661, 1676 (1991) (illustrating similar expansive jurisdiction).

32. *Prima Paint*, 388 U.S. at 409-10, 414 (Black, J., dissenting).

33. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668 (1986). There are intimations that the jurisdiction of arbitrators is growing yet more expansive. *See* Szalai, *supra* note 18, at 322 (addressing circuit split "whether a federal court's jurisdiction to enforce an arbitration agreement under the FAA may be based on the federal nature of the underlying dispute to be submitted to arbitration").

limited the corrective possibility of appeal.[34] It is important to address the options currently accommodated by the FAA to review the award of an arbitration panel before reaching this Note's proposal to alter the review process.

The only judicial allowance for vacatur of an arbitral award made explicit in the FAA is found in section 10(a) of that Act.[35] The enumerated provisions do not allow an appeal on the merits of the dispute.[36] Under a literal reading, section 10(a) is not an appeal of the dispute at all—merely an opportunity for a court to correct gross procedural errors.[37] Each of the provisions speaks to the composition and conduct of the panel, rather than to the nature of the dispute or merits of the action.[38] Absent statutory provisions, courts were constrained, when presented with an unsavory arbitration award, to create novel vacatur review standards outside of those provided in the FAA.

3. Non-Statutory Standards of Review for Arbitration Awards

Despite the express grant of judicial review for only those reasons contained in section 10(a), a number of circuit courts have recognized the existence of "nonstatutory" grounds for vacatur.[39] Among the recognized grounds are "a 'manifest disregard' of the law by the arbitrator, a conflict between the award and a clear and well established 'public policy,' an award that is 'arbitrary and capricious' or 'completely irrational,' and a failure of the award to 'draw its essence' from the parties' contract."[40] Every circuit but the Federal Circuit allows vacatur outside the grounds allowed by section 10(a).[41]

Those circuits recognizing non-statutory grounds for arbitral vacatur base their opinions on a dated and overruled case from the

34. Cohen & Dayton, *supra* note 22, at 273 ("There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.").

35. 9 U.S.C. § 10(a) (2000).

36. *Id.*

37. *See* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 116 (1992) (arguing that even the original champion of the FAA, Julius Henry Cohen, allowed for "a remarkably active role for the courts in preserving procedural protections for the arbitral parties").

38. 9 U.S.C. § 10(a).

39. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 739 (1996).

40. *Id.*

41. Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 461 (1998).

Supreme Court: *Wilko v. Swan*.[42] With increasing confusion, circuit courts stretch and warp the dicta of *Wilko* to accomplish vacatur of awards deemed to lack procedural or substantive backing.[43]

C. *Arbitration in England*

The "sceptered isle" has a long and storied history of arbitration.[44] Courts in England regularly and loudly rebuffed the advance of arbitration.[45] Objection to arbitration in England eventually sublimated into statutory control, yet English courts remained entitled to interfere in the jurisdiction of arbitral tribunals.[46] England has continued to update its statutory regime for arbitration, reflecting changing attitudes and relationships with arbitration.[47]

1. England's History of Statutory Control

The courts of England, as condoned by governing statute, exercised great power over arbitration; these statutes served to "control the substantive norms that arbitrators appl[ied]" to the dispute.[48] As early as the mid-nineteenth century, the "special case" practice had emerged, "whereby [arbitrators] rendered their awards in the form of alternative outcomes, leaving it to the courts to choose among them based on their judgment about specified legal questions that had arisen during the arbitration."[49] Additionally, courts exercised the "common-law

42. 346 U.S. 427 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481, 485 (1989). For an example of *Wilko*'s use, see Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) (citing *Wilko* in a determination of the doctrine of manifest disregard as applied to arbitral review).

43. James M. Gaitis, *Unraveling the Mystery of* Wilko v. Swan*: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1, 2-3 (2007); Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 870-71 (2000).

44. *See* Park, *supra* note 5, at 64.

45. *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 n.14 (2d Cir. 1942) (quoting Scott v. Avery, (1856) 10 Eng. Rep. 1121, 1138, 5 H.L.C. 811, 853 (H.L.) (commentary of Lord Campbell)).

46. *See, e.g.*, Arbitration Act, 1950, 14 Geo. 6, c. 27, § 21 (allowing parties to seek court intervention through the "statement of [the] case" procedure).

47. *See* Arbitration Act 1996, c. 23; Arbitration Act 1979, c. 42; Arbitration Act 1975, c. 3; Arbitration Act, 1950, 14 Geo. 6, c. 27; Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125; Civil Procedure Act, 1833, 3 & 4 Will. 4, c. 42, § 39.

48. Scodro, *supra* note 5, at 1940.

49. *Id.* Somewhat surprising when juxtaposed against our current antipathy to judicial review of arbitration awards, the special case once found limited purchase in the United States. Under an old version of Massachusetts's law, questions of law "may" be referred to a court; this lenient "may" transforms into a "shall" upon request of all parties. MASS. GEN. LAWS ch. 251, § 20 (1959). Additionally, if a party sought review "before the award becomes final . . . the superior court may in

power . . . to set aside awards for an error of law or fact on the face of the award . . . ."[50]

With the adoption of the English Arbitration Act of 1979 ("Arbitration Act 1979"),[51] the "special case" practice fell away.[52] In the time between the Arbitration Act 1979 and the adoption of the Arbitration Act 1996, judicial review of arbitration awards went through a number of permutations.[53] In 1982, the House of Lords handed down its decision in *The Nema*,[54] restricting the intervention of national courts severely in "one-off" arbitrations.[55] *The Nema* outlined a standard of limited judicial review, which, along with its companion case three years later, *The Antaios*,[56] was largely adopted in England's latest codification of arbitral law.[57]

2. Arbitration under the English Arbitration Act of 1996

The Arbitration Act 1996 was a shift in England's arbitration paradigm.[58] Commentators have been generally warm to its modifications.[59] The Arbitration Act 1996 seriously curtailed the

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its discretion instruct the arbitrator or arbitrators upon a question of substantive law." MASS. GEN. LAWS ch. 251, § 20 (1959). Illinois' original arbitration act was modeled on England's contemporary. Phillips, *supra* note 12, at 614. Connecticut and Pennsylvania also enjoyed slightly modified forms of England's arbitration act. *Id.*

50. Okezie Chukwumerije, *Reform and Consolidation of English Arbitration Law*, 8 AM. REV. INT'L ARB. 21, 43 (1997).

51. Arbitration Act 1979, c. 42.

52. *Id.* at § 1(1) ("In the Arbitration Act 1950 . . . section 21 (statement of the case for a decision of the High Court) shall cease to have effect . . . .").

53. *See generally* Paul A. C. Jaffe, *The Judicial Trend Toward Finality of Commercial Arbitral Awards in England*, 24 TEX. INT'L L.J. 67, 72-86 (1989) (discussing Arbitration Act 1979 and judicial review thereafter).

54. Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. ("The Nema"), [1982] A.C. 724 (H.L. 1981).

55. *Id.* at 742-43. A "one-off" arbitration involves a contract that was specifically negotiated between parties, as opposed to the standard contract forms often employed in general commerce. *See* Jaffe, *supra* note 53, at 68 n.4. *The Nema* established that leave to appeal from an arbitration award varied according to the type of case at issue. *Id.* at 74-75.

56. Antaios Compania Naviera S.A. v. Salen Rederierna A.B. ("The Antaios"), [1985] A.C. 191, 203-04 (H.L. 1984). *The Antaios* reaffirmed the holding of *The Nema* and further clarified access to appeal to the higher courts. *See* Jaffe, *supra* note 53, at 76-77.

57. CMA CGM S.A. v. Beteiligungs-KG MS "Northern Pioneer" Schiffahrtsgesellschaft mBH & Co., [2002] EWCA (Civ) 1878, (2003) 1 W.L.R. 1015, 1024-25 (C.A.).

58. Tom Birch Reynardson, *Reconciling Cost Control With Justice*, 1 INT'L ARB. L. REV. 115, 115 (1998); *see also* Lord Saville, *The Arbitration Act 1996: What We Have Tried to Accomplish*, 13 CONSTRUCTION L.J. 410, 410 (1998).

59. Oliver Browne, *London v. Paris: Territorial Competition in International Commercial Arbitration*, 7 INT'L ARB. L. REV. 1, 6 (2004) ("Since 1997 . . . English law has established itself as being amongst the world's more progressive arbitration regimes.").

opportunity of a court to interfere with the proceeding of arbitration.[60] In short, the "inherent jurisdiction of the courts" is no longer sufficient to justify intervention.[61]

Judicial control of arbitration in England may now be divided into two species: assessment of the arbitral procedure and review of the award.[62] When a court addresses arbitral procedure, it is "concerned [with] . . . ensuring that the tribunal is independent and free from bias, that it acts within its jurisdiction, that the parties are given equal opportunity to present their respective cases and that the arbitration otherwise conforms with the mandatory procedural laws of the seat of arbitration."[63] In its review of the arbitral award, the English courts are controlled by section 69 of the Arbitration Act 1996.[64] A restriction on the jurisdiction of the courts was clearly intended by the drafters:

> We have very severely limited the right to apply to appeal from an arbitration award. . . . You have to demonstrate that the arbitrator was obviously wrong, or in a case of general public importance, that his conclusion was at least open to serious doubt. . . . You can only apply to appeal on a point of English law. . . . You will not be able to appeal on questions of fact dressed up as questions of law. . . . More importantly still, we have inserted . . . 69(3)(d) of the Act . . . [so that it must be] "just and proper in all the circumstances for the court to determine the question." This new provision means that over and above the court being satisfied that the tribunal was obviously wrong in law, or (in a case of general importance) that its conclusion was at least open to serious doubt, there will have to be something else which makes it just and proper for the court to substitute its own decision for that of the tribunal. This should, and is intended to make successful applications for leave to appeal from an arbitration award very rare indeed.[65]

As illustrated by the foregoing commentary by Lord Saville, the final portion of section 69 is intended to further limit the interference of national courts, as "just and proper" circumstances must be weighed against party autonomy and intent.[66] There is some indication that courts

60. Chukwumerije, *supra* note 50, at 27.

61. *Id.* (noting that jurisdiction for court interference is now allowed only where so provided by the Act).

62. *Id.* at 41.

63. *Id.*

64. *See* Arbitration Act 1996, c. 23, § 69.

65. Saville, *supra* note 58, at 412 (quoting Arbitration Act 1996, c. 23 § 69(3)(d)).

66. *Id.*

have taken the new boundaries to heart, avoiding interference and limiting appeals.[67]

Section 69 is not a mandatory provision of the Arbitration Act 1996.[68] To opt out of section 69, parties must do so by express written agreement or grant the panel leave to make its award without reasons.[69] There is some authority that section 69 will be unavailable if parties select a set of arbitration rules incorporating an exclusion of appeal.[70]

Procedurally, section 69 is simple to follow. Section 69(2) allows an appeal from an arbitral award if all parties to the arbitration agree.[71] If the parties to the arbitration are unable to agree, the permission to appeal will be granted by the court "only if the court is satisfied . . . that the determination of the question will substantially affect the rights of one or more of the parties . . . ."[72] Upon a finding that the question substantially affects the rights of a party, permission to appeal from the arbitration to the court will be granted after the arbitration panel issues its award, "on the basis of the findings of fact in the award," in two circumstances: first, "the decision of the tribunal on the question is obviously wrong" or second, "the question is one of general public importance and the decision of the tribunal is at least open to serious doubt . . . ."[73] The threshold for permission is lower if the party seeking appeal is able to convince the court of the presence of a "question of general public importance."[74] The lowered standards for appeal provided in the Arbitration Act 1996 are compensation for the hurdle presented by the test derived from *The Nema*: The presumption that an appeal from an arbitral award is improper in all but the most extreme circumstances.[75]

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67. CMA CGM S.A. v. Beteiligungs-KG MS "Northern Pioneer" Schiffahrtsgesellschaft mBH & Co., [2002] EWCA (Civ) 1878, (2003) 1 W.L.R. 1015, 1021 (C.A.) ("So far as [this court is] aware, this is the first time that permission to appeal to this court has been granted pursuant to section 69 of the [Arbitration Act 1996].").

68. Taner Dedezade, *Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law*, 9 INT'L ARB. L. REV. 56, 59 (2006).

69. *Id.* at 60; *see also* Park, *supra* note 5, at 62. The possibility of exclusion is a significant development: "Under the Arbitration Act 1979, there was an ability to exclude the right to appeal on a point of law but such rights were restricted, in relation to domestic agreements, special categories and statutory arbitrations." Dedezade, *supra* note 68, at 59.

70. *See* Lesotho Highlands Dev. Auth. v. Impregilo SpA, [2005] UKHL 43, (2006) 1 A.C. 221, 224-25 (H.L. 2005); Steven Friel, *Excluding the Right to Appeal Under s.69 of the Arbitration Act 1996 by Reference to the Rules of an Arbitral Institution*, 9 INT'L ARB. L. REV. N26, N26 (2006).

71. Arbitration Act 1996, c. 23, § 69(2)(a).

72. *Id.* § 69(3)(a); Dedezade, *supra* note 68, at 63.

73. Arbitration Act 1996, c. 23, § 69(3)(c); Dedezade, *supra* note 68, at 63.

74. Dedezade, *supra* note 68, at 64.

75. *Id.*

The appealing party must clearly state a question of law to the court and explain why the appeal should be granted.[76] The court may decide whether to grant the appeal with or without a hearing.[77] Under the Arbitration Act 1996, there is a presumption that a hearing is not necessary or allowed.[78] This presumption, however, is not always followed.[79] The appealing party makes its request of the court at some risk: "On an appeal under this section the court may confirm the award, vary the award, remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or set aside the award in whole or in part."[80] The court's decision on the appeal is treated as a final judgment and is therefore granted limited appeal. Only if "the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."[81]

III. SIGNIFICANT PROBLEMS WITH THE CURRENT ARBITRAL REGIME OF THE UNITED STATES

The American approach to arbitration is troublesome for five important reasons: (1) it cripples the ability of our courts to make the precedents that support our common law foundation and statutory interpretations; (2) arbitration tribunals are not required (outside of discrete exceptions) to publish reasons for their awards, thus denying public and legislative response to arbitration awards; (3) the statutory grounds for vacatur, and the judicially created non-statutory grounds for vacatur, are chaotic and often in conflict; (4) the pre-emptive nature of the FAA limits the ability of states to expand judicial review of federal or state issues; and (5) parties may not contractually expand opportunities for judicial review when agreeing to arbitrate. Each of these escalating problems will be addressed in turn. When combined, these problems necessitate an amendment to the FAA to create a process of enhanced arbitral appeal.

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76. *Id.* at 66.

77. *Id.*

78. Arbitration Act 1996, c. 23 § 69(5).

79. *See* Dedezade, *supra* note 68, at 66-67.

80. *Id.* at 66.

81. Arbitration Act 1996, § 69(8); *see also* Henry Boot Constr. Ltd. v. Malmaison Hotel Ltd., [2000] 3 W.L.R. 1824, 1826 (C.A. 2000); Dedezade, *supra* note 68, at 66.

A. Precedent: An Embattled and Endangered Foundation

American law is one of common law roots.[82] The law is founded upon *stare decisis* and statutory interpretation by the courts.[83] The continued growth of the common law and the interpretation of statutory law are threatened by the unabated proliferation of arbitration.[84] The threat comes from a single truth: Arbitration does not make law. Although an arbitration tribunal may use adjudicatory tools such as discovery, witnesses, and reasoned awards, any award by the tribunal may not be relied upon as precedent.[85] At one point, the Supreme Court recognized the distinction between simple contractual claims and claims implicating a public interest: "[Arbitration] cannot provide an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights . . . ."[86] The Supreme Court has dynamited its earlier stopgaps, releasing a flood of arbitration.[87] This section will demonstrate the strangulation of court precedent in three areas of the law: antitrust, employment discrimination, and securities. Before these individual branches of the law are assessed, however, it is necessary to look at the entire tree and ground specificity in general theory.

In an influential article, Professor Owen Fiss laid out a challenge to the practice of court avoidance:

> Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the

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82. Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 36 (1944).

83. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

84. Kronstein, *supra* note 82, at 36 ("The growth in the United States of this extra-legal use of arbitration, subject at no juncture to judicial supervision, should challenge the complacent and stir those who would place public interest before private gain."); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 835 (2002) (noting that a hallmark of mandatory, binding arbitration is the "eliminati[on] [of] the claimant's right to present claims to a judge or jury[,] . . . [thereby] preventing litigants from setting public precedents").

85. Allison, *supra* note 12, at 240; Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095, 1107 (1993); Mitchell H. Rubinstein, *Altering Judicial Review of Labor Arbitration Awards*, 2006 MICH. ST. L. REV. 235, 262.

86. McDonald v. City of W. Branch, 466 U.S. 284, 290 (1984) (announcing this limitation of arbitration in the context of § 1983 claims); Smith, *supra* note 11, at 1222-23. Additionally, the Supreme Court has stated that "arbitral procedures [are] less protective of individual statutory rights than are judicial procedures . . . ." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 744 (1981).

87. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) (discussing arbitration precedent); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (declaring that federal policy favors arbitration).

> public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.[88]

Professor Fiss leveled his critique against settlements;[89] arbitration is readily analogous to settlement. The comparison is compelling: like settlement, arbitration is intended to facilitate the whims of private parties.[90] Furthermore, the practice of arbitration takes from the courts the disputes that will allow the court to hear and decide.[91] Judge Harry Edwards expressed similar concern: "An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values. In our rush to embrace alternatives to litigation, we must be careful not to endanger what law has accomplished . . . ."[92] Judge Edwards further framed the issue when he warned, "by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas."[93]

The proponents of the FAA conceded that the new arbitration regime was "simply a new procedural remedy" and therefore not outside of the broader adjudicatory framework.[94] A contemporary to the drafting of the FAA addressed the alternative dispute resolution system with trepidation:

> Strongly as I favor arbitration, we, as lawyers, must never forget that our law is an inheritance from all the ages. We have worked out certain definite principles, certain definite rights, certain definite remedies. They are subject to improvement; they are subject to clearer statement; they are subject to greater exactness; and they are subject to enormous improvement in their practical application, but I do not think we are ready to throw them overboard and to substitute for them the arbitrary

88. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

89. *Id.*

90. Margaret M. Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 429 (2004) (remarking that "[a]rbitration is a private system of justice, made possible by the parties' consent").

91. Fiss, *supra* note 88, at 1085.

92. Edwards, *supra* note 33, at 676. The economic foundation for public adjudication has been equally well-demonstrated. *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236-40 (1979).

93. Edwards, *supra* note 33, at 679 (recognizing civil rights, family law and the legal rights of the poor as such "disfavored" areas).

94. *See* Cohen & Dayton, *supra* note 22, at 279.

> unappealable will of a single individual entrained perhaps in this our legal inheritance.[95]

This eloquence is particularly potent in our current age of expanding arbitration. We are witness to the creeping engulfment of once-inarbitrable subjects by arbitration.[96] Even the driving force behind the FAA, Julius Henry Cohen, acknowledged that "[n]ot all questions arising out of contracts ought to be arbitrated . . . [i]t is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes."[97] The inarbitrable subjects featured in Cohen's commentary—cases involving constitutional questions and statutory interpretation—are exactly those subjects now featured in arbitration.[98]

The danger of arbitration may be simply drawn: "Public policy issues need public resolution."[99] Arbitration is not a public process.[100] Some commercial actors choose arbitration, at least in part, for its confidential nature.[101] This privacy comes at a price: courts are unable to prune the law, the public is denied an understanding of law applications, and Congress is unaware of problematic statutes.[102]

Courts are allowed to act only when confronted with a "real party" to a controversy.[103] A federal court may not issue advisory opinions.[104] Without a real party in interest, and the facts presented in the proceeding, a federal court may not interpret the law. Arbitration takes

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95. Address of United States Circuit Judge Julian Mack (Nov. 19, 1925), *in* 7 LECTURES ON LEGAL TOPICS 1925-1926, at 107 (Assoc. of Bar of the City of N.Y. eds., 1929).

96. *See, e.g.*, Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987) (holding claim under Securities Act of 1934 arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636-37 (1985) (holding antitrust claims arbitrable); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985) (holding that claims must be split between arbitration and litigation in the presence of an arbitration agreement); Sues v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998) (holding Title VII claim arbitrable).

97. Cohen & Dayton, *supra* note 22, at 281; *see also* Edwards, *supra* note 33, at 671-72.

98. *Compare* Cohen & Dayton, *supra* note 22, at 281 (noting that "[arbitration] is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes") *with* cases cited *supra* note 28.

99. Cooper, *supra* note 5, at 241.

100. Ware, *supra* note 5, at 707-08.

101. Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 161 (1989).

102. Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 59 (1988) ("Ordering by public justice produces decisions resting on considerations that transcend the immediate dispute and the immediate parties.").

103. FED. R. CIV. P. 17(a)(1) (2007).

104. United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

the party from the court. Under the expanded interpretation of the FAA by the Supreme Court, it has been argued that the Court has "delegated to arbitrators what is essentially the judicial power of the State."[105] Absent any judicial review, when a court confirms the award of a tribunal, "[it] adopts the arbitrator's decision as its own, and that decision is enforced like any other ruling of the court."[106]

The court is a public institution: The proceedings, papers, and decisions typically all become part of the public record.[107] In this manner, the public is able to recognize and understand the law as applied—to modify and check behavior accordingly.[108] The public learns about applicable law from the dispute and acts as a court of public opinion.[109] In confidential arbitration, "something very wrong can happen and be shielded from review."[110] Arbitration, once a purely commercial function, has become a confidential forum where questions of great public importance are resolved.[111]

An arbitrator serves at the behest of the parties to the arbitration. There is no compelling reason for the arbitrator to contemplate the greater good or the public interest because the arbitrator does not answer to the public as a member of government.[112] Under the rules of most arbitration organizations, parties select the members of the arbitration tribunal.[113] Most arbitration organizations provide for a neutral arbitrator

105. Moses, *supra* note 18, at 144.

106. Ware, *supra* note 5, at 708.

107. *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (discussing the common law right to inspect and copy public records, including court records).

108. Cooper, *supra* note 5, at 214-15.

109. William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75, 104 (2002) ("By their public nature, court cases often create behavioral rules to guide business conduct outside a particular dispute."); Sternlight, *supra* note 84, at 839 ("When litigation is brought in court, the public has the opportunity to learn about alleged illegal acts.").

110. Cooper, *supra* note 5, at 215.

111. Speidel, *supra* note 101, at 206 (noting that "unlike commercial arbitration, where the limitations of arbitration may be strengths, statutory rights pose issues of public law which require a vindication that arbitration may be unable consistently to provide"); Di Jiang-Schuerger, Note, *Perfect Arbitration = Arbitration + Litigation?*, 4 HARV. NEGOT. L. REV. 231, 242 (1999).

112. Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. REV. 759, 783 ("The arbitrator, often a non-lawyer, is merely a contract-reader. She is entirely beholden to the parties and their contract. While the judiciary should generally defer to the merits of an arbitration award, federal courts should not abdicate their essential role of enforcing the laws of the land and representing the public.").

113. *See* American Arbitration Association Commercial Arbitration Rule 12 (2007), *available at* http://www.adr.org/sp.asp?id=22440.

to chair a panel of party-appointed arbitrators.[114] The selection of a "neutral" arbitrator is an implicit recognition that a party's own selection of an arbitrator necessarily leads to inferences of favoritism toward the selecting party. A judicial assignment is random, unbiased, and traditionally free from intimations of conflict.[115]

Through the appellate process, the law is vetted and molded.[116] The courts are the check upon congressional action.[117] It is clear that federal courts, under Article III, Section 2, of the Constitution,[118] and state courts, under the Supremacy Clause,[119] must follow the law of the land when rendering their decisions. Because arbitrators serve at the behest of the parties and are not bound by the Constitution, it is not certain that arbitral awards must comport with the law.[120] Jurists have noted that some sacrifices or procedure and process in arbitration are acceptable as a function of party autonomy.[121] For the purposes of this discussion, however, it is enough to note that regardless of the law used, the award remains non-precedential.[122] In this manner, the scope of a piece of legislation remains unaddressed. Even if an arbitration tribunal arrives at the conclusion that the applicable law is inapplicable and therefore denies one party recovery, that assessment will not be deemed meritorious or subject to rejection through the appellate process.[123] Parties denied recovery are left questioning the efficacy of arbitration and the merit of congressional action.[124]

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114. *Id.* at Rule 13. The neutrality of these organizationally-appointed arbitrators has recently come into question. *See* Nathan Koppel, *Arbitration Firm Faces Questions Over Neutrality*, WALL ST. J., Apr. 21, 2008, at A3 (discussing suit against the National Arbitration Forum, Inc., alleging that the arbitration provider favored debt collectors over consumers in arbitrations).

115. *See, e.g.*, S.D.N.Y. & E.D.N.Y. Rules for the Division of Business Among District Judges R. 1 (discussing the "Individual Assignment System" of the Southern District of New York), *available at* http://www1.nysd.uscourts.gov/rules/rules.pdf.

116. Marin Roger Scordato, *Post-Realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence*, 7 NEV. L.J. 263, 270 (2007).

117. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803).

118. U.S. CONST. art. III, § 2.

119. *Id.* at art. VI, cl. 2.

120. Ware, *supra* note 5, at 719-21 (citing the survey contained in Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961)).

121. Am. Almond Prod. Co. v. Consol. Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944) (Learned Hand, J.) ("They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to [arbitration's] machinery.").

122. 9 U.S.C. § 10(a) (2000); Allison, *supra* note 12, at 240.

123. For a recent example of this process outside the arbitration context, see *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (reversing the lower court and holding the applicable law unconstitutional).

124. Professor Sternlight developed a compelling image in a recent article:

> [An] analogy might be carbon monoxide, a gas which silently and secretly has a

Congress, through the political process, can transform law to accommodate the concerns reflected in a court's ruling.[125] Court rulings serve an important social notice function.[126] This notice is also important to lawmakers. Congress, in the course of legislative compromise, recognizes that "ambiguous statutory language" will later be interpreted by the courts.[127] If Congress does not agree with the application of law on real parties, Congress can change the law.[128] However, "[d]ecisions contrary to congressional intent, if they take place in arbitration, will likely go unnoticed."[129]

The failure of precedent caused by unrestricted and unreviewable arbitration is evident in three subject areas: antitrust, employment discrimination, and securities.

1. Antitrust

The Sherman Act,[130] a collection of statutes designed to protect competition, is of manifest importance to America's regulation of commerce.[131] Indeed, "[t]he antitrust laws . . . are at the very heart of government economic policy. . . . [These laws are often] characterized as a 'charter of freedom' possessing an almost constitutional status."[132] Parties may bring antitrust actions as private attorneys general, giving

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deleterious impact on the global environment. Permitting companies to use mandatory pre-dispute arbitration clauses to prevent consumers and employees from enforcing their rights may ultimately have a devastating impact on the laws that are intended to ensure that employees and consumers are treated fairly.

Sternlight, *Out on a Limb*, *supra* note 84, at 861.

125. *See* United States v. Lopez, 514 U.S. 549, 552 (1995), *superseded by statute*, Pub. L. 104-208, § 657, 110 Stat. 3009-370 (1996) (amending law, after a finding of unconstitutionality by the Supreme Court, to insert a nexus sufficient to accommodate Commerce Clause concerns).

126. Cooper, *supra* note 5, at 214 ("How can a citizen know the commands of the law if its elucidation is shrouded in secrecy? How can continuing content be given to the concept of discrimination if arbitrators determine what is permissible or impermissible, yet only the immediate parties learn what that is?").

127. John V. O'Hara, Comment, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way"?*, 136 U. PA. L. REV. 1723, 1746 (1988).

128. Sever, *supra* note 31, at 1678 ("[T]he Court has now read [the FAA] as creating an almost untouchable and separate, decisionmaking [sic] institution . . . [it is unclear] what such a separation will mean for the parties involved in the arbitration and for the lawmakers who may wish to ensure proper application of their laws.").

129. Scodro, *supra* note 5, at 1952.

130. 15 U.S.C. §§ 1-37(a) (2000).

131. *See* Allison, *supra* note 12, at 231.

132. *Id.*

these actions a "semipublic" nature because of the national economic interests involved.[133]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[134] the Supreme Court held that an antitrust counterclaim was arbitrable in an international commercial dispute.[135] The Court's decision effectively undercut a long-standing public policy barrier to antitrust arbitration, resulting in an increase of antitrust arbitrations.[136]

The move to arbitrate antitrust claims is an extraordinary development in American jurisprudence. Arbitration and antitrust enforcement had long been viewed as oil and water.[137] The public rights envisioned by the Sherman Act were felt to have no kin in the private enforcement mechanism of arbitration.[138] The recent trend is also a dramatic turn from earlier cases espousing an outright distrust of antitrust arbitration.[139]

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133. *Id.* at 232; Moses, *supra* note 18, at 139. *See, e.g.*, Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 317-18 (4th Cir. 2007), *cert. denied*, 2008 WL 117869 (U.S. Mar. 17, 2008).

134. 473 U.S. 614 (1985).

135. *Id.* at 635-37 (claim brought under the Clayton Act § 4, 15 U.S.C. § 15 (2006) (Like the Sherman Act, the Clayton Act is one of the foundational competition laws.)).

136. Allison, *supra* note 12, at 235-37; Donald I. Baker, *Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?*, 16 LOY. CONSUMER L. REV. 379, 406 (2004) (noting the increase of antitrust arbitration after the *Mitsubishi Motors* decision).

137. *See* Pitofsky, *supra* note 5, at 1076-81.

138. Allison, *supra* note 12, at 235-37. Professor Allison eventually argues *for* the arbitration of antitrust claims, noting, among other rationale, that antitrust law is no longer a fast-growing legal field and litigation is "more of a refinement process." *Id.* at 241. I do not share Professor Allison's willingness to sacrifice even this "refinement" to the unbound work of arbitrators. Even while encouraging arbitration of antitrust claims, Professor Allison does not surrender the entire process: he would allow limited court intervention (to allay party concerns) in the selection of arbitrators and the legal standards employed by the panel. *Id.* at 270. Furthermore, recent decisions have emphatically demonstrated that antitrust law is anything but staid. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007) (overruling 90-year old precedent and holding that vertical retail price restraints are no longer per se illegal).

139. *See, e.g.*, Univ. Life Ins. Co. of Am. v. Unimarc Ltd., 699 F.2d 846, 850-51 (7th Cir. 1983) (Posner, J.) ("Federal antitrust issues . . . are nonarbitrable. . . . They are considered to be at once too difficult to be decided competently by arbitrators—who are not judges, and often not even lawyers—and too important to be decided otherwise than by competent tribunals."), *superseded by statute*, Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4670 (1988) (codified as amended at 9 U.S.C. § 16 (2000)); Am. Safety Equip. Co. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968) ("Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest.").

Arbitration affords parties limited discovery.[140] Antitrust claims are therefore particularly mismatched to arbitration because "much of the information needed to prove that a monopolist is monopolizing is under the control of the monopolist," and arbitrators may not have the power to compel the necessary production.[141] Many of the private parties that avail themselves of the antitrust laws have a contractual relationship.[142] As arbitration is inherently contractual, the contract is the carrier for the arbitral epidemic endangering private antitrust action.

2. Employment Discrimination

The Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*,[143] held that a claim brought under the Age Discrimination in Employment Act of 1967 ("ADEA") should be sent to arbitration when an agreement existed between the parties.[144] After *Gilmer*, the use of arbitration in employment disputes exploded.[145]

The Court's opinion in *Gilmer* has been assailed for its failure to address fundamental conflicts between the FAA (a private dispute resolution method) and the petitioner's claims (pervasive discrimination requiring public attention).[146] Employment discrimination arbitration after *Gilmer* has also produced an arbitral system that is often disadvantageous to individual employees.[147] Discrimination law is

140. Michele M. Buse, Comment, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award*, 22 PEPP. L. REV. 1485, 1498 (1995).

141. Moses, *supra* note 18, at 140; *see also* Baker, *supra* note 136, at 406 (noting the "practical" problem of discovery in antitrust arbitration "because facts are often so critical to determining liability and/or damages").

142. Allison, *supra* note 12, at 232; *see also* Baker, *supra* note 136, at 406 (discussing the prevalence of "horizontal agreements" between competitors). In an ironic recent development, a lawsuit bringing claims against a cadre of credit card companies under the antitrust laws for allegedly "holding secret meetings at which they colluded to require customers to sign away their ability to take disputes to court and instead settle disagreements in arbitration" was reinstated by the Second Circuit. Kathy Shwiff, *Appeals Court Reinstates Credit-Card Suit*, WALL ST. J., Apr. 26-27, 2008, at B2.

143. 500 U.S. 20 (1991).

144. *Id.* at 35.

145. Mitchell H. Rubinstein, *Advisory Labor Arbitration Under New York Law: Does it Have a Place in Employment Law?*, 79 ST. JOHN'S L. REV. 419, 437 & n.92 (2005); *cf.* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (holding that the exclusionary clause of the FAA applies only to transportation workers engaged in foreign or interstate commerce).

146. Cooper, *supra* note 5, at 204 ("The unsatisfying superficiality of the opinion suggests a Court less interested in principle than in reducing the workload of the federal judiciary.").

147. The procedural hurdles set before potential claimants have been well-summed:

> [C]ompanies have drafted lopsided arbitration agreements that, for example, waive the employee/consumer's right to recover punitive damages and attorneys' fees, cap the

complex and often court-created; arbitrators may not have the expertise to apply the law, and panels certainly do not have the power to promulgate necessary new advances in the law.[148]

The *Gilmer* Court rested its decision, in part, on the arbitration rules of the New York Stock Exchange ("NYSE").[149] These rules require arbitrators to issue written awards, to be place on file at the offices of the NYSE.[150] The Court justified its decision by analogizing party settlement to arbitration—both avenues do not lead to precedent.[151] The Court felt that most ADEA claims would continue to be litigated and therefore arbitration would not threaten the growth of law.[152]

The Court's refusal to accept a "death-of-precedent" argument is troubling. There is no guarantee that "most" ADEA claims will continue to be litigated.[153] The great number of employee contracts implicated by the expansion of the FAA has the potential to engulf workers as diverse as skilled laborers, temps, and CEOs.[154] Additionally, the parallels between settlement and arbitration are not as closely tracked as the Court would have us believe. Arbitration involves a quasi-judicial remedy in which parties battle a controversy to a quasi-judicial solution. The desire of a party to continue the battle before a fact-finder is the real source of precedent.

There are indicia that lower courts have allowed the Court's reasoning in *Gilmer* to invade employment discrimination claims beyond the ADEA.[155] In particular, the arbitration of claims under Title

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> amount of consequential damages well below the amount permitted by statute, impose shortened statutes of limitation, impose filing fees and their prohibitive costs on would-be claimants, require employees and consumers to submit their claims to arbitration while leaving the company free to litigate, forbid class actions, restrict or eliminate discovery, and give the company unilateral authority to appoint arbitrators.

Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. KAN. L. REV. 583, 584-85 (2004); *see also* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 4, at 1641-42 (noting same).

148. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 396 (1999); Cooper, *supra* note 5, at 218-19.

149. *Gilmer*, 500 U.S. at 31-32.

150. *Id.*; Cooper, *supra* note 5, at 214.

151. *Gilmer*, 500 U.S. at 32.

152. *Id.*

153. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1019 (1996) (noting the increasing prevalence of employment arbitration).

154. Lucy T. France & Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability Without Equivalency*, 64 MONT. L. REV. 449, 491 (2003).

155. *See, e.g.*, Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 182 (3d Cir. 1998) (holding a Title VII claim arbitrable). The tendency of arbitration to engulf claims under Title VII of the Civil

VII of the Civil Rights Act of 1964 ("Title VII") is troubling. Title VII is "an attempt to address a systemic social ill—discrimination—that is deeply embedded in the cultural fabric."[156] As such, "adjudication . . . is both an opportunity to reverse an instance of discrimination and an occasion for examining the institutions that made discrimination possible."[157] Additionally, Title VII claims have an "overlapping system" of access to multiple forums.[158] Stripping Title VII claimants of multiforum opportunities by compelling a single arbitral remedy frustrates the design of Title VII.[159]

The claim in *Gilmer* was discrimination on the basis of age.[160] Employment discrimination and other civil rights claims often turn on the basis of other fundamental characteristics: race, gender, nationality, and disability.[161] These suits should be remedied in full view of the public "because societal problems such as discrimination need the glare of litigation's public spotlight to increase awareness."[162] The resolution of civil rights claims in a court of law, and the subsequent public discourse, "changes societal relationships."[163] The resolution of employment discrimination claims through arbitration starves the public and the courts of opportunities for awareness and growth.

3. Securities

The Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") collectively provide the

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Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000), from the Supreme Court's pronouncement of acceptable arbitration in ADEA claims is not altogether illogical as "the substantive prohibitions of the ADEA were derived '[*in*] *haec verba* from Title VII.'" G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 571 (1990) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

156. Shell, *supra* note 155, at 568.

157. *Id.*

158. *Id.*

159. *Id.* at 568-69.

160. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

161. Jenifer A. Magyar, Case Comment, *Statutory Civil Rights Claims in Arbitration: Analysis of* Gilmer v. Interstate/Johnson Lane Corp., 72 B.U. L. REV. 641, 654-55 (1992).

162. *Id.* at 655. Particularly troubling is the reality that constitutional rights, rights often at the heart of employment discrimination cases, need *not* be applied by arbitrators. *See* Brunet, *supra* note 37, at 99 (discussing Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir.) (1986), wherein the circuit court "refused to require arbitrators to apply constitutional safeguards"). Additionally, arbitration clauses (even the more complex versions) typically do not include constitutional rights inclusion provisions. *Id.* at 103.

163. Magyar, *supra* note 161, at 654-55.

foundation of America's regulated economy.[164] At the time of the adoption of the Acts, many felt that the collapse of the market in the Great Depression could be traced to shady deals and opaque accounting practices.[165] The intent behind the Acts was to shed light on the securities markets, as "sunlight is said to be the best of disinfectants."[166] It is ironic that claims under these Acts are now being shunted to arbitration, a *private* dispute resolution method, a method graced by less sunlight than many bank vaults.

Securities law is noted for its reliance on development through court decisions.[167] The judicial cultivation of securities law led then-Justice Rehnquist to comment: "When we deal with private actions under [the securities laws], we deal with a judicial oak which has grown from little more than a legislative acorn."[168]

In *Scherk v. Alberto-Culver Co.*,[169] the Court began to move toward the modern relationship between securities law and arbitration. The *Scherk* Court held that a claim involving an international commercial transaction under section 10(b) of the Exchange Act was arbitrable.[170] In *Shearson/American Express, Inc. v. McMahon*,[171] two customers brought claims against a securities broker, alleging fraud under section 10(b) of the Exchange Act, its regulatory counterpart, SEC Rule 10-b5, and the Racketeer Influenced and Corrupt Organizations Act ("RICO").[172] The Court held that an arbitration agreement between the broker and the customers precluded court action.[173] In a subsequent case, the Court also held claims under the Securities Act to be arbitrable.[174]

164. *See* 15 U.S.C. § 78a *et seq.* (2000); 15 U.S.C. § 77a *et seq.* (2000); *see also* STEPHEN J. CHOI & A. C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 104 (2005).

165. CHOI & PRITCHARD, *supra* note 164, at 104.

166. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 92 (New ed. 1932).

167. *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) (finding an implied private cause of action in Rule 10b-5 of the Exchange Act).

168. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

169. 417 U.S. 506 (1974).

170. *Id.* at 515-17, 519-20.

171. 482 U.S. 220 (1987).

172. *Id.* at 223. RICO may be found at 18 U.S.C. § 1861 *et seq.* (2000).

173. *McMahon*, 482 U.S. at 238.

174. Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477, 485 (1989). *Rodriguez de Quijas* overruled *Wilko*, thereby calling into question the manifest disregard doctrine. *Id.*; *see also* Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 249 (1993).

A circuit court also found an arbitration agreement binding in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*,[175] in which an investor sued his broker over a short-sale dispute.[176] The SEC rule at issue was not settled and there was little law on the application of the rule.[177] An arbitrator on the panel commented that the claim came "down to . . . a matter of interpretation of the law . . . and we now hopefully have to come up with the right answer on this law, and it is a very gray area."[178] Because "[a]n arbitrator cannot disregard law that is not sufficiently clear and well settled," an award by an arbitration panel applying unsettled law would not be subject to judicial review under the manifest disregard doctrine.[179]

In 1991, Professor Norman S. Poser noted the prevalence of arbitration agreements in the contracts between brokers and investors:

> Today, arbitration has largely . . . replaced litigation as the method of resolving disputes between customers and their brokers. A recent report . . . states that all of the nine largest brokerage firms, which, in the aggregate, handle the accounts of about seventy-five percent of all individual customers, require their customers to sign predispute arbitration clauses when they open margin or option accounts. Thus, customers who wish to borrow money from their brokers in order to purchase securities, or who wish to participate in the options market, are almost always required to sign arbitration agreements.[180]

The numbers of securities arbitrations in our present day may be assumed to represent an even greater percentage of disputes between brokers and investors.[181] Recognizing the prevalence of arbitration in the securities industry, the SEC adopted uniform procedures governing arbitration.[182] Even the parties in the strongest bargaining position, the brokerage firms, may be adversely affected by a lack of predictability

175. 808 F.2d 930 (2d Cir. 1986).

176. *Id.* at 931.

177. *Id.* at 933.

178. *Id.* (quoting arbitrator).

179. Scodro, *supra* note 5, at 1939.

180. Poser, *supra* note 85, at 1101 (citing U.S. GEN. ACCOUNTING OFFICE, SECURITIES ARBITRATION: HOW INVESTORS FARE 28 (1992)).

181. Margaret M. Harding, *The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power*, 46 DEPAUL L. REV. 109, 118-19 (1996) (finding that arbitrations by securities organizations increased 800% between 1980 and 1994); Poser, *supra* note 85, at 1100-01 (noting that between 1985 and 1990, the number of arbitrations sponsored by securities organizations rose from 2800 to 5300).

182. Order Approving Proposed Rule Changes Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, Exchange Act Release No. 34-26805, 54 Fed. Reg. 21144, 21144-55 (May 16, 1989).

due to an absence of judicial precedent in securities law.[183] Following the Court's imprimatur of securities arbitration, there has been a "marked decrease in court decisions addressing broker-customer relations, resulting in a freeze of the relevant law."[184]

The expanding arbitration of antitrust, employment discrimination, and securities disputes are examples of the withering of American common law. However, a dearth of precedents is not the only disorder stemming from the American arbitral regime.

B. Reasoned Awards are Uncommon and Unwelcome in American Arbitration

American arbitrators typically do not issue written rationales for their awards.[185] Indeed, some arbitral organizations actively discourage their arbitrators from writing the reasoning behind an award.[186] Curiously, the United States is one of only a few nations that issues arbitration awards in the absence of written findings of fact or conclusions of law.[187]

Absent reasoned awards, "[t]he parties and their counsel are provided no reliable indicia of whether the arbitrator's decision was founded on a full understanding of the material facts and a proper interpretation and application of the relevant provisions of their contract and the applicable law."[188] A judge, when presented with an award unaccompanied by findings, commented: "For all we know, the arbitrators concluded that the sun rises in the west, the earth is flat, and

183. Poser, *supra* note 85, at 1110; *see also* Summers, *supra* note 5, at 710 (noting the same irony in employment arbitration).

184. Park, *supra* note 109, at 105-06.

185. MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 29:06, at 435-36 (Rev. ed. 2002).

186. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 259 (1987) (Blackmun, J., concurring in part and dissenting in part); Cooper, *supra* note 5, at 215. This practice may be changing in certain circumstances and under certain organizations. *See* American Arbitration Association, National Rules for the Resolution of Employment Disputes, Rule 34(c) (2005), *available at* http://www.adr.org/sp.asp?id=22075 (requiring a written award absent a contrary request by the parties); A.B.A., DUE PROCESS PROTOCOL FOR MEDIATION AND ARB. OF STATUTORY DISPS. ARISING OUT OF THE EMP. RELATIONSHIP 3 (1995), *available at* http://www.bna.com/bnabooks/ababna/special/protocol.pdf.

187. Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 PEPP. DISP. RESOL. L.J. 157, 214 (2003).

188. Hayford, *supra* note 41, at 447.

damages have nothing to do with the intentions of the parties or the foreseeability of the consequences of a [contractual] breach."[189]

Some critics have called for action, requesting reasoned awards in certain situations.[190] One scholar commented: "[H]ow can we build up a unified system of commercial law and practice and code regulation unless [reasoned awards] are used? Without them we have a hodgepodge of nothingness, and business is not helped nor arbitration aided by the mistakes or wisdom of others."[191] The absence of reasoned awards hurts commercial parties because it does not instruct them how to modify future behavior or structure future transactions.[192] The absence of a reasoned award may even encourage parties to seek court vacatur, as the losing party is unable to assess the foundation of the award.[193]

C. *Statutory Grounds for Vacatur, and Judicially Created Non-Statutory Grounds, are Chaotic and Often in Conflict*

In a weighty article, Professor Stephen L. Hayford demonstrated, circuit by circuit, the messy standards for both statutory and non-statutory vacatur of arbitration awards.[194] There is "substantial disagreement" between the circuits about whether judicially-created grounds for vacatur are viable.[195] This confusion is compounded by the

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189. Perini Corp. v. Great Bay Hotel & Casino, Inc., 610 A.2d 364, 392 (N.J. 1992) (Wilentz, C.J., concurring), *abrogated by* Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc, 640 A.2d 788, 791-93 (N.J. 1994).

190. Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 404 (1995) (recommending reasoned awards upon request of the parties); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 486 (1988); Galbraith, *supra* note 174, at 261 (advocating the use of written opinions only when requested by parties, lest arbitration become too similar to litigation).

191. Phillips, *supra* note 12, at 606.

192. Park, *supra* note 109, at 104.

193. Hayford, *supra* note 41, at 447.

194. As described by Professor Hayford:

> Four circuit courts of appeals can be described as being in a state of extreme confusion with regard to the non-statutory grounds for vacatur: the Sixth, Ninth, Fifth, and Seventh. The case law in each of those four circuits contains one or more unequivocal assertion that the exclusive grounds for vacatur of commercial arbitration awards are those set forth in section 10(a) of the FAA, juxtaposed with one or more opinions recognizing and applying a non-statutory ground for vacatur.

Hayford, *supra* note 39, at 764-65. Professor Hayford has since updated his survey of the courts, noting that twelve of thirteen circuits, with the exception of the Federal Circuit, now recognize some form of non-statutory vacatur. Hayford, *supra* note 43, at 870.

195. Hayford, *supra* note 39, at 746. To date, "[o]nly the Fourth Circuit has unequivocally rejected the nonstatutory grounds for vacatur." *Id.* at 764 (citing Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995)) ("The statutory grounds for vacatur permit challenges on sufficiently improper conduct in the course of the proceedings; they do

"increased willingness" of the circuit courts to go beyond arbitral awards and assess the reasoning and interpretation of the merits of the disputes before them.[196] The circuit courts appear to be in a "struggle[]" to reach a proper standard of review, a debate not yet resolved by the Supreme Court.[197]

International experience indicates that despite the commercial desire for finality, parties in arbitration sometimes desire a "safety net" of judicial review.[198] The FAA should be amended to alleviate the confusion and forum shopping inherent in conflicting circuit standards by enunciating clear opportunities and guidelines for court review.[199]

D. Because of the Preemptive Nature of the FAA, States are Unable to Effectively Modify Judicial Review of Arbitration

The application of federal or state law to an arbitration agreement "can have substantial – even determinative – impact . . . on the outcome of a case."[200] In *Southland Corp. v. Keating*,[201] the State of California learned a tough lesson: the Supreme Court held that a California statute reserving certain claims from arbitration was preempted by the FAA.[202] Ten years later, when the Court granted certiorari in *Allied-Bruce Terminix Cos. v. Dobson*[203] to resolve another question of federal law preemption, twenty state attorneys general filed amici briefs to have *Southland* overturned.[204] The Court refused, holding the Alabama law at issue preempted by the FAA, expanding the scope of the FAA to regulate all "commerce in fact."[205] The FAA, as interpreted by the Supreme Court, is an exercise of Congress's Commerce Clause

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not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators reached.").

196. Hayford, *supra* note 39, at 735-36.

197. Galbraith, *supra* note 174, at 250.

198. Park, *supra* note 109, at 104 (citing CODE JUDICIAIRE Art. 1717(4) (Belg.) (enacted in 1985, amended on May 19, 1998)).

199. van Ginkel, *supra* note 187, at 212 (recommending same, with Arbitration Act 1996, c. 23, § 68(2) as a model for a "more extensive list of grounds on which an award can be set aside").

200. Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 410 (1992).

201. 465 U.S. 1 (1984).

202. *Id.* at 16.

203. 513 U.S. 265 (1995).

204. Moses, *supra* note 18, at 129.

205. Sternlight, *Panacea*, *supra* note 5, at 665 (quoting *Allied-Bruce Terminix*, 513 U.S. at 281).

authority.[206] As such, the FAA is applicable to both state and federal courts.[207] Any state arbitration law contrary to the FAA is preempted by the affirmative act of Congress in this area if the dispute is deemed a federal case.[208] Even state laws that attempt to increase the awareness of arbitration clauses by consumers are suspect.[209] If change is to come in the American arbitral regime, it must come from Congress.

E. Parties are Unable to Contractually Expand Judicial Review of Arbitration Proceedings and Awards

An amendment to the FAA to accommodate expanded judicial review is crucial in light of the Supreme Court's recent decision limiting the ability of parties to expand contractually the judicial review of their arbitral awards.[210] Arbitration is fundamentally a contractual exercise.[211]

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206. Hayford, *supra* note 25, at 69; Sternlight, *Panacea*, *supra* note 5, at 665-66. At the time of adoption, the FAA was not so clearly within Congress's Commerce Clause power. As noted by Julius Henry Cohen, "[The FAA] rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in such courts, they are clearly within the congressional power. This principle is so evident and so firmly established that it cannot be seriously disputed." Cohen & Dayton, *supra* note 22, at 275.

207. Hayford, *supra* note 25, at 69.

208. As noted by Professor Hayford:

> Read in concert, *Southland*, *Perry*, *Terminix*, and *Casarotto* confirm that the FAA preempts state law conflicting with any of its terms. The substantive law of commercial arbitration is that set out in the Federal Arbitration Act, at least with regard to the issues expressly addressed in the FAA. The state courts are obliged to apply that law, even in the face of contrary state statutory or case law. This line of cases repeatedly signals that the Supreme Court will not tolerate efforts by state legislatures or state courts to undermine the seminal purpose of the FAA--the enforcement of contractual agreements to arbitrate.

Hayford, *supra* note 25, at 71 (listing Southland Corp. v. Keating, 465 U.S. 1 (1984); Perry v. Thomas, 482 U.S. 483 (1987); *Allied-Bruce Terminix*, 513 U.S. at 265; Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996)); *see also* Sternlight, *Panacea*, *supra* note 5, at 665-67 (same). The one exception to the preemptive power of the FAA is insurance; under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000), states may regulate "without fear of federal preemption." Sternlight, *Out on a Limb*, *supra* note 84, at 841; Strickland, *supra* note 200, at 447. The Supreme Court recently held that "state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." Preston v. Ferrer, 128 S. Ct. 978, 981 (2008).

209. *See Doctor's Assocs.*, 517 U.S. at 688 (invalidating a Montana statute requiring commercial parties to place a notice of arbitration on the first page of any contract). For a particularly vitriolic response to the trend of expansive arbitral jurisdiction and federal preemption under the FAA, see the special concurrence by Justice Trieweiler in the decision by the Montana Supreme Court reversed by the Court in *Doctor's Assocs.* Casarotto v. Lombardi, 886 P.2d 931, 939-41 (Mont. 1994) (Trieweiler, J., specially concurring).

210. Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1400 (2008); *see also* Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 510 (2002) (noting a circuit split over

Despite the desire of some parties to expand judicial review of arbitration decisions by contract, party autonomy is not recognized in this area.[212] Without congressional action to amend the FAA, party contractual expansion of the judicial review of arbitration awards is futile.[213]

F. Conclusion: The Judicial Review of Arbitration Awards Must Change

Standards for review of arbitral awards under the FAA are substantially identical to their original incarnation.[214] The FAA provides a mere "skeletal structure" for the regulation of arbitration in the United States.[215] The growth of arbitration has been driven entirely by the decisions of the Supreme Court, yet the FAA has not changed with the times.[216] Put succinctly, "[t]he Act is . . . ill-suited to such use as an all-terrain vehicle."[217]

To satisfy the great need for clarification and consistency, for-profit arbitral institutions, such as the American Arbitration Association and Judicial Arbitration and Mediation Services, Inc., have promulgated rules for commercial arbitrations.[218] The piecemeal nature of these rules, despite their popularity, is "not an effective substitute for well thought-out legislative reform."[219]

Enhanced arbitral appellate review cannot be founded in the current form of the FAA, or squeezed into the non-statutory grounds for vacatur. To accomplish expanded review, Congress must act to amend the FAA.[220]

"whether parties to an arbitration agreement could agree to federal court appellate review of an arbitration award").

211. JEAN-FRANCOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION § 1.1.1, at 3 (2007).

212. *Hall Street Assocs.*, 128 S. Ct. at 1403; *see also* Rubinstein, *supra* note 85, at 247-53 (collecting and discussing cases both for and against contractual expansion of judicial review); Jiang-Schuerger, *supra* note 111, at 232-33 (same).

213. *Hall Street Assocs.*, 128 S. Ct at 1403; *see also* Sullivan, *supra* note 210, at 560.

214. Act of July 30, 1947, ch. 392, 61 Stat. 669, 669-74 (codified as amended at 9 U.S.C. §§ 1-15 (2000)).

215. Hayford, *supra* note 25, at 68; Cole, *supra* note 30, at 214.

216. Ware, *supra* note 5, at 712-13.

217. Park, *supra* note 109, at 76.

218. Hayford, *supra* note 25, at 68.

219. *Id.*

220. Jiang-Schuerger, *supra* note 111, at 248.

IV. A RECOMMENDATION FOR REFORM

A. The Enhanced Arbitration Appeal Amendment ("EAAA")

Since American courts dramatically changed perspective on the use of arbitration, little has been recommended to reconcile the American stance with its English counterpart.[221] Commentators have gazed longingly across the waters to England and ultimately shied away from dramatic reform.[222]

Arbitration in England has been altered over the course of the twentieth century by amendments to the Arbitration Act—each substantially changing the English approach to arbitration.[223] Arbitration in the United States has flourished not from continued tweaking of the FAA, but from the changing interpretation of the FAA by the courts of this country.[224] The FAA is long overdue for an overhaul.[225]

The stewardship of American law by the courts, despite the increasing use of arbitration, will be best served by an amendment to the FAA. This Note proposes an amendment to section 10 of that Act. The proposed amendment, to immediately follow section 10(a), would read:

> (b) An arbitral award must be in writing, accompanied by reasons for the award sufficient to allow judicial review;
> (c) A district court may engage in enhanced judicial review of an

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221. *See* Park, *supra* note 5, at 55 ("Measured by the plumb lines of both efficiency and justice, the syncretistic legislation offers an optimal balance of finality and fairness in private dispute resolution. Contemplating this impressive achievement, thoughtful American lawyers are likely to ask whether English-style arbitration reform would succeed in the United States."); *see also* van Ginkel, *supra* note 187, at 219 (describing the Arbitration Act 1996 as "well thought out, fairly complete, and accessible").

222. *See* Phillips, *supra* note 12, at 610-11; *see also* Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 112-13 (1997) (critiquing the Arbitration Act 1996 in the context of U.S. judicial non-statutory review of arbitration awards); van Ginkel, *supra* note 187, at 219 (arguing that the Arbitration Act 1996 could be a model for improvements to the FAA, but stating that "[c]ontrary to the provision under the English Arbitration Act for arbitral appeal by leave of the court only on questions of law and only when certain conditions have been met, a somewhat more open system of appeal may be preferable for the United States"); Park, *supra* note 5, at 67 ("[A]t some point American consumers of arbitral services should probably be given the option to have an award reviewed for error of law, similar to the opportunity now provided under the English statute."); Scodro, *supra* note 5, at 1961 (acknowledging English arbitral law, but ultimately arguing for a certification process for novel questions of law arising in an arbitral context, similar to the current process from federal courts to state courts).

223. *See* Arbitration Act 1996, c. 23; Arbitration Act 1979, c. 42; Arbitration Act 1975, c. 3; Arbitration Act, 1950, 14 Geo. 6, c. 27.

224. *See* Sternlight, *Panacea*, *supra* note 5, at 664.

225. *See* Sternlight, *Dreaming*, *supra* note 6, at 1.

arbitral award when:
(1) parties mutually agree to submit an appeal; or
(2) a question of law substantially affects the rights of a party and;
(a) the appeal raises a novel question of law, or
(b) the question of law implicates a matter of general public significance;
and the decision of the tribunal is at least open to serious doubt.

The remainder of this Note will discuss the structure of this appellate process and the benefits of enhanced arbitration appeal.

B. Models for Standards of Review

Despite its absence in the United States, the possibility of appeal from an arbitral award is not rare among nations.[226] The courts of those states allowing appeal center the threshold inquiry on whether "the question of law will substantially affect the rights of one or more of the parties, or that the point of law is of general public importance."[227]

Section 69 of England's Arbitration Act 1996 is the best model for an amendment to the FAA. This is not an arbitrary model: England has long been a world center for arbitration.[228] Our English counterparts seem to understand that the growth of common law requires fertilizing and weeding.[229] We should not, however, adopt section 69 wholesale.[230]

The remainder of Part IV will discuss: (1) the procedural aspects of an appeal and the results of a denied application; (2) the definition of a question of law; (3) the definition of a novel question of law; and (4) the definition of a question of general public significance.

1. The Procedure of the New Arbitral Appellate Process

An appeal under the EAAA would follow the intention of Arbitration Act 1996 section 69 in large measure, but fit within the United States federal appellate process. A party seeking appeal would

226. van Ginkel, *supra* note 187, at 194-96 (noting unlimited appeal in Belgium and France (for domestic arbitrations only) and limited appeal in England, Australia, Hong Kong (for domestic arbitrations only), New Zealand, and Singapore "if the court finds that certain conditions have been met").

227. *Id.* at 196.

228. Browne, *supra* note 59, at 1.

229. Frederick A. Mann, *Private Arbitration and Public Policy*, 4 CIV. JUST. Q. 257, 267 (1985) ("[I]t is in the highest interest of the State, that it is a matter of public policy of great import to maintain a principle of judicial review of arbitration not only to develop the law, but also to ensure the administration of justice and thus to avoid the risk of arbitrariness.").

230. Park, *supra* note 109, at 77-78 ("Part of the peculiar U.S. genius has been our ability to adapt (rather than adopt) inventions from abroad.").

petition a federal district court for review in the *situs* of the arbitration (in the district in which the arbitration panel was constituted). Appeal would also be possible in a federal district court situated in the jurisdiction in which a party seeks to enforce the arbitral award.[231] The appeal could begin only after the tribunal reaches its final award. In this manner, courts avoid intrusion into the competence of tribunals, while still serving as a check on the question of law at issue.[232] Unlike the ability of parties to opt out of section 69 review under Arbitration Act 1996,[233] parties would be unable to close out court review. The key rationale behind the EAAA is to rectify the drought of precedent. Allowing parties to avoid court review by agreement will not resolve that problem. An opt-out provision may place greater strain on the already disparate bargaining positions of many employees and consumers forced to arbitrate. The unavailability of an opt-out provision will be tempered by the strictures discussed below.

This appeal process would look similar to the process of appeal from a circuit court to the Supreme Court.[234] The process of petitioning for leave to appeal is crucial to the EAAA: An appeal remains a discretionary function of the court and not a unilateral claim of right by the appealing party.[235] Appeal would automatically be granted, however, if the arbitral parties mutually agreed to submit an appeal.[236] Because an amendment to the FAA expanding judicial review must implicate the subject matter jurisdiction of the federal courts, parties seeking review must comport with the strictures of diversity and amount in controversy.[237] It is also essential for the continued development of

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231. Kanowitz, *supra* note 16, at 273 ("Review of an arbitration award by a court of first instance may also be referred to as an appeal.").

232. In this procedure, my amendment is distinct from a prior proposal for the adoption of a process, similar to a "certified question" from a federal court to its sister state court during the course of an ongoing arbitration:

> [I]f a party to a private arbitration raises a statutory claim that she believes would constitute a novel question for the federal courts, she may ask the arbitrator to certify that question to a federal district court. It is for the arbitrator (1) to make the factual determination of whether the legal claim is dispositive of the case, given the facts as she finds them, and (2) to examine case law presented by the parties or that she herself discovers to determine whether the question is novel.

Scodro, *supra* note 5, at 1959-60.

233. Browne, *supra* note 59, at 3, n.18.

234. 28 U.S.C §§ 1253, 1254, 1257, 2101 (2000).

235. SUP. CT. R. 10 (2007).

236. *See* Arbitration Act 1996, c. 23, § 69(2)(a).

237. 28 U.S.C. § 1332 (2000). As noted in one critique of the FAA: "Parties do not automatically have a federal case merely because they have brought arbitration decisions to a

precedential opinions to maintain a vehicle for parties to reach the court on disputes involving a federal question.[238]

The United States appellate procedure, governed by statute,[239] will also apply to a denial of an appeal by a district court. United States circuit courts draw a distinction between an interlocutory matter and a final decision: Only when a decision "leaves nothing for the court to do but execute the judgment" will a circuit court take review.[240] If a district court accepts a party's appeal of an arbitral award under the EAAA, a district court decision would clearly be a final decision. However, like the English appeal, there will be an additional hurdle: Appeal from the district court to the circuit court is not one of right; therefore, the district court must certify that the question is one which should be granted an appeal.[241]

2. The Subject Matter of the New Arbitral Appellate Process

It is important that a district court's inquiry remain centered on a "question of law." Arbitration is best as a fact-finding institution.[242] The court should not disturb pure questions of fact. Of course, even the English courts have bandied about the distinction between a question of law and a question of fact.[243]

Under Arbitration Act 1996, a "question of law" is defined simply as a domestic law of England.[244] The practical effect of this simple definition is important: "[The] cases seem[] to . . . delimit the questions of law which can be appealed to questions of English law. These cases support the proposition that awards based on applicable foreign law are likely to be excluded."[245]

Appeals under the EAAA would be limited to questions of law arising from the law of a state or the laws of the United States. The Supreme Court appears cognizant of the need to maintain province over

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federal court under the FAA. A federal court may not hear an arbitration case unless diversity or a federal issue dispute exists." Jiang-Schuerger, *supra* note 111, at 238.

238. 28 U.S.C. §§ 1331, 1367 (2000).

239. *Id.* §§ 1291, 1292.

240. Catlin v. United States, 324 U.S. 229, 233 (1945), *superseded by statute*, 9 U.S.C. § 15, Pub. L. No. 100-669, 102 Stat. 3969 (1988).

241. *See* Arbitration Act 1996, c. 23, § 69(8).

242. Cohen & Dayton, *supra* note 22, at 281.

243. Stewart R. Shackleton, *Annual Review of English Judicial Decisions on Arbitration—2000*, 4 INT'L ARB. L. REV. 178, 194 (citing Whistler Int'l Ltd. v. Kawasaki Kisen Kaisha Ltd. ("The Hill Harmony"), [2001] 1 A.C. 638, 647 (H.L. 2000)).

244. Arbitration Act 1996, c. 23, § 82(1).

245. Dedezade, *supra* note 68, at 62.

United States law in international arbitration.[246] District courts must dismiss appeals under the new amendment absent a question implicating United States law. Additionally, the question of law asserted by an appealing party must be either a novel question of law or a question of general public significance.

a. Novel Questions of Law

The adjudication of a novel question of law is the opportunity of a court to announce, by its opinion, a new standard or test.[247] An opportunity for appeal on a novel question of law is not currently available under the Arbitration Act 1996.[248] Appeals on novel questions of law must, however, be allowed and thereby ensure the growth of our law. A novel question of law is not easily defined. Novel questions of law are alternately described as questions of first impression. Often, these questions are "call 'em when you see 'em." It is the burden of the party seeking appeal to convince the district court that the question at issue raises a novel question of law.[249]

b. Questions of General Public Significance

A question of law implicating general public significance should, by its very nature, be reviewed in a public forum. Because the importance of questions of public significance is clear, recommendations to keep these questions from the scope of arbitration have been made for United States arbitration.[250] The subjects discussed previously—antitrust employment discrimination, and securities—often involve matters of public importance. It is important, however, to establish a high threshold for the determination of a question of general public significance, lest appeal become too commonplace and burdensome. Similar to an appeal for a novel question of law, it will be the burden of the party seeking appeal to impress upon the district court the general public significance of the question. Although a novel question of law may often be characterized as a question of general public significance, the terms are

246. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (recognizing that domestic courts would have the opportunity, at the award enforcement stage, to review the application of national antitrust law).

247. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655, 659 (1992).

248. Arbitration Act, 1996, c. 23, § 69.

249. *Cf.* Demco Invs. & Commercial SA v. Se Banken Forsakring Holding Aktibolag, [2005] EWHC (Comm) 1398, [2005] 2 Lloyd's Rep. 650, 658 (Q.B.D. 2005).

250. Kronstein, *supra* note 82, at 68 (arguing "that government and private parties be permitted the right to appeal to the courts in all arbitration cases provided the public interest is affected").

not synonymous and a distinction should be made between the two avenues for appeal.

3. Awarding of Costs to a Party as a Cautionary Tool

As a cautionary measure, the costs of the appeal may be levied against the party unsuccessfully seeking appeal. Imposition of costs against a party is traditionally appropriate where a party brings suit on a frivolous or obviously weak claim.[251] A party should only appeal the decision of an arbitration panel with good cause. A district court's refusal to accept an appeal from an arbitration award may thus be treated as a frivolous or overtly meritless attempt to prolong the dispute. The imposition of costs will force parties to adequately sound their arguments for appeal before making that significant step.

4. Reasoned Awards Must Become a Crucial Component of American Arbitral Practice

If the EAAA is to be successful, district courts must have some basis for a grant of appeal. This foundation may be set upon the procedures of the EAAA and a new requirement for arbitrators to provide parties with a reasoned award. In prior practice, courts often refused to review arbitral awards because courts could not assess the rationale for the award and thus were uncomfortable extending their review into the realm of the arbitration panel's competence.[252] Reasoned awards are not common in American arbitration, but they are not an oddity.[253] America appears to be one of the few countries in which reasoned awards are not prevalent in arbitration.[254] It is time for the United States to bring its practice of arbitration to the level of the international community.

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251. This is a long-standing traditional power of appellate courts. See, for example, *M.C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 387-89 (1884), in which the court held:

> Here the plaintiffs in error wrongfully removed the cause to the Circuit Court. . . . its effect is, to defeat the entire proceeding which they originated and have prosecuted. . . . [I]n order to give effect to its judgment upon the whole case against them, to do what justice and right seem to require, by awarding judgment against them for the costs that have accrued in this court.

Id.; *see also* Hochman, *supra* note 222, at 115.

252. Brunet, *supra* note 37, at 88.

253. *Id.* at 89 (1992) (noting that is it "customary practice" for labor arbitration panels to write opinions).

254. van Ginkel, *supra* note 187, at 214.

V. THE BENEFITS FROM ENHANCED APPEAL OF ARBITRAL AWARDS

A. Promoting Precedent

Enhanced appellate review of arbitral awards will promote the continued development of American law. As elucidated by Professor William Park, "judicial review of awards on the legal merits of the case . . . fertilizes legal development by creating a publicly available 'legal capital' of new principles to meet changing commercial circumstances."[255] The English system long demonstrated a desire to encourage the development of the common law through court interaction with arbitration.[256] The success of the English approach to the development of precedent was noted during its use.[257] Indeed, some feel that the English system now restricts the development of English law too much.[258] The United States, because of its liberal arbitration policies, desperately needs a mechanism to maintain the "fertilization" of our common law.[259]

Some scholars are more restrained in their assessment of the state of American precedent. Professor Christopher Drahozal notes that "it is the rare case that contributes to the development of the law in a significant way."[260] Professor Thomas Carbonneau has found that only about seven percent of employment arbitration awards are "equivalent of substantial judicial opinions on employment law," with the remainder constituting "purely factual determinations."[261] Mandatory arbitration of customer-broker disputes does not appear to have dramatically slowed the flow of court cases.[262] However, cases such as *Bobker*,[263] in which

255. Park, *supra* note 109, at 105.

256. Dedezade, *supra* note 68, at 59.

257. Phillips, *supra* note 12, at 616 ("The opinions rendered in special cases seem to have helped make law not only for other arbitrations, but for general usage as well.").

258. Paul Ardetti, a member of a Committee that drafted a generally positive critique of the Arbitration Act 1996, excepted from the Committee's report:

> I differ from this conclusion [that no changes to the Arbitration Act 1996 are necessary] as follows. The quality of the Common Law underpins the success of this jurisdiction, both in arbitration and the Court, and the Act is too restrictive of the timely development of the Common Law. This has not changed as a result of the survey. Some updating of the Act therefore continues to be of paramount importance to arbitrators, lawyers and the parties they serve, in my view.

REPORT ON THE ARBITRATION ACT 1996 (2006), at 23 n.2, *available at* http://www.idrc.co.uk/aa96survey/Report_on_Arbitration_Act_1996.pdf.

259. Park, *supra* note 109, at 105.

260. Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 209 (2006).

261. Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183, 1205 (2004).

262. Poser, *supra* note 85, at 1102.

the law is unsettled, demonstrate the continued growth of American precedent: Not all questions of law are answered; every statute has not been interpreted. The crucial matter is not the number of cases that fall into arbitration or reach a court or the percentage of disputes involving significant matters, it is the importance of each case and its effect on precedent.

In recent years, some federal courts have adopted the practice of issuing unpublished or non-precedential opinions.[264] Circuits using selective publishing have adopted rules to determine when decisions are published; for example, the Federal Circuit's rules are designed to promote precedents, particularly in cases of first impression or general public interest.[265] The cases captured by the publication rules are the exact disputes that encourage precedent and promote the development of the law.

With the adoption of the Arbitration Act 1996, England limited the right to appeal an arbitration award.[266] It is important to note, however, that the right to appeal under Arbitration Act 1996 has not been entirely lost.[267] Under the Act, England still offers a "split-level approach to

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263. Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 933-34 (2d Cir. 1986).

264. *See* FED. CIR. R. 47.6; Beth Zeitlin Shaw, Casenote, *Please Ignore this Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1013-14 (2004) ("The Federal Circuit disposes of many cases without publishing opinions. In fact, the Federal Circuit issues an average of 77% of its opinions as 'unpublished' decisions . . . .").

265. As compiled by Ms. Shaw:

> According to the Federal Circuit's Internal Operating Procedures, the court publishes opinions meeting one or more of the following criteria:
> (a) The case is a test case.
> (b) An issue of first impression is treated.
> (c) A new rule of law is established.
> (d) An existing rule of law is criticized, clarified, altered, or modified.
> . . . .
> (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
> . . . .
> (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.
> (j) A new constitutional or statutory issue is treated.
> (k) A previously overlooked rule of law is treated.
> . . . .
> (n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.

Zeitlin Shaw, *supra* note 264, at 1017 (citing FED. CIR. R. INTERNAL OPERATING PROC. 10).

266. *See* Arbitration Act 1996, c. 23, §§ 1(b), 69.

267. Richard Clegg, *The Role of Courts in Arbitration*, 16 CONSTRUCTION L.J., 462, 463 (2000) ("With respect to appeals of general public importance, the test in the 1996 Act of 'open to serious doubt' would appear to be a lower test than the former 'strong prima facie case'. To that extent, the 1996 Act has widened the door to appeals.").

judicial review" in which parties may exercise an "optional right to appeal points of English law, coupled with a non-waivable opportunity to seek judicial review of an arbitration's fundamental procedural regularity."[268]

The limited arbitral appeal in England is, for most purposes, exactly what United States arbitration needs. The criteria are such as to "discourage all but the most serious of challenges . . . . Leave to appeal will not be granted unless the arbitrators' decision is 'obviously wrong,' or the question is one of general public importance and the decision is 'open to serious doubt.'"[269]

B. Promoting Clear Arbitral Decisions

Along with the enhanced appellate process, the EAAA would require arbitrators to provide a basic reasoned award, including a brief statement of findings of fact, applicable law, and law application. A brief reasoned award is useful for the future conduct of the parties, serving as a guide to their commercial interactions.[270] As Professor Park notes, "[a]nnulment of aberrant awards . . . has an *in terrorem* effect that helps to reduce problems at earlier stages, since most arbitrators are understandably adverse to the public rebuke inherent in having their awards vacated."[271] Additionally, with an enhanced appellate process in place, courts may easily do away with the conflicting non-statutory grounds for vacatur, as congressional intent would be clearly reflected in the EAAA.[272]

The EAAA will not only help the courts, it will help lawmakers. As statutory interpretations contrary to legislative intent go unnoticed in arbitral proceedings, an enhanced appeal method will ensure that new or controversial legislation is publicly interpreted.[273]

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268. Park, *supra* note 5, at 55.

269. *Id.* at 62.

270. Park, *supra* note 109, at 104.

271. *Id.* at 98; *see also* Klaus Peter Berger, *The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective*, 12 FORDHAM INT'L L.J. 605, 656-57 (1989) ("The constant threat of judicial review along clearly defined criteria leads arbitrators to pay due regard to the interests of the parties and factual and legal setting of the case, thus further contributing to more legality in arbitral proceedings."). It is this Note's contention that "more legality" in arbitration is, in fact, a good thing.

272. Hayford, *supra* note 39, at 842 (noting that the increased use of arbitration will also increase the number of awards vacated on non-statutory grounds, eventually requiring the U.S. Supreme Court to address those grounds); Park, *supra* note 5, at 67 (arguing that sections 67 and 68 of Arbitration Act 1996 may be used to defeat the current "scatter-gun" approach to vacatur).

273. Scodro, *supra* note 5, at 1952.

C. *Promoting Arbitration*

Enhanced judicial review under the EAAA will have beneficial effects on arbitration as a dispute resolution method.[274] The desire of parties to seek arbitration will only increase with the knowledge that arbitrators are likely to produce "good" awards.[275] A statutorily constructed arbitration appellate process allows parties to make significant decisions regarding their choice of law provisions. Parties may proactively avoid the potential problems inherent in an arbitration award based on an unsettled law by avoiding that law, leaving potentially problematic statutory constructs until the courts have a say.[276]

Arbitration, as a private dispute resolution mechanism, exists at the behest of parties in a contractual relationship.[277] Parties to arbitration are believed to knowingly relinquish the right to pursue judicial remedies in exchange for the speed, reduced cost, and finality of arbitration.[278] Some lament that expanding the opportunities for parties to appeal an arbitration award to a court would give parties "a second bite at the apple."[279] These critics argue that a party to arbitration is "stuck with the result" of the arbitration, as long as the tribunal followed proper arbitral procedures.[280]

The exchange of adjudication for arbitration does not, however, replace one system of law for another. As the Supreme Court famously noted:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[281]

The Supreme Court resoundingly supports arbitration, often with the cachet of a reduced docket dangling before it.[282] The argument against

274. Sever, *supra* note 31, at 1696 ("[L]imited judicial review may prove essential to the health and survival of both domestic and international arbitration.").

275. Park, *supra* note 109, at 98.

276. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (noting party inclusion of a choice-of-law provision in an international contract).

277. *See* POUDRET & BESSON, *supra* note 211, § 1.1.1, at 3.

278. Speidel, *supra* note 101, at 160; Sullivan, *supra* note 210, at 549.

279. Hayford, *supra* note 39, at 841; Hochman, *supra* note 222, at 113; Sullivan, *supra* note 210, at 509.

280. Hayford, *supra* note 39, at 841; Sever, *supra* note 31, at 1693 (noting same critiques).

281. *Mitsubishi Motors Corp.*, 473 U.S. at 628.

282. Carbonneau, *supra* note 1, at 1957.

expanded appeal therefore assumes that court review will dramatically increase the time and expense of the dispute, along with the burgeoning court docket.[283] To the Supreme Court, "[i]t seems to matter little what the ultimate implications are for individual rights or the institution of arbitration."[284] The continued development of our system of law is undoubtedly worth more than a court schedule. A congested docket is better served by "new courts and . . . the expenditure of additional public resources upon the judiciary."[285]

Arbitration is intended, and assumed, to be cost-effective and speedy.[286] To avoid defeating these alleged benefits of arbitration, federal courts have traditionally limited their review of arbitral awards.[287] As an initial matter, the purported benefits of arbitration are not substantially supported by empirical evidence.[288] The alleged speed and frugality of arbitration are increasingly questioned as arbitration becomes de rigueur.[289] The opportunity for judicial review, it is argued, will destroy the benefit of finality.[290] However, the English arbitral regime has not been so cavalier with the realities of arbitral finality:

> The drafters of the [Arbitration Act 1996] rightly rejected . . . foreclosing the option of appeals, an approach that harshly implies an irrebuttable presumption that parties to arbitration assume

283. Galbraith, *supra* note 174, at 259; Sullivan, *supra* note 210, at 551.

284. Carbonneau, *supra* note 1, at 1957-58.

285. *Id.* at 1957.

286. Cohen & Dayton, *supra* note 22, at 269; Kanowitz, *supra* note 16, at 255.

287. *See* Office of Supply, Gov't of the Rep. of Korea v. N.Y. Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972); Galbraith, *supra* note 174, at 259.

288. Carbonneau, *supra* note 1, at 1959 (noting that as the scope of arbitration increased, "so did lawyer participation in the process and the adversarial tenor of arbitral proceedings"); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 896 (1991) ("ADR [in federal districts using the system] has not resulted in speedier resolution of federal civil cases, has not reduced backlogs, and has not affected the incidence of civil trials."); Poser, *supra* note 85, at 1107 ("As the volume of cases [in securities arbitration] has increased, delays of many months, or even a year or more, between the time of filing a demand for arbitration and the time of the hearing have become the rule."); Summers, *supra* note 5, at 696-98 (comparing filing costs of courts and arbitrations and finding that arbitration costs are not significantly less than court costs). The critique of arbitration's devolution has come to the attention of the public media. *See, e.g.*, Richard Karp, *Wall Street's New Nightmare: For Brokerage Firms, Arbitration Has Turned Unexpectedly Nasty*, BARRON'S, Feb. 21, 1994, at 15; Nathan Koppel, *When Suing Your Boss Is Not an Option*, WALL ST. J., Dec. 18, 2007, at D1 (discussing claims of sex discrimination and rape by an individual employed in Iraq, subject to compulsory arbitration).

289. Engalla v. Permanente Med. Group, Inc., 43 Cal. Rptr. 2d 621, 640 (Cal. Ct. App. 1995) (finding that HMO delayed appointment of neutral arbitrator until after plaintiff's death), *rev'd*, 938 P.2d 903, 925 (Cal. 1997); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 3 (1991) (noting the increasingly adversarial and legal nature of ADR).

290. Hayford, *supra* note 41, at 504.

> the risk that their arbitral awards might contain substantive errors. Such a presumption is not founded on any empirical evidence that arbitrating parties inevitably prefer finality to the right of appeal; neither is it necessarily supported by the legitimate expectation of the parties.[291]

To preserve the arbitration process from the courts, some have recommended the use of arbitration appellate bodies.[292] This option does not rectify the stultification of precedent or significantly ameliorate other concerns such as arbitrator bias or confidential outcomes.[293]

Dramatic change frightens many; legal professionals are certainly no exception. Arbitration is a moneymaker—for the counsel involved in the dispute and, through economic impact, for the host city and the arbitrators.[294] Practitioners and parties opposed to expanded arbitral appeal claim that American arbitration would become so cumbersome and unpredictable that commercial entities will sail for friendlier shores.[295] History may be full of migration, but the EAAA is unlikely to inspire one. Indeed, there is authority that enhanced appeal may even make a forum a more attractive *situs* for arbitration.[296]

The choice of an arbitral *situs* often depends on extra-legal concerns.[297] For example, "[g]eography and history usually matter more to the choice of an arbitral situs than the efficiency of the legal

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291. Chukwumerije, *supra* note 50, at 46.

292. Hayford & Peeples, *supra* note 190, at 405-06.

293. van Ginkel, *supra* note 187, at 200-02 (dismissing the possibility of appeal to an appellate arbitration body); Phillips, *supra* note 12, at 624.

294. Browne, *supra* note 59, at 6 ("Hosting a large number of arbitration proceedings brings money into the economy of the host location and spotlights that location as a leading, sophisticated legal centre, in turn bringing in even more money.").

295. Reynadson, *supra* note 58, at 115 (lamenting the plight of arbitration in London prior to the adoption of the Arbitration Act 1996, with parties seeking New York as a more amenable seat).

296. According to Queen's Counsel V.V. Veeder: "[I]t is an English oddity which has helped to make English Commercial law the most useful and popular system of law in world trade. It remains unthinkable that the symbiotic link should be broken between commercial arbitration, the development of the English law and the English Commercial Court . . . ." *quoted in* Dedezade, *supra* note 68, at 59.

A compelling argument for the EAAA and its ability to *attract* arbitration may be the "failed experiment" of Belgium and its mandatory "'non-review' of awards." Park, *supra* note 109, at 104 (citing CODE JUDICIAIRE Art. 1717(4) (Belg.) (enacted in 1985, amended on May 19, 1998)). Belgium sought to attract parties by adopting a regime disallowing all judicial review of arbitration. *Id.* The regime proved unpopular. *Id.*; *see also* Bernard Hanotiau & Guy Block, *The Law of 19 May 1998 Amending Belgian Arbitration Legislation*, 15 ARB. INT'L 97, 98 (1999). Belgium subsequently amended its law to allow for a default "safety net" of judicial review. Park, *supra* note 109, at 104.

297. Browne, *supra* note 59, at 4-5 (highlighting cost, culture, and competence as the primary factors considered by parties).

environment."[298] Both England and Switzerland enjoyed popularity as arbitral seats while still enforcing enhanced review procedures in their respective national courts.[299] The special case procedure drew arbitrators' ire prior to its abolishment,[300] yet England's preeminent position in modern maritime and insurance practice ensured a steady stream of arbitrations.[301]

In a 2006 survey, practitioners resoundingly supported the retention of the possibility of appeal under the Act.[302] Of those who desired change, the majority thought that "[section] 69 [was] too narrow at present."[303] Additionally, a 2003 survey by International Financial Services revealed that "[m]ore international and commercial arbitrations take place in London than in any other city in the world."[304] Commercial parties, despite the desire for finality, still desire correct decisions and good law. The EAAA balances the commercial desire for finality and the public desire for precedent creation.

If the United States adopts enhanced appeal of arbitration awards, it need not fear isolation. Other nations, like England, allow greater judicial review.[305] Indeed, unlimited appeal is allowed in Belgium and France for domestic arbitrations and limited appeal is allowed in England, Australia, and Hong Kong.[306] New Zealand and Singapore allow appeal "if the court finds that certain conditions have been met"—most important, the question must be on a point of law of "general public importance."[307]

There will undoubtedly be costs for enhanced appeal of arbitration awards. Lawyers and judges are notoriously wedded to the language of their professions—an amendment would require that they "must learn a new lexicon of untested notions, procedures and nomenclature[;] [w]ords that drew their meaning from decades of application must yield

298. Park, *supra* note 5, at 64.

299. *Id.*

300. Anthony Diamond and V. V. Veeder, *The New English Arbitration Act 1996: Challenging an English Award Before the English Court*, 8 AM. REV. INT'L ARB. 47, 47 (1997) (noting the aspersions cast upon the special case procedure by practitioners).

301. Park, *supra* note 5, at 64.

302. REPORT ON THE ARBITRATION ACT 1996, *supra* note 258, at 16 (60% of respondents thought that the possibility of appealing should be retained in its current basis; 15% argued for abolition of all appeal; and 20% recommended changing the tests for granting leave to appeal).

303. *Id.* at 17.

304. INTERNATIONAL FINANCIAL SERVICES, LONDON, LEGAL SERVICES 11 (2003), *available at* http://www.ifsl.org.uk/research/index.html.

305. *See, e.g.*, Arbitration Act 1996, c. 23, § 69.

306. van Ginkel, *supra* note 187, at 194-96.

307. *Id.* at 196.

to inventive interpretation, perhaps increasing expensive litigation over the meaning of novel concepts."[308] Learning and renewal, however, come with each shift in American jurisprudence or congressional action. An unwillingness to budge simply cannot be a sound reason to avoid change.

VI. CONCLUSION

Arbitration, as a dispute resolution regime, is both popular and prevalent. Although arbitration is unlikely to overtake adjudication, we must nonetheless be cognizant of the significant and deleterious effect that overly expansive arbitral jurisdiction has on the development of American law. In this age of arbitration, the challenge "will not be to legitimate the arbitral process, but rather to find suitable means of placing necessary limits upon its newly found statutory autonomy."[309] The best limit for arbitration is not found in a constriction of the jurisdiction or scope of arbitration. Rather, the best limit is one that solves the risk to American jurisprudence—an enhanced appellate process for arbitration awards. With limited appeals of arbitration awards, the law may yet grow, statutes may yet be interpreted, and both arbitration and adjudication will benefit from the achievement of greater exactness.

*Drew M. Gulley**

308. Park, *supra* note 5, at 65. This has been the case in England. *See* Clegg, *supra* note 267, at 462-64.

309. Ulrich Drobnig, *Assessing Arbitral Autonomy in European Statutory Law*, *in* THOMAS CARBONNEAU, LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 201 (Thomas E. Carbonneau, ed., rev. ed. 1998).

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