Keynote Address: *Steelworkers Trilogy* After a Half Century

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A Half Century of the *Steelworkers Trilogy*: Fifty Years of Ironies Squared

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I. Introduction

It is a pleasure to return here to the National Academy of Arbitrators' Annual Meeting today to speak to you about the *Steelworkers Trilogy* since my last talk here which was 15 years ago – by labor law standards a considerable amount of time. One of the most significant labor law developments alongside the passage of the National Relations Act itself, a quarter century earlier, the *Trilogy* promoted a process which had gained considerable impetus in the immediate post-World War II era. Arbitration – grievance or rights arbitration – brought with it a new corps of neutrals (amongst whom you are the most prominent) who were to be confronted with a wide variety of issues involving dismissals, discipline, seniority, layoffs, no-strike and management functions clauses[1] and much more. Though, as Jack Stieber, told the Academy at the Annual Meeting 40 years ago,[2] interest arbitration over new contract terms antedated this relatively new process born out of the protest of the early 20th century,[3] the latter soon became more prevalent in the dispute resolution arena.

The role of the law was to be a matter of debate,[4] with early academic and arbitral

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[1] *Cf.* NLRB v. American National Insurance Co. 343 U.S. 395 (1952) (when upholding the employer's right to insist upon a broad "management functions" clause).

[2] Jack Stieber, "Voluntary Arbitration of Contract Terms," Proceedings of the Twenty-Third Annual Meeting National Academy of Arbitrators, 71 (1970). *See also* Harry H. Platt, "Arbitration of Interest Disputes in the Local Transit and Newspaper Publishing Industries," Proceedings of the Twenty-Sixth Annual Meeting National Academy of Arbitrators, 8 (1974). Professor Stieber describes the grievance arbitration process in J. Stieber, *Grievance Arbitration in the United States: An Analysis of its Functions and Effects, in* RESEARCH PAPERS NO. 8; ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS (1967).

[3] I. BERNSTEIN, TURBULENT YEARS; A HISTORY OF THE AMERICAN WORKER, 1933-1941 (1969); W. GALENSON, THE CIO CHALLENGE TO THE AFL (1960).

[4] *Compare* Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955) *with* Archibald Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Archibald Cox, *Reflections Upon*

differences about whether opinions should be published at all – the fear being that publication would produce an unwarranted reliance upon *stare decisis*. In his classic comment, Dean Harry Shulman said: "I suggest that the law stay out – but, mind you, not the lawyers."[5] Debate ensued in the 1950's.

And then came 1960. The labor law year of 1960 at the Supreme Court began quite differently in comparison to what was to come in June. Just a few months before the *Steelworkers Trilogy* the Supreme Court, addressing a duty to bargain unfair labor practice litigation said the following:

> The parties…proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. [This is so notwithstanding the fact that] [a]bstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises…[6]

June 20, 1960…the United States Supreme Court handed down its landmark *Steelworkers Trilogy* decisions a half century ago. Those three decisions echoed a theme hardly inconsistent but perhaps at some tension with the language quoted above – but one consistent with the theme that the Court had propounded three years earlier, *i.e.*, that the Taft-Hartley amendments promoted the voluntary negotiation of arbitration and no-strike clauses in collective bargaining

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Labor Arbitration, 72 HARV. L. REV. 1482 (1959).
[5] Shulman *supra* at 1024.
[6] NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-89 (1960).

agreements as the *quid pro quo* for one another.[7]

Steelworkers Trilogy gave birth to a labor arbitration law jurisprudence[8] which has been with us for a half century and which, in my view, will likely be with us when our successors are here a half century from now – though, if ironies squared over the first half century can be any guide to the future, with significant shifts both in substance and perhaps even statutory form. In those cases decided on June 20,[9] it is to be recalled that the Court attempted to establish a bright line between the role of the judiciary and that of arbitrators in resolving labor arbitration disputes in those cases before the Court involving the interpretation of collective bargaining agreements. Working against the pre-*Lincoln Mills*' judicial hostility to arbitration,[10] these cases all involved motions to compel arbitration where one side, the employer, resisted or judicial review of arbitration awards previously rendered where one party, again the employer, would not adhere to the opinion and award.

Steelworkers Trilogy was not front page news. But on page 19 of the *New York Times* an unsigned article – lengthy in detail by today's standards said:

> In three important labor decisions today the Supreme Court laid down the policy that arbitrators should be able to do their work with little or no interference from the Federal courts.[11]

How little those writers knew about the issues that awaited labor and management and

[7] Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957).
[8] The National Labor Relations Board had already facilitated the arbitration process through *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Litigation was to continue about the proper accommodation between the NLRA and arbitration. *See, e.g.*, Olin Corp. 268 N.L.R.B. 573 (1964); Mobil Oil Exploration & Producing, 325 N.L.R.B.176, 180-181 1997 (Chairman Gould, concurring) (1997).
[9] June 20, 1960 was the day when I began my first labor law position, while in between my second and third years at Cornell Law School, with the United Auto Workers in Detroit. I began that day after walking about a mile or so down the road from my place of residence on East Jefferson Avenue to Solidarity House, the UAW headquarters.
[10] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (finding that the purpose of the Federal Arbitration Act was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."). One of the manifestations of judicial hostility is contained in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1923).
[11] *Arbitrator Role Upheld By Court*, N.Y. TIMES, June 21, 1960, at A19.

ultimately the High Tribunal itself. A couple of weeks later the *Times* editorialized what many of us at that time were thinking:

> One of the most important recent developments in the field of industrial relations—too little recognized by the general public—has been the enormous growth in the use of impartial arbitration to settle disputes that occur under collectively bargained agreements. Fifteen years or so ago instances were rare. Today more than 90 per cent of all labor contracts provide for arbitration, usually binding on both parties, as the final step in the processing of grievances.
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> But problems of enforcement have plagued the movement from the start…
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> The court has held that an arbitrator's award, based on his construction of the contract, must be enforced by the Federal court regardless of whether the judge agrees with that interpretation. The court has also held that a Federal judge cannot refuse to compel arbitration unless there is 'positive assurance; that the contract explicitly exempts that matter in dispute. It is not the function of the judge, in the Supreme Court's view, to decide which matters should be excluded if the contract calls for the submission of all grievances.
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> The trend of these decisions is surely sound. Arbitration has proved so conclusively to be the best way to settle contract grievances that the courts have an obligation to go as far as they can, within the bounds of correct legal reasoning, to strengthen the position of those who arbitrate.[12]

Ironically, this litigation took place under Section 301 of the Taft-Hartley amendments to the National Labor Relations Act which provides that "…suit[s] for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce…may be brought in any district courts of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." [13] The irony here is that this provision was enacted out of a concern articulated by the 80th Congress that unions, engaged in numerous strikes and disputes in the wake of World War II

[12] *Gains for Labor Arbitration*, N.Y. TIMES, Jul. 6, 1960, at A32.
[13] Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 USCA § 185).

over their pent-up demands suppressed during the wage restraint and no-strike policies during that substantial conflict,[14] were engaged in stoppages which in some instances were unfaithful to their no-strike obligations in collective bargaining agreements. Now the difficulties involved in enforcing some contracts which had been regarded as "gentlemen's agreements" and the problems in reaching unincorporated associations who were frequently sued in the names of their members were suddenly surmounted. The challenges to this statute, both constitutional and statutory (the latter taking the form of the Norris-La Guardia Act of 1932 and its prohibition against injunctions in the federal courts)[15] were not resolved until a decade later in the Court's landmark *Lincoln Mills* decision. And then came the *Steelworkers Trilogy*.

But first let us take a few steps back. In *Lincoln Mills*, it is to be recalled, that Justice Douglas' majority opinion although noting that the legislative history of Section 301 was, in its view, "somewhat cloudy and confusing" nonetheless found a "few shafts of light that illuminate our problem."[16] The Court noted that Congress was interested in "promoting collective bargaining that ended with agreements not to strike … Plainly the agreements to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."[17] A new substantive federal labor law of contract was to be fashioned by the courts "… from the

[14] *See generally* JAMES B. ATLESON, LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II (1998); Jesse Freidin & Francis J. Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309 (1945). On the earlier history and development of arbitration, *see generally* R.W. FLEMING, THE LABOR ARBITRATION PROCESS (1965); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557 (1983).
[15] Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-115.
[16] Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 452 (1957).
[17] *Id*. at, 455

policy of our national labor laws"[18] – and in so doing the Court presumably reversed the previous encounter with collective bargaining agreements where it had explicitly disclaimed reliance upon federal labor law in the discharge of a Communist party union member[19] and in contractual litigation over what the Court characterized as "uniquely personal."[20] In a stinging rebuke Justice Frankfurter, dissenting, derided the Court's majority interpretation in Section 301 as one which attributed to the section "…an occult content" which found a "clear" legislative instruction through "… more than be fairly asked even from the alchemy of construction."[21] Significantly, for the future development of labor arbitration law, the dissent found the "… rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion." And because the Act "authorize[s] the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for 'contracts of employment' … the Court would hardly spin such power out of the empty darkness of § 301."[22]

In the wake of *Lincoln Mills*[23] the Court soon addressed a series of questions – the first of which involved the relationship between the judiciary and arbitrators. The *Steelworkers Trilogy* sought to limit the role of the courts in resolving Section 301 contract issues so as to avoid Justice

[18] *Id*. at 456
[19] Black v. Cutter Laboratories, 351 U.S. 292 (1956).
[20] Association of Westinghouse Salaried Emp. v. Westinghouse Elec. Corp., 348 U.S. 437, 461 (1955). Later the Court did so explicitly in *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). *See, infra*, note ___.
[21] Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 461 (1957) (Frankfurter, J., dissenting)
[22] *Id*. at 461.
[23] *See* Saul G. Kramer, *In the Wake of* Lincoln Mills, 9 LAB. L.J. 835 (1958). *See also* Archibald Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247 (1958); Archibald Cox, *Reflections Upon Labor Arbitration*, 73 HARV. L. REV. 1482 (1959); William B. Gould, *The Supreme Court and Labor Arbitration*, 12 LAB. L.J. 330 (1961); Bernard Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI L. REV. 464 (1961); Clyde Summers, *Judicial Review of Labor Arbitration*, 2 BUFFALO L.REV 1 (1952). The litigation itself has been chronicled in Katherine V.W. Stone, *The Steelworkers Trilogy: The Evolution of Labor Arbitration*, LABOR LAW STORIES, 149 (Cooper & Fisk, eds.) (2005).

Frankfurter's Cassandra-like warning that "judicial intervention is ill-suited to the special characteristics of the arbitration process and labor disputes."[24] Since the parties had bargained for the presumed superior expertise of arbitrators, where there was a broad arbitration clause providing the third party neutral with jurisdiction over a wide variety of grievances involving the interpretation of a collective bargaining agreement "…only the most forceful evidence of the purpose to exclude the claim from arbitration can prevail, particularly where…the exclusion is vague and the arbitration clause is quite broad."[25] The evil to be avoided was judicial involvement in the merits through "entangle[ment]…in the construction of the substantive provisions of the labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."[26] Because the "mature labor agreement" attempted to regulate "all aspects of the complicated relationship," given the compulsion to arrive at an agreement dictated sometimes by economic pressure and induced by the duty to bargain obligations were frequently present. Said the Court through Justice Douglas: "Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the Agreement."[27] Therefore, said the Court: "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[28]

One of the *Steelworkers Trilogy* also dealt with the award once it had been rendered by the arbitrator. Here, said the Court, the arbitrator might "look for guidance from many sources," but was confined to an award where it "…is legitimate only so long as it draws its essence from

[24] Lincoln Mills, *supra* note 16, at 463.
[25] Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582-85 (1960); *See also* United Steelworkers of the American Mfg. Co. 363 U.S. 564 (1960).
[26] *Id*.
[27] *Id*. at 580.
[28] *Id*. at 582.

the collective bargaining agreement. When the arbitrators' words manifested an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[29]

Thus, *Steelworkers Trilogy* established the broad parameters. But this half century, from Eisenhower to Obama, has brought much change and here I attempt to address some aspects of it and a number of the issues which are raised by its progeny. That said, before we discuss them seriatim it is important to note a second irony.

The Federal Arbitration Act, which some courts have held to be applicable to collective bargaining agreements,[30] in the wake of *Circuit City*,[31] now clearly provides much more finality

[29] United Steelworkers v. Enterprise and Wheel Corporation, 363 U.S. 593, 597 (1960).

[30] *Compare* Coca-Cola Bottling Co. of New York, Inc. v. Soft Drink and Brewery Workers Union Local 812, Int'l Bhd. of Teamsters, 242 F.3d 52, 53 (2d Cir. 2001) ("[i]n cases brought under Section 301 ... the FAA does not apply."); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir. 1996) ("We need not rely on the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, in this case because, in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements."); Int'l Chem. Workers Union v. Columbian Chemicals Co., 331 F.3d 491, 494 (5th Cir. 2003) (finding that the district court appropriately relied only on Section 301, as opposed to the FAA, when confirming an award brought pursuant to an arbitration mandated by a collective bargaining agreement); International Brotherhood of Teamsters, Local 519 v. United Parcel Service, Inc., 335 F.3d 497, 503 (6th Cir. 2003) ("Although the Federal Arbitration Act ('FAA') does not apply to collective bargaining agreements, *see* 9 U.S.C. § 1, federal courts have looked to it for guidance in labor cases brought under § 301 of the Labor Management Relations Act ('LMRA'), 29 U.S.C. § 185."); *and* Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 380 F.3d 1084, 1097 (8th Cir. 2004) ("§ 301 provides an independent basis for federal jurisdiction to enforce labor arbitration[.]"); *with* Electronics Corp. of Am. v. International Union of Elec., Radio and Mach. Workers, Local 272, 492 F.2d 1255, 1258 (1st Cir. 1974) ("In directing the parties to resubmit the issues to arbitration, we act within the scope of the Federal Arbitration Act ... which, we have held, applies to collective bargaining agreements");; Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, Local 437, 207 F.2d 450 (3d Cir. 1953) (holding that the FAA applies to collective bargaining agreements); *and* Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Indus. Workers of America, AFL-CIO, 36 F.3d 712, 715 (7th Cir. 1994) ("As it happens, our circuit is among the minority that has limited § 1 [of the Federal Arbitration Act] to the transportation industries and therefore applies the Arbitration Act to most collective bargaining agreements."). Furthermore, not all circuits have decided the issue. *See, e.g.*, Dogherra v. Safeway Stores, Inc. 679 F.2d 1293, 1297 (9th Cir. 1982) ("Neither the Supreme Court nor this court has ever held the Federal Arbitration Act applicable to arbitration of labor disputes… Because fraud is a ground for vacating an arbitral award under either the Federal Arbitration Act or the federal common law fashioned from the policy of the national labor laws under the authorization of *Textile Workers v. Lincoln Mills*, we need not decide whether the Federal Arbitration Act governs labor arbitrations.") (citations omitted); Barrington v. Lockheed Martin, 483 F.Supp.2d 1154, 1163 (M.D.Fla. 2007) ("Judge Fawsett also determined that the United States Court of Appeals for the Eleventh Circuit *would likely hold* that the procedures of the FAA apply to an arbitration conducted pursuant to the provisions of a collective bargaining agreement to the extent that those procedures do not contradict the more specific provisions of LMRA.") (emphasis added). On the peculiar nature of the collective bargaining agreement produced both by agreement and statute, *see* J.I. Case v. NLRB 321 U.S. 332 (1944).

[31] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (holding that the FAA applies to arbitration agreements in individual employment contracts).

to an arbitration award than does Section 301. It is to be recalled that *Steelworkers Trilogy*, most particularly *United Steelworkers v. Enterprise and Wheel Corporation*[32] established the proposition that courts must not interfere with the enforcement of such awards unless they betrayed the essence of the agreement. The judicial review romp through the playpen of public policy as a basis for invalidating awards had yet to come.

And here is yet another irony. Last year, with no mention or reference to Justice Frankfurter's dissent in *Lincoln Mills* the Court decided an important case involving the collective bargaining agreement and the respective roles of arbitrators and courts under the Federal Arbitration Act without even discussing the content of the statute or its relationship to labor arbitration disputes arising under such agreements! [33]

Tied to this development is the fact that the Court has seemingly so restricted judicial review of labor arbitration awards under the 1925 law, that the question of judicial review under public law standards in discrimination cases, for instance, remains unsettled.[34] But it seems clear that that previous reliance upon a standard that would invalidate arbitrations where there was a manifest disregard for law cannot now stand as an independent basis for review.[35] The major

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[32] Enterprise and Wheel Corporation, *supra* note 29.

[33] 14 Penn Plaza v. Pyett, 129 S.Ct. 1456 (2009).

[34] Hall Street Assocs., L.L.C. v. Mattel, 128 S.Ct. 1396 (2008). *See also* William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Arbitration*, 55 EMORY L.J. 609 (2006). For an example of the complexity of the public-law statutes that may be involved in these arbitrations, *see, e.g.*, Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) (employer need not specifically designate leave as FMLA leave for it to count against time which employer is required to provide).

[35] Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) ("We conclude that *Hall Street* restricts the grounds for vacatur to those set forth in § 10 of the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.*, and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA."). Judge Jolly noted that a circuit split had developed on this issue:

> Four other circuits have considered this issue. The First Circuit, in dictum and with little discussion, concluded that *Hall Street* abolished manifest disregard of the law as a ground for vacatur. *See Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008) ("We acknowledge the Supreme Court's recent holding in *Hall Street Assocs., L.L.C. v. Mattel* that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]." (citations omitted)). The Sixth Circuit, in an unpublished opinion, reached the opposite conclusion by narrowly

question is whether considerations akin to that standard are subsumed within Sections 10 and 11 of the Act.[36]

That said, I propose to discuss the following: First, I discuss the problems that have arisen in motions to compel arbitration and, perhaps more important, judicial review of awards, notwithstanding what seemed to be fairly clear words in 1960 – and the issues that have been raised in connection with the no-strike portion of the *quid pro quo* promoted in both *Lincoln Mills* and *Steelworkers Trilogy*. Second, I consider the relationship between the new public law of these past fifty years and, in particular, the relationship between arbitration and anti-discrimination legislation which emerged due to the civil rights revolution of the early '60s and the legislation enacted at both a federal and state level in its aftermath. In this connection, I focus in particular upon the so-called external law issue in statutory arbitrations and the implications of what I view as the badly flawed analysis of the Supreme Court in *14 Penn Plaza v. Pyett*[37] (hereinafter to be referred to as *Pyett*). Here I examine the relationship between the Federal Arbitration Act of 1925[38] and labor arbitration since, without any discussion whatsoever in what was arguably the mirror image of the Court's refusal to discuss the statute in *Lincoln Mills* itself, the Court presumed to resolve the issues posed by that dispute under the standards of that Act. The Supreme Court has earlier stated – this time with some slight discussion but

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construing the holding of *Hall Street* to apply only to contractual expansions of the grounds for review. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed.Appx. 415, 418-19 (6th Cir. 2008). The Second Circuit has also held that manifest disregard survives *Hall Street. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93-95 (2d Cir. 2008). The court, however, recognized that *Hall Street*'s holding was in direct conflict with the application of manifest disregard as a nonstatutory ground for review, but resolved the conflict by recasting manifest disregard as a shorthand for § 10(a)(4). *Id.* Finally, the Ninth Circuit has concluded that *Hall Street* did not abolish manifest disregard because its case law defined manifest disregard as shorthand for § 10(a)(4). *See Comedy Club Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("*Comedy Club II*").

Id. at 355 -356. On October 5, 2009, the Supreme Court denied petitions for *certiorari* in *Coffee Beanery, Ltd. v. WW, L.L.C.*, 130 S.Ct. 81 (2009), and *Comedy Club, Inc. v. Improv West Assocs.*, 130 S.Ct. 145 (2009).

[36] Citigroup Global, *supra* note 35, at 358.

[37] Pyett, *supra* note 33.

[38] Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

without any rationale that the courts should look to the 1925 law as a "source for guidance" under Section 301.[39]

Third, I examine the case law that has emerged as the result of a Court test of Supreme Court decisions dealing with both arbitration and the duty to bargain under the National Labor Relations Act, fueled by the policy considerations adumbrated in *Steelworkers Trilogy*. The first of these is *Wiley v. Livingston*[40] in the '60s and great debate has now emerged at the circuit court level as to the meaning of these decisions.

Fourth, I consider the relationship between the jurisprudence of Section 301 during this past half century and of the law relating to so-called interest arbitration awards where the arbitrator is performing a legislative as opposed to a quasi-judicial function in the sense that he or she is writing the contract for the parties in the former instance. Do the public policy considerations enshrined in the *Steelworkers Trilogy* apply to interest arbitration cases with which, like the statutory arbitrations, the overwhelming percentage of the National Academy of Arbitrators members have little experience?[41] And what role does the Federal Arbitration Act play in this arena as well? The emergence of collective bargaining in the public sector and the *de jure* consensus that the public employee right to strike cannot be recognized or tolerated, has given rise to interest arbitration[42] as a substitute for strife for new collective bargaining

[39] United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 41 n.9 (1987).
[40] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).
[41] *See* Gary Blasi and Joseph W. Doherty, California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 50, (Center for Law & Public Policy 2010), *available at* http://cdn.law.ucla.edu/SiteCollectionDocuments/Centers%20and%20Programs/FEHA%20at%2050%20-%20UCLA%20-%20RAND%20Report_FINAL.pdf.
[42] *See* Alaska Stat. § 23.40.070(b) (2006) (compulsory arbitration for police, fire, correctional facility, and hospital employees); Conn. Gen. Stat. Ann. §§ 5-276a(e), 7-473c (West 2007 & Supp. 2008) (binding, item-by-item final-offer arbitration available at either party's request after statutory period of negotiation for all state employees; mandatory after statutory period of negotiation for municipal employees); Del. Code Ann. tit. 19, §§ 1614-1615 (2006) (binding, total-package final-offer arbitration available at either party's request or the mediator's recommendation for police and fire employees); D.C. Code Ann. §§ 1-617.02, .17 (2009) (compulsory binding, total-package final-offer arbitration after statutory negotiation period for all Washington D.C. employees when

agreements. Final offer arbitration has been incorporated into some state statutes – and the debate, if it materializes, about the Employee Free Choice Act will focus upon first contract arbitration. Here the words of Justice Stevens, albeit uttered within the context of litigation relating to the enforcement of the collective bargaining agreement may nonetheless have some applicability: "[a strike or a lockout] … is simply a method by which one party imposes its will

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compensation is at issue; a variety of mechanisms are available in other cases); Haw. Rev. Stat. Ann. § 89-11 (LexisNexis 2007) (compulsory binding arbitration for most state employees-including police and fire-after statutory negotiation period is the default rule; parties may stipulate their own impasse procedures that end in arbitration); 5 Ill. Comp. Stat. Ann. 315/14 (2005 & Supp.) (binding, item-by-item final-offer arbitration at either party's request after statutory period of negotiation for security employees, peace officers, and firefighters); Iowa Code Ann. §§ 20.22, 679B.15-.27 (West 2009) (binding, item-by-item final-offer arbitration available at either party's request after statutory negotiation process for most public employees, including police; bargaining on behalf of firefighters in towns larger than 10,000 is probably governed by § 679B, which does not provide for binding arbitration); Me. Rev. Stat. Ann. tit. 26, § 965 (2007 & Supp. 2008) (compulsory binding arbitration on issues other than salary, pension, and insurance after statutory negotiation process for public employees including police and fire employees; parties may agree to binding arbitration on those issues as well); Mich. Comp. Laws Ann. §§ 423.231-247 (West 2001 & Supp. 2008) (compulsory binding item-by-item final-offer arbitration for police and fire employees); Minn. Stat. Ann. § 179A.16 (West 2006 & Supp. 2008) (binding final-offer arbitration at the request of either party for "essential employees," a designation which includes police and fire employees; the parties may choose item-by-item or total-package); Mont. Code Ann. §§ 39-31-503-505, 39-34-101-103 (2007) (binding total-package final-offer arbitration available at the request of either party for police and fire employees); N.J. Stat. Ann. §§ 34:13A-14-16 (West 2000 & Supp. 2008) (compulsory arbitration after statutory negotiation process for police and fire employees; parties may chose the type of arbitration by agreement); N.M. Stat. Ann. § 10-7E-18 (West 2003 & Supp. 2008) (binding, total-package final-offer arbitration available at either party's request after statutory negotiation period for public employees); Okla. Stat. Ann. tit. 11, §§ 51-101-113 (West 1994 and Supp. 2009) (binding, total-package final-offer arbitration available at either party's request after statutory negotiation period for police and fire employees); Or. Rev. Stat. Ann. § 243.742 (West 2003 & Supp. 2008) (compulsory binding arbitration for public employees prohibited from striking, including police and fire); 43 Pa. Cons. Stat. Ann. §§ 217.1-.10 (West 1992 & Supp. 2008) (binding arbitration at request of either party after statutory negotiation period for police and fire); R.I. Gen. Laws §§ 28-9.1-1-16, 28-9.2-1-16 (2006 & Supp. 2008) (compulsory binding arbitration after statutory negotiation period for police and fire employees); Vt. Stat. Ann. tit. 21, § 1733 (West 2007) (compulsory binding arbitration after statutory negotiation process for police and fire employees); Wash. Rev. Code Ann. § 41.56.450 (West 2006) (binding arbitration after statutory negotiation process for "uniformed personnel," which includes police and fire employees); Wis. Stat. Ann. §§ 111.70, .77 (West 2002 & Supp. 2008) (compulsory binding total-package final-offer arbitration after statutory negotiation process for police and fire employees). *See also* Del. Code Ann. tit. 14, §§ 4014-4015 (binding, total-package final-offer arbitration available at either party's request or the mediator's recommendation for public school employees); D.C. Code. §§ 1-617.02, .17 (2006) (compulsory binding, total-package final-offer arbitration after statutory negotiation period for all Washington D.C. employees when compensation is at issue; a variety of mechanisms are available in other cases); Iowa Code Ann. § 20.22 (West 2001) (binding, item-by-item final-offer arbitration available at either party's request after statutory negotiation process for most public employees including teachers); Me. Rev. Stat. Ann. tit. 26, § 965 (2007 & Supp. 2008) (compulsory binding arbitration on issues other than salary, pension, and insurance after statutory negotiation process for public employees, including teachers; parties may agree to binding arbitration on those issues as well); N.M. Stat. Ann. § 10-7E-18 (West 2003 & Supp. 2008) (binding, total-package final-offer arbitration available at either party's request after statutory negotiation period for public employees); R.I. Gen. Laws §§ 28-9.3-1-16 (2006) (arbitration available at either party's request; the decision is binding on all issues "not involving the expenditure of money").

upon its adversary. Such a method is the antithesis of the peaceful methods of dispute resolution envisaged by Congress when it passed the LMRA."[43]

Some of these arbitration disputes about whether interest arbitration can be imposed in arbitration itself relate to a so-called "evergreen" dispute and rulings of the National Labor Relations Board through its interpretation of the duty to bargain provisions contained in the statute.[44]

II. The Next Stage of the *Steelworkers Trilogy*: Initial Review and No-strike Pledges

In the wake of *Steelworkers Trilogy* beginning with the '60s a whole host of issues came before the Court with considerable frequency. The Court held in short order that notwithstanding the fact that the conduct involved in litigation to enforce collective bargaining agreements was arguably an unfair labor practice[45] within the jurisdiction of the National Labor Relations Board, the matter could be brought to court – in this instance by individual employees as well as the union.[46] Suits involving the terms of a strike settlement between labor and management and not a collective bargaining agreement were enforced.[47] Though the substantive of labor law of contracts was federal, actions could be brought in state court as well as federal.[48]

Suits by individual employees represented by unions which sought to compel labor organizations to take their issues under the grievance-arbitration machinery through the full steps

[43] Groves v. Ring Screw Works, 498 U.S. 168, 174 (1990). In major respects this echoes Justice Stevens' carefully reasoned dissent in *Buffalo Forge v. United Steelworkers* 428 U.S. 397 (1976). *Cf*. William B. Gould IV, *On Labor Injunctions Pending Arbitration: Recasting* Buffalo Forge, 30 STAN. L. REV. 533 (1978).
[44] Globe Newspaper Co. v. International Ass'n of Machinists, 648 F.Supp.2d 193, 198 (D.Mass. 2009) ("It appears that every court to have considered [the question of whether an arbitrator has the authority to re-impose an interest arbitration provision in a new collective bargaining agreement over a party's objection] has concluded that this type of second generation interest arbitration provision is unenforceable as contrary to public policy.")
[45] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
[46] Smith v. Evening News Ass'n, 371 U.S. 195 (1962). On the issue of the standing of individual employees to sue, this meant that another pre-*Steelworkers Trilogy* decision—*Association of Westinghouse Salaried Emp. v. Westinghouse Elec. Corp*., 348 U.S. 437 (1955)—was overruled.
[47] Retail Clerks v. Lion Dry Goods, Inc., 369 U.S. 17 (1962).
[48] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

of the process culminating in arbitration itself, were rejected in the absence of the unions' failure to meet its duty of fair representation obligation, *i.e.*, the obligation to represent the employee and the bargaining unit fairly without hostility, discrimination or bad faith or the handling of the grievance in a "perfunctory" method.[49] Said the Court: "[w]e do not agree that the individual employee has an absolute right to have [a] grievance taken to arbitration…"[50] The Court emphasized the fact that the settlement process screened out frivolous grievances which would otherwise be "costly and time-consuming" for the parties. Subsequently in two decisions the Court excluded negligence as a basis for establishing a duty of fair representation violation.[51] Said the Court in the 1970s: "union discretion is essential to the proper function of the collective bargaining system."[52] The effect of the so-called hybrid duty of fair representation/Section 301 cases was to immunize much of the parties' relationship from judicial review – particularly where that review was sought by individual employees.

For some time it was unclear as to whether the standard of resolving all doubts in favor of arbitrability was one which meant that the judiciary or the arbitrator was to determine the question of whether the dispute was arbitrable in the first instance. Ultimately, the Supreme Court held in *AT&T v. Communications Workers*[53] that the presumption was that the matter was for the courts and not the arbitrators – though that presumption itself could be rebutted if the collective bargaining agreement explicitly bestowed jurisdiction upon the arbitrator. But standards relating to judicial review of arbitration awards where one party, usually the employer, challenged the award were different. The standard, *i.e.*, that the arbitrator was not to dispense his

[49] Vaca v. Sipes, 386 U.S. 171, 191 (1967). *See also* Hines v. Anchor Motor Freight, Inc. 424 U.S. 554 (1976); Bowen v. United States Postal Service 459 U.S. 212 (1983).
[50] *Id*.
[51] Steelworkers v. Rawson, 495 U.S. 362 (1990); Air Line Pilots v. O'Neill, 499 U.S. 65 (1991).
[52] Electrical Workers (IBEW) v. Faust, 442 U.S. 42 (1979).
[53] AT&T v. Communications Workers, 475 U.S. 643 (1986).

or her own brand of industrial justice and that his award was to manifest fidelity to the collective bargaining agreement was fairly easy to state but difficult for the courts to apply in fact.[54] Professor Feller, who argued *Steelworkers Trilogy* and much of its progeny in the 1960s was focused exclusively upon Section 301 and not the FAA – and, most probably, as a result, so was Justice Douglas' opinion. Feller said later about the holding that the arbitrator's award must owe its "essence" to the agreement – one man's essence had an entirely different meaning when applied by another man or woman.[55] Judge Sutton of the Court of Appeals for the Sixth Circuit noted in 2006 that his review of challenges to arbitration awards in his circuit established that one out of four was reversed.[56] Though undoubtedly most arbitration awards are not challenged in the courts, the odds for reversal, when doing so, are fairly good with these kinds of numbers.

The other shoe had dropped long before this story had played itself out. This was the other part of the bargain, *i.e.*, the *quid pro quo* – which, it is to be recalled, was substitution of peaceful resolution through arbitration for strikes. Were injunctions available here too? But the Norris-La Guardia Act of 1932[57] prohibiting the issuance of injunctions by federal courts against strikes and picketing – its strictures had been avoided in *Lincoln Mills* on the ground that a decree providing for equitable relief through a motion to compel arbitration was not "part and parcel" of the abuses at which Norris La-Guardia was aimed – was a problem. Strikes in violation of no-strike clauses were a closer call, notwithstanding the legislative history of Section 301 which had been much more concerned with strikes than arbitration. Though the Court had

[54] Enterprise Wheel, *supra* note 29, at 597; *Cf.* Major League Baseball Players Association v. Garvey, 532 U.S. 504 (2001).
[55] David E. Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards,* 19 BERKELEY J. EMP. & LAB. L. 296, 303 (1998).
[56] Michigan Family Resources, Inc. v. Service Employees Intern. Union Local 517M, 438 F.3d 653, 663-672 (6th Cir. 2006) (J. Sutton, concurring).
[57] For insight into the historical and intellectual background of the Norris-LaGuardia Act, *see* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

appeared to speak more qualifiedly about the *quid pro quo* a couple of years after the *Steelworkers Trilogy*,[58] injunctions for the violations of no-strike clauses presented to the Court posed a more direct tension between Norris-La Guardia and the Taft-Hartley amendment in the form of Section 301.

Where the Railway Labor Act of 1926 was involved the Court, in *Brotherhood of Railroad Trainmen v. Chicago & Indiana Railroad*,[59] had held that strikes called over an issue properly submitted to the National Railroad Adjustment Board (NRAB) could be enjoined notwithstanding the Norris-La Guardia hurdle. But in 1962 the Court by a vote of 5-3, over Justice Brennan's vigorous dissent, rejected the same argument under Taft-Hartley on the ground that it could not find that the Norris-La Guardia Act's bar against injunctions in labor disputes had been "impliedly repealed" by Section 301.[60] A majority of the Court was of the view that Section 301 and Norris La-Guardia could not be accommodated to one another. Eight years later the Court, speaking through Justice Brennan who had dissented in *Sinclair*, reversed that opinion in *Boys Markets, Inc. v. Retail Clerks Union*[61] and held, this time by 5-2 vote, that federal courts were not precluded from issuing injunctions against strikes in violation of collective bargaining agreements. In this case, Justice Stewart rejected the doctrine of *stare decisis* quoting a concurring opinion of Justice Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[62]

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[58] Drake Bakeries, Inc. v. Local Fifty, American Bakery & Confectionery Workers, 370 U.S. 254, 267, n. 7 (1962); Local 721 United Packinghouse Workers v. Needham Packing Co., 376 U.S. 247 (1964).
[59] Brotherhood of Railroad Trainmen v. Chicago & Indiana Railroad, 353 U.S. 30 (1957).
[60] Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).
[61] Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970). The case is discussed in more detail in William B. Gould IV, *On Labor Injunctions, Unions, and the Judges: The* Boys Markets *Case*, 1970 SUP. CT. REV. 215; Note, *Labor Injunctions,* Boys Markets, *and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972).
[62] Henslee v. Union Planters Bank, 335 U.S. 595, 600 (1949).

The Court's reasoning factored in a number of considerations[63] not the least of which was the point that in the absence of an injunction an employer was deprived of its most effective remedy for a no-strike violation.[64] While the *Boys Markets* opinion did not assess the effectiveness of other remedies for no-strike clause violations such as discipline and discharge, it did nonetheless focus upon the alternative of damage actions on a breach of contract theory. Said the Court:

> …an award with damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.[65]

Boys Markets was predicated upon the order of arbitration as a condition for the injunction against the strike – in this case an arbitration of the underlying grievance which gave rise to economic pressure. But clearly the significance of the injunction remedy was to be found in the fact that it was so expeditious, in contrast to other avenues like damages and employer self-help

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[63] These considerations included: (1) an erosion of state jurisdiction through removal under *Avco Corp. v. Machinists*, 390 U.S. 557 (1968), thus diminishing employers' enforcement of no-strike clauses; (2) the devastating implications if federal law deprived employers of equitable remedies in state courts; (3) the idea—in my view erroneous—that employers would not have an incentive to negotiate for arbitration/no-strike clauses; (4) the growth of labor unions in "strength" and "toward maturity" that is quite different from the "nascent" movement at the time of the Norris-LaGuardia Act; and (5) the availability of relief under the Railway Labor Act.

[64] Boys Markets, *supra* note 61, at 248:

> While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike.

The Court also includes an extended quotation from an ABA report on the failings of the pre-*Boys Markets* situation:

> Under existing laws, employers may maintain an action for damages resulting from a strike in breach of contract and may discipline the employees involved. In many cases, however, neither of these alternatives will be feasible. Discharge of the strikers is often inexpedient because of a lack of qualified replacements or because of the adverse effect on relationships within the plant. The damage remedy may also be unsatisfactory because the employer's losses are often hard to calculate and because the employer may hesitate to exacerbate relations with the union by bringing a damage action. Hence, injunctive relief will often be the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor policy.

Id. at 248, n. 17.

[65] *Id*. at 248.

disciplinary measures.

Thus two themes ran through *Boys Markets*, *i.e.*, the availability of arbitrations as a substitute for industrial strife and the *quid pro quo* idea. Soon, the Court would be called upon to determine which of the two themes was dominant. (Subsequently the Court implied no-strike obligations for the purpose of an injunction from a union's agreement to arbitrate all issues.)[66] Then a 5-4 majority of the Court held that a federal court could not enjoin a sympathy strike pending an arbitrator's decision of whether the strike is forbidden by the express no-strike clause contained in the collective bargaining agreement. That was *Buffalo Forge v. United Steelworkers*[67] where the majority stated that an underlying grievance which triggered the breach of contract strike and an order to arbitrate the grievance were a pre-requisite for an injunction. Nonetheless, in my view, Justice White's opinion in *Buffalo Forge* was flawed in a number of critical respects – particularly his assumption that the parties had bargained for a no-strike injunction in *Boys Markets* and had not done so in *Buffalo Forge*. This just does not happen, though the parties frequently negotiate so-called "quickie" or expeditious no-strike violation procedures through which an arbitrator can issue a cease and desist award against a no-strike violation which will, if necessary, be taken to court for enforcement.[68]

As I had advocated in my *Boys Markets* discussion, the judges should not have issued an injunction without a rigorous review of the no-strike clause scope and question of whether it had been violated in order to avoid a Norris-La Guardia collision. This was the standard taken by Justice Stevens dissenting in *Buffalo Forge*, *i.e.*, "The judge should not issue an injunction

[66] Gateway Coal Company v. United Mine Workers of America, 414 U.S. 368 (1974).
[67] Buffalo Forge v. United Steelworkers, 428 U.S. 397 (1976). I discuss this holding and its implications in William B. Gould IV, *On Labor Injunctions Pending Arbitration: Recasting* Buffalo Forge, 30 STAN. L. REV. 533 (1978). For the history leading up to *Buffalo Forge*, *see* Arthur B. Smith, Jr., *The Supreme Court,* Boys Market *Labor Injunctions, and Sympathy Work Stoppages*, 44 U. CHI. L. REV. 321, 323-30 (1977).
[68] Buffalo Forge, *supra* note 67, at 431 (J. Stevens, dissenting).

without convincing evidence that the strike is clearly within the no-strike clause."[69] Injunctions were only bargained for in an expedited no-strike procedure. But *Buffalo Forge* has remained good law (even though it is in truth bad law) and the Court has followed it in cases involving breach of contract stoppages over political issues.[70] Indeed, the holding has precluded the issuance of injunctions for clear violations of no-strike clauses involving workplace issues where they are non-arbitrable.[71] Notwithstanding the tone of cautious trepidation followed by the majority in *Buffalo Forge*, the circuit courts have jumped in and fashioned so-called "reverse *Boys Markets*" injunctions to enjoin management decisions involving generally a loss of jobs through plant closures, contracting out of work where the passage of time would make an arbitral remedy ineffective.[72] Thus in these key respects, *i.e*., (1) the availability of injunctions for violations of no-strike clauses, express or implied, on a *Boys Markets* theory; (2) the unwillingness to extend it to issues where there is no underlying grievance which itself is susceptible to arbitration as part of *quid pro quo* for an injunction; (3) and the availability of

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[69] *Id*. at 431-32 (J. Steven's giving his support to a form of expedited arbitration in the context of *Boys Markets* injunctions). *See also* Gould, *On Labor Injunctions Pending Arbitration*, *supra* note ___, at 541-42:

> [W]henever a *Boys Markets* injunction issues, it should be conditioned on the willingness of both parties to accede to expedited arbitration procedures. Under such procedures, the arbitrator decides in a few days or hours whether the union has breached the no-strike clause, as well as whether the employer has violated the agreement in connection with the underlying grievance that precipitated the strike. Thus, expedited arbitration limits the duration of the court's injunction and preserves the role of arbitration as the dispute-settlement mechanism. Although most *Boys Markets* cases are not reported, it does not appear that many courts have required expedited arbitration coupled with a de novo hearing as a condition of injunctive relief. The failure of courts to adopt these two proposals has contributed substantially to an avalanche of *Boys Markets* cases and problems relating to union worker disobedience.

[70] Jacksonville Bulk Terminals v. Longshoremen, 457 U.S. 702 (1982).

[71] Coordinating Committee Steel Companies v. United Steelworkers of America, 436 F.Supp. 208 (W.D.Pa. 1977).

[72] Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927 (1st Cir. 1988); American Postal Workers Union, AFL-CIO v. U.S. Postal Service 766 F.2d 715 (2d Cir. 1985); United Steelworkers of America, AFL-CIO v. Fort Pitt Steel Casting, Division of Conval-Penn, Inc., Division of Conval Corp. 598 F.2d 1273 (3d Cir. 1979); Lever Bros. Co. v. International Chemical Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976)**;** Gulf Coast Indus. Workers' Union v. Exxon Co., U.S.A., 712 F.2d 161 (5th Cir. 1983); Aluminum Workers Intern. Union, AFL-CIO, Local Union No. 215 v. Consolidated Aluminum Corp. 696 F.2d 437, 441 (6th Cir. 1982); Local Lodge 1266, IAM v. Panoramic Corp., 668 F.2d 276, 279-83 (7th Cir. 1981)**;** Teamsters Local 610 v. Kroger Co., 858 F.2d 415 (8th Cir. 1988)**;** Newspaper & Periodical Drivers' & Helpers' Union, Local 921 v. San Francisco Newspaper Agency, 89 F.3d 629, 632 (9th Cir.1996)**;** Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO, Local 2-286 v. Amoco Oil Co. (Salt Lake City Refinery), 885 F.2d 697 (10th Cir. 1989).

injunctions in so-called reverse *Boys Markets* cases the law has remained stable for most of these four decades since *Boys Markets*.

To be sure, some of the reasoning in *Buffalo Forge* seemed to undercut the basis for reverse *Boys Markets* injunctions. This was so in light of two considerations that seemed important to Justice White in that case. The first is the idea that relief for violation of the no-strike clause is essential only when judicial intervention or review is bargained for rather than the arbitral process. This was a consideration not relied upon by the Court in *Boys Markets*, notwithstanding the above-noted practice of a quickie or expeditious no-strike arbitration procedures where arbitrators have issued cease and desist orders against no-strike violations.

The second theme in *Buffalo Forge* was in some respects a logical corollary from the first, at least in sympathy strike cases, from a policy perspective courts ought not to become involved in issuing preliminary injunctions because of the interference with the arbitral process. Said *Buffalo Forge*, in response to the argument that injunctions could preserve the status quo until the question of whether the no-strike obligation had been violated was resolved in arbitration:

> But this would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is permitted. Injunctions against strikes, even temporary injunctions, very often permanently settle the issue; and another context time and expense would be discouraging factors to the losing party in court in considering whether to relitigate the issue before the arbitrator.[73]

Thus the teaching of *Buffalo Forge* has a bearing upon union motions for injunctions

[73] Buffalo Forge, *supra* note 67, at 412.

preserving the status quo ante until the ground that the arbitration process would be frustrated in the interim until the hearing itself. The implication of Justice White's opinion is that the parties themselves must bargain some expeditious procedure in order for the court to grant an injunction in that situation as well – the prospect of "massive preliminary injunctions" and the preemptive nature of judicial views on the arbitration process which follows would apply here as well. The Court of Appeals for the Ninth Circuit initially[74] took this view in a key case remanded in the wake of *Buffalo Forge* when it stated: "an undertaking to preserve the status quo pending arbitration would be to [the employer] … what an undertaking not to strike would be to a union."[75] In other words, just as the Court looked for a special bargain for procedure in a *Buffalo Forge* sympathy strike context, the same intent to have the matter treated expeditiously should be found in the form of a status quo clause which preserved conditions pending arbitration when the union sought to restrain employer conduct in the first take on this issue by the Ninth Circuit. Stated one court soon after the Ninth Circuit's position was taken: "Granting an injunction, even for the limited purpose of this case [a reverse *Boys Markets* injunction to preserve the status quo ante on unilateral changes at work involving assignment, overtime and contracting out of work and changes in work schedules, wages, and conditions] … would require some examination of the merits of the dispute between the parties … therefore, the type of injunction, requested by the Union might well contravene the policies of *Buffalo Forge*."[76]

But the weight of authority appears to be against this kind of position and to restrict

[74] The court would later abandon this approach in *Newspaper & Periodical Drivers' & Helpers' Union, Local 921 v. San Francisco Newspaper Agency*, 89 F.3d 629, 632 (9th Cir.1996)
[75] Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc., 529 F.2d 1073 (9th Cir. 1976) (Greyhound I), *vacated and remanded*, 429 U.S. 807 (9th Cir. 1977) (Greyhound II), *cert. denied*, 434 U.S. 837 (1977). *Contra* Lever Bros. Co. v. International Chemical Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976); Local Lodge No. 1266 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981).
[76] Texaco Independent Union v. Texaco, Inc., 452 F.Supp. 1097, 1105 (W.D.Pa. 1978).

Buffalo Forge, as the opinion itself states to "injunctions against strikes …."[77] – a conclusion perhaps partially justified by the *Lincoln Mills* reasoning to the effect that a collision with Norris-La Guardia could be avoided here because these cases are not "part and parcel" of the abuses at which that statute was aimed. Though, as noted, it has been said that a status quo procedure is to be implied in reverse *Boys Markets* actions, the key consideration is whether the arbitral process is frustrated in that the arbitrator is unable to return the parties to the status quo ante due to the passage of time.[78] Said the Seventh Circuit in a case involving the union's attempt to enforce a successorship clause against the predecessor before a new commercial relationship was consummated with a successor which would not adhere to the contractual obligations: "the implied status quo would emphasize the 'parties' intended forum or remedies for the resolution of contract disputes. As such, the approach is consistent with the concern expressed in *Buffalo Forge* that the parties be given the benefit of their bargain and that a contractually assumed arbitral remedy not be supplanted by injunctive relief."[79]

The Court of Appeals for the First Circuit state that the need for an implied status quo rule "… has as its premise what amounts to a lopsided vision of the covey of obligations arising in connection with collective bargaining pacts. Under such a view, an arbitration clause implicitly binds the union not to strike, but does not implicitly bind the employer to preserve the status quo … [the requirement of a status quo clause would be one in which '…the Court has added another story to the edifice erected by the Congress – and in the process, tilted the structure's delicate balance. The asymmetry of this promissory rule appears to contravene, at least implicitly, the equipoise between labor and management which Congress sought to forge

[77] Buffalo Forge, *supra* note 67, at 412.
[78] Oil, Chemical and Atomic Workers International Union, AFL-CIO Local 2-286 v. Amoco Oil Company (Salt Lake City Refinery), 885 F.2d 697 (10th Cir. 1989).
[79] Panoramic Corporation, *supra* note 72, at 282.

and which the Court elaborated in *Boys Markets*…"[80] The Court of Appeals for the Fourth Circuit in a fashion responsive to the concern expressed by *Buffalo Forge* about the impact upon judicial proceedings beyond the subsequent arbitration itself, stressed the need to stay free of the merits enough to allow evidence developed at a court hearing to be used in subsequent grievance proceedings.[81]

Fittingly, the courts have fashioned preliminary injunctions pending arbitration in a variety of reverse *Boys Markets* situations. For instance, a court has found an injunction is appropriate where liquidation and the disposition of assets will make any victory by the union at the bargaining table meaningless.[82] On the other hand where reinstatement and back pay in an arbitration can be complied with the compelling circumstances for a preliminary order are unnecessary.[83] This is so even though during the interim foreclosure, repossessions and injury to credit status take place because they do not threaten the integrity of the arbitral process. But the great candidates for preliminary injunction have been changes which result in the physical relocation of the facilities or ownership which cannot be reversed[84] – though the subcontracting which triggers a loss of business relationships between salespersons and customers will not suffice.[85]

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[80] Independent Oil & Chemical Workers v. Proctor & Gamble, 864 F.2d 927, 931 (1st Cir. 1988).

[81] Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71. v. Akers Motor Lines, Inc., 582 F.2d 1336, 1342 (4th Cir. 1978):

> …we also disapprove that portion of the district court's order which allows evidence developed at the court hearing to be used in subsequent grievance proceedings. The function of gathering and evaluating evidence is for the arbitrator. The parties agreed to this mechanism when they negotiated the mandatory grievance procedures. It is not for the courts to re-write the collective bargaining agreement.

[82] *Id*. at 1341.

[83] Aluminum Workers v. Consolidated Aluminum Corp., 696 F.2d 437 (6th Cir. 1982).

[84] United Electrical, Radio & Machine Workers v. Simpson Mfg. Co., 1983 U.S. Dist. LEXIS 19362, *1-2 (N.D.Cal. 1983).

[85] Bakery Drivers Union, Local 802 v. S.B. Thomas, Inc., 1978 WL 1654, *5, 1978 U.S. Dist. LEXIS 17085, *14 (E.D.N.Y. 1978).

Significantly in an era of health insurance debate, the loss of health insurance coverage has constituted irreparable harm.[86] Some courts insisting upon a need to show actual irreparable harm through the denial of health care,[87] notwithstanding the Court of Appeals for the Eighth Circuit which has implied that a diminution in scope of health coverage does not constitute irreparable injury,[88] the courts have held that without injunctive relief in the interim the eventual award will be a "hollow formality."[89]

Thus, *Buffalo Forge* notwithstanding labor and management both appear to be accepting or reconciled to judicial enforcement of both arbitration and no-strike clauses – a consensus, however, which does not carry over to the issue of and standards for judicial review.

III. The *Steelworkers Trilogy* and Public or External Law: Statutory Arbitrations

Title VII, of the Civil Rights Act of 1964, the first comprehensive anti-discrimination legislation which has fueled a wide variety of other statutes and executive orders at both the federal and state levels, was not in existence that summer of 1960 when the *Steelworkers Trilogy* was handed down. The tension between the role of an arbitrator who was confined to the collective bargaining agreement and public law obligations emerged in the '60s matters which triggered debate amongst arbitrators and scholars[90] from the get go – and in the context of the Academy there broke out a debate between Robert Howlett and Bernard Meltzer.[91] The

[86] Whelan v. Colgan, 602 F.2d 1060 (2d Cir. 1979).
[87] *Compare* Morgan v. Fletcher 518 F.2d 236, 240 (5th Cir. 1975) *with* Gonzalez v. Chasen 506 F.Supp. 990, 999 (D.P.R. 1980). *See generally* Graphic Communications Conference-International Brotherhood of Teamsters Local 404 M. v. the Bakersfield Californian, 541 F.Supp. 2d 1117 (E.D.Cal. 2008).
[88] Local Union No. 884, United Rubber, Cork, Linoleum & Plastic Workers v. Bridgestone/Firestone, 61 F.3d 1347, 1354 (8th Cir. 1995).
[89] United Auto., etc. Local 645 v. General Motors Assembly Div., 1983 WL 31148, 1983 U.S. Dist. LEXIS 19159, *3-4 (C.D. Cal. 1983).
[90] *See generally* William B. Gould IV, *Labor Arbitration of Grievances Involving Discrimination*, 118 U. PA. L. REV. 40 (1969).
[91] *See generally* Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?*, 24 LAB. LAW. 1 (2008).

challenge that the public law and employment discrimination cases pose in particular is that, on the one hand, arbitration is in major respects infinitely preferable to litigation. In 1984 I chaired a California State Bar Committee which proposed wrongful discharge arbitration – statutory arbitration, not as was subsequently developed, employer promulgated arbitration.[92] Amongst the reasons for this proposal – and it was picked up nationally as well later in the '80s[93] – is that so many low income employees, disproportionately racial minorities and females, do not have the resources to go to court as opposed to the relatively inexpensive system of arbitration which can be informal and expeditious as well.

For many years it has been clear to me that low income employees are screened out of plaintiffs lawyers' offices in both wrongful discharge and fair employment practice actions – a point made with emphasis by the Professors Blasi and Doherty in a comprehensive report highlighting the inadequacies of both litigation and administrative enforcement of employment discrimination law in California.[94] Yet the conundrum is that arbitration contains numerous shortcomings and institutional deficiencies as well – and they were apparent in the 1960s.[95] Though the *amicus brief* of the Academy in the *Pyett* case indicates that the organization's position has altered over the years, when I first spoke about this issue in both the law reviews and here at the Academy,[96] there was considerable reticence about these cases and the handling

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[92] Ad Hoc Comm. on Termination at Will and Wrongful Discharge, State Bar of Cal., To Strike A New Balance (1984), http://www.law.stanford.edu/directory/profile/26/William%20B.%20Gould%20IV/.
[93] Model Unif. Employment-Termination Act, reprinted in 9A Lab. Rel. Rep. (BNA) 540:21 (1991); *see also* Comm. on Labor and Employment Law, Final Report on Model Rules for the Arbitration of Employment Disputes, 50 Record 629 (1995) (publication of the Association of the Bar of the City of New York).
[94] Gary Blasi and Joseph W. Doherty, "California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 50," (Center for Law & Public Policy 2010), *available at* http://cdn.law.ucla.edu/SiteCollectionDocuments/Centers%20and%20Programs/FEHA%20at%2050%20-%20UCLA%20-%20RAND%20Report_FINAL.pdf).
[95] Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, *supra* note 95; William B. Gould IV, *Non-governmental remedies for employment discrimination*, 20 SYR. L. REV. 865 (1969); Harry Platt, *The Relationship between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L. REV. 398 (1969).
[96] William B. Gould IV, *Judicial Review of Employment Discrimination Arbitrations*, *in* LABOR ARBITRATION AT

of them under public law standards. This is because, as I said in 1969 my recommendations many of which are contained in this paper, "…run against the grain of much of the conventional wisdom contained in the national labor policy devised since the War Labor Board…"[97] I opined that the question was "…whether the leaky ship is worth patching. One might well argue that it is better to build a new ship that's structured in the form of government labor courts more responsive to public law."[98]

The first case to come before the United States Supreme Court produced a far-reaching and important yet partially flawed ruling authored by Justice Powell in *Alexander v. Gardner-Denver Co*.[99] Here the Court addressed the "proper relationship between federal courts and the grievance-arbitration machinery of collective bargaining agreements in the resolution and enforcement of an individual's right to equal employment opportunities under Title VII…"[100] But the Court decided the case at a time when some, particularly employers, contended that an individual employee pursued a grievance processed by a union to arbitration elected a preclusive remedy[101] and could not then litigate the matter in federal court.

In the *Gardner-Denver* case a black worker doing maintenance work at the company's facility in Denver, Colorado was discharged and the company took the position that he was producing "too many defective or unusable parts that had to be scrapped." The petitioner filed a grievance under the collective bargaining agreement that protested the discharge and sought reinstatement without referencing racial discrimination at the first stage of the grievance-arbitration machinery. The collective bargaining agreement stated that the company could

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THE QUARTER-CENTURY MARK: PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, 114 (1972).

[97] Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, *supra* note 95, at 67.

[98] *Id*.

[99] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[100] *Id*. at 38.

[101] *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970).

"…discharge [employees] for proper cause"[102] and also contained a no-discrimination clause which prohibited discrimination on account of race, color, religion, sex, national origin or ancestry. The agreement also spoke of an obligation not to discharge for "just cause" and contained a broad arbitration clause addressing the meaning and application of the agreement and "any troubles arising in the plant." The issue of racial discrimination was not raised until the final step before arbitration. The matter proceeded to arbitration while, simultaneously, a charge was filed alleging racial discrimination before the Colorado Civil Rights Commission and ultimately the Equal Employment Opportunity Commission. At the hearing the grievant testified that his discharge was the result of racial discrimination and informed the arbitrator that he had filed the charge with the Colorado Commission because he "could not rely on the union." The union introduced evidence about disparate treatment of the grievant. The arbitrator ruled that the grievant had been discharged for "just cause" and made no reference to the claim of racial discrimination, though he suggested that management and the union confer on whether it was possible to transfer the employee to another job. The grievant, subsequent to an EEOC determination that there was no reasonable cause to believe that the violation of Title VII had taken place, filed suit.

Speaking on behalf of a unanimous court, Justice Powell concluded that lower courts' determination that the grievant was bound by the arbitral decision and had no right to sue under Title VII was in error. The Court noted that Title VII "does not speak expressly" to the interplay between the federal courts and grievance-arbitration machinery. Said the Court: "There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's

[102] Gardner-Denver, *supra* note 99, at 39.

right to sue or divests federal courts of jurisdiction."[103] The Court stated Title VII was designed to supplement rather than supplant existing law and that the individual does not "forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement."[104] The relationship between the forums is "complementary" consideration of the statutory claim by both may, in the Court's view, promote the policy underlying each.

The Court specifically stated that the employee could not be deemed to have waived his cause of action inasmuch as there could be no "prospective waiver of an employee's rights under Title VII."[105] In contrast to so-called collective rights like the waiver[106] of the right to strike through a no-strike clause,[107] the Court noted that Title VII stood on antimajoritarian grounds, designed, as it was, to protect the rights of minorities who had been victimized through collective and other kinds of interests engaged in by the majority. The Powell opinion stated that a waiver could only be made by an employee on a knowing and voluntary basis and that this could only arise through a voluntary settlement and "in no event" could a no-discrimination clause in an agreement serve as a binding waiver. Moreover, the Court noted that the arbitrator's authority was rooted in the agreement itself and that he or she possessed no general authority to invoke laws that "conflict with the bargain between the parties…"[108]

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[103] *Id*. at 48.
[104] *Id*. at 52, n. 15.
[105] *Id*. at 51.
[106] The Supreme Court has exhibited a hostility to waiver where the right to organize is involved. NLRB v. Magnavox Co., 415 U.S. 322 (1974). *Cf*. U-Haul Co. of California, 347 N.L.R.B. 375, 378–379 (2006), *enfd*. 255 Fed.Appx. 527 (D.C. Cir. 2007); William B. Gould IV, Speech at the Greater Bay Chapter of the Industrial Relations Research Association, Alternative Dispute Resolution and the National Labor Relations Board: Some Ruminations About Emerging Legal Issues, Jose Canseco and Gertrude Stein (Apr. 8, 1997) in 69 BNA DAILY LAB. REP. E-1, 1997.
[107] A strike in violation of a negotiated no-strike provision is an unprotected activity. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939). A no-strike pledge is a mandatory subject of bargaining. *Shell Oil Co*., 77 N.L.R.B. 1306 (1948).
[108] Gardner-Denver, *supra* note 99, at 53.

Nonetheless Justice Powell's opinion spoke of the fact that the arbitrator's authority could, with a no-discrimination clause in the collective agreement, be similar to or duplicative of Title VII rights. *Gardner-Denver* thus concluded that, armed with a no-discrimination clause, arbitrators could function some under some Title VII-like standards. Concluding that the grievance-arbitration machinery was "relatively inexpensive and expeditious" the Court noted that it could "make available the conciliatory and therapeutic processes" which could make litigation unnecessary. Thus, from the employee and employer perspective, misunderstandings or discriminatory practices might be eliminated which would otherwise invite wasteful litigation.

Finally, however, the Court, conceding that tensions between contractual and statutory objectives in machinery could be "mitigated" where the collective bargaining agreement contained provisions that were similar to Title VII, noted that arbitral expertise and specialization was in the "law of the shop, not the law of the land."[109] The "broad language" of Title VII could frequently be given meaning "only by reference to public law concepts" which were the "primary responsibility" of the judiciary, said Justice Powell.[110] Noting that a "substantial proportion of labor arbitrators are not lawyers," the Court said that they possessed a "high degree of competence" in implementing public policy promoting the arbitration process itself. Nonetheless, in a much-cited footnote 21 the Court established standards to which an arbitral opinion and award could be given "great weight." The factors which should convince the courts, said the high tribunal, were contractual provisions in the collective bargaining agreement which "conformed substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of

[109] *Id*. at 56.
[110] *Id*. at 57.

particular arbitrators."[111]

Perhaps the *Gardner-Denver* opinion adopted a tone that was too hostile to the role that arbitration would play inasmuch as it denigrated lack of discovery (relatively unimportant in many individual cases) and a lack of expertise about public law issues. Some parties – I know of collective bargaining agreements where I arbitrated in the '70s and '80s – established machinery which was apparently intended to be responsive to footnote 21.[112]

Soon the Court extended the *Gardner-Denver* principle to other statutory and constitutional claims.[113] But as the '80s and '90s unfolded the Court began to move in a different direction when it first upheld commercial agreements to arbitrate and rejected subsequent causes of action challenging arbitration's propriety under the Federal Arbitration Act of 1925 – sometimes where public law issues were involved. The commercial arbitration cases began to drive a more arbitration friendly environment and these adjudications began to reference commercial and labor arbitration interchangeably.[114]

In a case where an individual non-union employee promised to arbitrate all disputes with an employer, the Court held in the *Gilmer* case[115] that arbitration of a claim arising under age discrimination law (ADEA) could be compelled to the exclusion of litigation. The Court distinguished *Gardner-Denver* and its progeny in *Gilmer* as predicated upon lack of employee agreement to arbitrate statutory claims and cases in which labor arbitrators were not authorized to resolve them. Moreover, noted the Court in *Gilmer*, *Gardner-Denver* was distinguishable as a

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[111] *Id*. at 60, n. 21.
[112] *See, e.g.*, Weyerhauser Co. v. Int'l Woodworkers of Am., 78 LA 1109 (1982) (Gould, Arb.); Basic Vegetable Prods., Inc. v. General Teamsters, Warehousemen, & Helpers Union, Local 890, 64 LA 620 (1975) (Gould, Arb.).
[113] Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) (Fair Labor Standards Act); McDonald v. City of West Branch, 466 U.S. 284 (1984) (Section 1983 civil rights claims).
[114] *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
[115] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

case involving a collective bargaining agreement where the employees were represented by unions and the potential tension between collective representation and individual statutory claims. But the fact that *Gilmer* itself was predicated upon an approach, albeit applicable to individual employees in the non-union sector, at odds with some of the assumptions of *Gardner-Denver* created the setting for another case in which the Court would address the same issues.

First, in an opinion authored by Justice Scalia the Court held that a collective bargaining agreement which would produce a knowing and voluntary waiver for bargaining unit employees must contain a "clear and unmistakable waiver of the covered employees' right to a judicial forum for federal claims of employment discrimination."[116] Yet, while suggesting that precise language would produce the waiver, just a few days earlier the Court had said that a collective bargaining agreement contained "…rights in a contract workers are unlikely to read."[117] Thus clearly this case, the *Wright* decision, was wrong. It created the fiction that a waiver was knowing and voluntary when the talismanic language fit a particular form – notwithstanding the fact that the Court had noted how unimportant the language was to the average employee. But the beat went on.

The other shoe finally dropped in *14 Penn Plaza v. Pyett*.[118] Here the Court purported to address the question of whether a "provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under…[age discrimination legislation]…is enforceable."[119] The case was similar to *Gardner-Denver* in some major respects. In both *Pyett* and *Gardner-Denver* the collective bargaining agreement established a broad arbitration clause which the Court viewed as requiring "union members" to submit claims

[116] Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 82 (1998).
[117] Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 47 (1998).
[118] Pyett, *supra* note 33.
[119] *Id*. at 1460.

of employment discrimination to binding arbitration. The no-discrimination clause, in contrast to *Gardner-Denver*, explicitly stated that arbitrators "shall apply appropriate law in rendering decisions based upon claims of discrimination" and characterized claims subject to the grievance and arbitration procedures as the "sole and exclusive remedy of a violation."[120] The union filed grievances on behalf of a number of employees which challenged their re-assignments on the theory that the agreement's prohibition of discrimination on account of age was violated and that, in any event, the re-assignment violated seniority rules – and that the employer failed to equitably rotate overtime. After the "initial" arbitration hearing the union withdrew the age discrimination grievance claims. The union apparently believed that it could not legitimately object to the re-assignments as discriminatory because as it had agreed to them – but continued to arbitrate the seniority and overtime issues. After the age discrimination claims were withdrawn a complaint was filed by the employees with the EEOC and, subsequent to a no-cause letter dismissing the charge, suit was filed – and it was this proceeding which triggered a motion to compel arbitration under the Federal Arbitration Act. The lower courts concluded that there was no clear and unmistakable waiver of the right to a judicial process under the collective bargaining agreement.

Justice Thomas' opinion for a 5-4 majority began with the assumption that unenforceability of the clause would mean that a "labor union could not collectively bargain for arbitration on behalf of its members"[121] – an assumption that was both a *non sequitur* and erroneous. The arbitration of the no-discrimination issue was either a mandatory or non-

[120] *Id*. Supportive of this general trend in both *Gilmer* and *Pyett* is Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783 (2008).
[121] *Id*. at 1463.

mandatory subject to bargaining[122] – and the proper view in my opinion was that it was a mandatory subject.[123] But nothing in any of the holdings including *Gardner-Denver* itself would have limited or precluded bargaining on this subject whatsoever. Indeed the Court, apparently operating under the assumption that the matter could only be a mandatory subject of bargaining when the proposal was that arbitration be the final step in the process and that further litigation be precluded, so held.[124] The Court stated that it would require something explicit in the anti-discrimination statute involved to find reticence or hostility on the part of Congress towards arbitration. The Court found that the arbitration clause in question was one which "clearly and unmistakably requires" arbitration – and then in the next sentence stated that Congress had chosen to "allow" arbitration, referencing an entirely different word and standard.

In *Pyett* the Court then concluded that the arbitration in *Gardner-Denver* was "not preclusive because the collective-bargaining agreement did not cover statutory claims"[125]" – though it certainly did! Anti-discrimination clauses, frequently accompanied by severability provisions which purport to sever that which is illegal from the agreement presuppose an intent on the part of the parties to abide by the law. Beyond the fact that the Court itself had stressed the unimportance of the precise language in the collective bargaining agreement around the time that *Wright* was decided an arbitrator could replicate public law standards under broad contractual provisions which did not contain the magic words set forth in citations to particular statutes. The anti-discrimination clause which *Pyett* concluded did not give the arbitrator

[122] *Compare* Airline Pilots Ass'n Int'l v. Nw. Airlines, Inc., 199 F.3d 477, 486 (D.C. Cir. 1999) (holding that a proposal for arbitration of a no-discrimination clause is not a mandatory subject of bargaining within the meaning of the NLRA because the union cannot provide the employer with a statutory waiver under *Gardner-Denver*) *with* Int'l Union of Elec., Radio, & Mach. Workers v. NLRB, 648 F.2d 18, 25 n.6 (D.C. Cir. 1980) (finding that the elimination of discrimination is a mandatory subject of bargaining when raised by either labor or management—a decision after *Gardener-Denver* that subsequently triggered the erroneous *Airline Pilots* reversal).
[123] *See* Gould, *Kissing Cousins*, *supra* note 34, at 651-53.
[124] Pyett, *supra* note 33, at 1459.
[125] *Id*. at 1467.

adequate authority under *Gardner-Denver* did in fact provide such authority and, as we have seen, the Court in *Gardner-Denver* fostered arbitration of employment discrimination claims under certain circumstances. Clearly footnote 21 contemplated employee claims that would be heard with the protections of Title VII and relevant and anti-discrimination law to which the courts could give "great weight."

Justice Thomas then proceeded to dismiss the *Gardner-Denver* distrust of arbitration as inappropriately rooted in antimajoritarian considerations. The Court stated that in the absence of new amendments it could not adhere to a "conflict of interest concern identified" in *Gardner-Denver*. Thus the Court dismissed this aspect of *Gardner-Denver* as a "collateral attack on the NLRA."[126]

In one of its most remarkable passages the *Pyett* opinion states that a conflict of interest can be addressed through litigation initiating duty of fair representation issues. But, as the Court had correctly stated in *Gardner-Denver* "… a breach of the union's duty of fair representation may prove difficult to establish. … In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers."[127] *Pyett* turned this point around against the grievants by stating that employees could always pursue ample avenues of anti-discrimination legislation against the unions if the arbitration was unsuccessful, ignoring the fact that the avenue that it makes available to employees is the one which demonstrates the antimajoritarian congressional philosophy which was well noted in *Gardner-Denver*. Meanwhile, as the Court of Appeals for the Eighth Circuit has recently held, where the union initiates a grievance under a collective bargaining agreement, union liability is

[126] *Id*. at 1471.
[127] Gardner-Denver, *supra* note 99, at 58 n. 19.

not generally deemed to be within the scope of arbitral authority.[128]

This extraordinary High Court decision is rooted in so many errors and misconceptions that it is difficult to know where to begin – and surely the Court, even as presently constituted, as well as Congress will be called upon to revisit the errors with which the opinion is strewn. In the first place, although one must confess that this is a limitation which exists in *Gilmer* and its progeny as well, no consideration was given to the capabilities and expertise of arbitrators. It is true that more than 80% of arbitrators have heard statutory claims – but in fact as a National Academy of Arbitrators report which produced this data notes "… while 78 percent [of arbitrators] have been required to interpret or apply Title VII, only 58 percent have received or given training or [been] given training that would allow a presumption of contemporary knowledge of the statute."[129] Lack of training and the acquisition of relevant expertise is in the view of the Academy reporters "…a potentially troubling lack of expertise."[130] Moreover as of 2000, of the Academy membership only 12% are women and less than 6% are non-white,[131] a factor which is at least relevant to diversity in a multi-racial society. In 2010 blacks constitute 2.82%, and women 18.34%. Even more ominously, there appear to be no special panels maintained by organizations such as the American Arbitration Association[132] providing the impartial arbitrators acceptable to labor, management and the individual grievants who possess

[128] Turner v. United Steelworkers of America, Local 812, 581 F.3d 672 (8th Cir. 2009).
[129] Michael Pitcher, Ronald Seeber & David Lipsky, Report, *The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators*, *in* ARBITRATION 2000: WORKPLACE JUSTICE AND EFFICIENCY IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE FIFTY-THIRD ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, 307 (2000).
[130] *Id*.
[131] *Id*. at 276. *Cf*. Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Suits*, 4 J. AM. ARB. 1 (2005).
[132] E-mail from Eric P. Tuchman, General Counsel and Corporate Secretary, American Arbitration Association, Feb. 8, 2010 (on file with author). Mr. Tuchman's response is based upon the fact that, in his view and of others, the clear and unmistakable language and individual access which the Court seems to require in Wright and Pyett is relatively unusual and that therefore at this point there is no demand for such provisions.

the requisite expertise and diversity.

Though the National Academy of Arbitrators' report has concluded that the lack of expertise by arbitrators in statutory cases is troubling, nonetheless it must be noted that in both *Gilmer* which was the first step towards the emasculation of *Gardner-Denver* and in *Pyett* itself, the Court simply assumed arbitral expertise with a mere sleight of hand reference to it and citing no evidence whatsoever![133] Nonetheless, in none of these cases was a record or argument before the Court on this critical subject which could have supported the expertise. This is in sharp contrast to the Court's decisions in *Lincoln Mills* and especially in *Steelworkers Trilogy* where the idea of arbitral expertise in the "law of the shop" arena was first formulated, and a two day oral argument providing a kind of seminar in the labor arbitration process. Nothing remotely comparable to this was present in *Pyett*.

Gilmer is now two decades old and wrongful discharge and fair employment arbitration has already traveled some considerable distance.[134] *Pyett*, however, is just the beginning in the organized sector and, as we have seen, the problems for individual employees are exacerbated by the tension between the exclusive bargaining representative and individual employees operating under a majoritarian statutory scheme which the Court first noted in *Gardner-Denver*. The most

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[133] Pyett, *supra* note 33, at 1471 (citations omitted):

> These misconceptions [related to arbitral competence regarding the construction of public law] have been corrected. For example, the Court has "recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision" and that "there is no reason to assume at the outset that arbitrators will not follow the law." An arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA. Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." In any event, "[i]t is unlikely ... that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims." At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.

[134] *See, e.g.*, Gould, *Kissing Cousins*, *supra* note 34.

remarkable aspect of the rejection of this by Justice Thomas in *Pyett* is that the conflict alluded to in *Gardner-Denver* was present in the former case in its most dramatic form. Again, the union had withdrawn the grievance because it had made an agreement already. Like the employer, it thought that younger workers could do the work in question which was protested by older workers in the arbitration proceeding. And thus it was not able or willing to represent the employees in any way in the arbitration proceeding given the fact that its interests were diametrically opposed to them. Who would represent the interest of the employees in such a proceeding? On this critical point the majority opinion in *Pyett* was silent, though Justice Thomas seems to indicate that in his view individual employees would be able to proceed to arbitration on their own initiative. If this were not the case, the opinion would have been reasoned differently or the grant of certiorari would have been dismissed as improvidently granted.

Again, the Court noted that avenues were open to the employees but, we have already seen what *Gardner-Denver* itself noted, *i.e.*, that a duty of fair representation claim is of little value accorded the unions in representing employees in the grievance-arbitration process. The reference to the fact that employees could contend that the unions are liable under existing anti-discrimination legislation,[135] is a point on which the Court meets itself coming around the corner. For it was Congress' mistrust of the adequacy of union representation in the workforce which led them to impose liability upon unions as well as employers. This is the point which the *Gardner-Denver* Court made in highlighting the inadequacy of the collective bargaining process in addressing discrimination issues. Congress itself had already made the very point which the

[135] Pyett, *supra* note 33, at 1460 ("[U]nion members may bring a duty of fair representation claim against the union; a union can be subjected to direct liability under the ADEA if it discriminates on the basis of age; and union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board").

Court refused to acknowledge!

True, 2010 is not 1974.[136] Most unions have black, minority and female membership (and less frequently leadership) than appears to have been the case in the immediate post-Title VII era. The fact that the minority base has grown in unions and that many of them like the UAW, Teamsters and the Service Employees in the private sector are organizing such workers in union campaigns is reflected in the substantial number of cases that come before the NLRB involving references to racial issues now raised by unions rather than employers – the latter group more likely to raise or allude to race in the election campaign when the Board first became concerned with this issue in the early '60s. During my Chairmanship of the NLRB we had a number of such important cases.[137] But the fact is that blacks and sometimes other minorities and women remain outside the top echelon of organized labor and, all too frequently, have not advanced to the higher rungs of the employment ladder. In post-racial America, as it is sometimes called, clearly great gains have been made since *Gardner-Denver*. But racial and other forms of discrimination remain pressing, as the above-referenced California report well demonstrates. Of this, *Pyett* seems scarcely aware.

The most bizarre aspect of *Pyett* is the remedy sought and obtained, *i.e.*, the granting of an employer's motion to compel arbitration. But under the collective bargaining agreement in the case – and in this respect it is illustrative of most other such contracts – the union appears to possess exclusive control over whether the grievance can advance to arbitration under the

[136] But many of the patterns remain the same. Louis Uchitelle, *For Blacks, A Dream In Decline*, N.Y. Times, Oct. 23, 2005, § 4 (Week in Review), at 1. *See also* WILLIAM B. GOULD IV, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES (1977). *Cf.* HERBERT NORTHRUP, ORGANIZED LABOR AND THE NEGRO (1944); MICHAEL SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966).

[137] *See, e.g.*, Shepherd Tissue Inc., 326 N.L.R.B. 369 (1998) (Chairman Gould, concurring) (approving a campaign handbill which included a statement by a discharged unit employee concerning a sexual harassment investigation that "black folk have been wrongly touched by whites for over 300 years" under the standards set forth by the Board in *Sewell Mfg. Co*., 138 N.L.R.B. 66 (1962)).

contract (That will be resolved in an arbitration in the spring of 2010). Considerable confusion was created in *Pyett* itself by the fact that the employer counsel in oral argument said in response to questions by Justices Souter and Scalia (the former concerned with the fact that the Court would be confronted with "total ignorance of the contract in this case"), that the grievant would go "either through the union…or the union will turn the claim over to them and let them go by themselves."[138] In the latter event, said counsel, the employer would "…pay for the arbitration, because the union in this case said we are not going to pay."[139]

The employer contended before the Court that the contractual language relating to grievances which could be taken to arbitration was broader in discrimination cases than in all others and that "all claims" meant that the union could not screen these grievances out. True, there are some arrangements, for instance the Pacific Maritime Association (PMA) and the International Longshoremen and Warehousemen Union (ILWU) where the parties have established special procedures for discrimination complaints may be taken up individually without the union.[140] But, in most collective bargaining relationships, the grievance-arbitration process is a multi-layered system where attempts to resolve the matter at lower steps of the machinery are critical and where the union is selective in advancing cases to arbitration, sometimes screening out those which are meritorious because of other considerations such as union finances.[141] Now, under *Pyett*, where the union declines to arbitrate as the agreement so

[138] Transcript of Oral Argument at 10, 14 Penn Plaza v. Pyett, 129 S.Ct. 1456 (2009).
[139] *Id*. at 21.
[140] Pacific Coast Special Grievance Handbook: ILWU-PMA Special Grievance Handbook 2008-2014: Special Section 13.2 Grievance Procedures, etc. (Jun. 15, 2009) *available at* http://www.pmanet.org/pubs/laborAgreements/2008-2014%20ILWU-PMA%20Discrimination,%20ADA%20Policy.pdf. *See also* Letter of Understanding re ILWU-PMA Special Grievance/Arbitration Procedures For The Resolution Of Complaints Re Discrimination And Harassment Under Section 13.2 Of The Pacific Coast Longshore & Clerks Agreement (Rev. Oct. 12, 2005) *available at* http://www.pmanet.org/pubs/ilwu/grievance/13.2-SGP-LOU-B-082201-Rev-101205.pdf.
[141] Vaca v. Sipes, 386 U.S. 171, 191-192 (1967).

provides, and the employees seek the avenue of anti-discrimination legislation open to them, the employer will head them off contending that the matter should have been arbitrated when apparently it cannot be. Does the employer represent the employees' interests? Hardly! The employer made the assignment which has given rise to the grievance. Will the union dare do so? Again the answer is the same given the fact that they have consented to the assignment. Here the individual employee is even more disfavored than in *Gilmer* in the non-union environment because the employee is disfavored by both union and employer. What is there to arbitrate under the agreement negotiated by the union and the employer – the real parties to arbitration – and how can it be arbitrated? And what will an arbitrator think when a union is not present or sits passively while the case is presented?[142]

Curiously the Court toward the end of its opinion almost as an afterthought states that the employees argued that the agreement would allow the union to "block" the arbitration but then adverts the argument that the union could allow the case to go forward and yet decline to participate. Justice Thomas then states that "…this question require[s] resolution of contested factual allegations…[and] was not fully briefed to this or any court and is not fairly encompassed within the question presented…"[143]

It might be contended that *Pyett* is an aberration and that the broad arbitration and no-

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[142] *See* Gould, *Labor Arbitration of Grievances Involving Discrimination*, *supra*, note 95, at 58-59:

> The notion that the minority or individual position will not be argued fully without the right of intervention for the grievant has special significance in the case of discrimination charges. The [court in *Dewey v. Reynolds Metal Co.*, 291 F. Supp. 199 (C.D. Cal. 1968)] recognized this factor when, refusing to bind the plaintiff to an arbitration award, it noted that the plaintiff was not represented with his own counsel at the hearing. If the discrimination charge involves the administration or negotiation of the collective bargaining agreement (in which, of course, both the union and employer are involved), it is often possible that the union's viewpoint and interests are different from, or conflict directly with, those of the grievants.

See also Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1960); Acuff v. United Papermakers, 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969). *Cf.* PAUL R. HAYS, LABOR ARBITRATION: A DISSENTING VIEW (1966); R. W. FLEMING, THE LABOR ARBITRATION PROCESS (1965).

[143] Pyett, *supra* note 33, at 1474.

discrimination clauses – at least as characterized by the employer counsel in oral argument before the Court – are atypical. Certainly, the arbitration clause seems to be fairly illustrative of the kinds of provisions which are negotiated in most collective bargaining relationships. Though the *Pyett* opinion generally seems to be scarcely aware of its numerous past precedents where this has been recognized, generally unions will want to control access to the machinery since the process is privately financed and employees' dues have already been called upon.[144] Can a new surtax be imposed upon statutory arbitrations? Will alleged discriminatees be required to pay twice for both statutory and non-statutory arbitrations? Surely, while the individual employee in

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[144] Bowen v. United States Postal Service 459 U.S. 212, 225-226, 226 n.14 (1983) (citations omitted):

> Although each party participates in the grievance procedure, the union plays a pivotal role in the process since it assumes the responsibility of determining whether to press an employee's claims. The employer, for its part, must rely on the union's decision not to pursue an employee's grievance. . . . Just as a nonorganized employer may accept an employee's waiver of any challenge to his discharge as a final resolution of the matter, so should an organized employer be able to rely on a comparable waiver by the employee's exclusive representative. . . .
>
> The parties to the collective-bargaining agreement, of course, may choose not to include a grievance procedure supervised by the union, or, if they do, may choose not to make the procedure exclusive. . . Most collective-bargaining agreements, however, contain exclusive grievance-arbitration procedures and give the union power to supervise the procedure.

Hines v. Anchor Motor Freight, 424 U.S. 554, 564 (1976) (citations omitted):

> Contractual remedies, at least in their final stages controlled by union and employer, are normally provided; yet the union may refuse to utilize them.

McDonald v. City of West Branch, 466 U.S. 284, 291, 291 n. 10 (1984) (citations omitted):

> [W]hen, as is usually the case, the union has exclusive control over the "manner and extent to which an individual grievance is presented," there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee. Thus, were an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously.
>
> *Amici* AFL-CIO and the United Steelworkers of America inform us that under most collective-bargaining agreements the union 'controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case.'

Vaca v. Sipes 386 U.S. 171, 192 (1967) (citations omitted):

> It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L. M. R. A. § 203 (d), if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration.

both unionized and the non-unionized context is relatively impecunious the fact is that he who pays the piper calls the tune. It is always undesirable to have one party exclusively financing the arbitration process exclusively as employer counsel maintained was the case in *Pyett*,[145] notwithstanding the good will and integrity of members of the National Academy of Arbitrators.

Undoubtedly, the Court's uncertainty about the facts in *Pyett* are what led Justice Souter to say in dissent that the "… majority opinion may have little effect for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of the employee's claims in arbitration …."[146]

Again, with regard to the no-discrimination clause itself, long ago I wrote that most no-discrimination clauses and the severability provisions under which the parties state that that which is unlawful will be severed from the agreement, created a presumption that the parties intended to comport themselves so as to adhere to the law. Now the Court, within weeks of the time that it had told us that workers who had not previously provided knowing and voluntary consent in *Gardner-Denver* rarely read collective bargaining agreements, has devised a test which led the way to the idea that the waiver herein *Pyett* is clear and unmistakable and, in so doing, has muddied the waters.

Another irony here lies in the fact that arbitration can play an important role in resolving employment discrimination cases. Chief Justice Roberts, during oral argument in *Pyett* continuously asked why the employer would agree to an arbitration clause relating to no-discrimination matters if it could not be final and binding. What was in it for the employer, rhetorically asked Chief Justice Roberts. Just as the Supreme Court said in *Carey v.*

[145] *Contra* Cole v. Burns Intern Security Servs., 105 F.3d 1465 (D.C.Cir. 1997).
[146] Pyett, *supra* note 33, at 1481 (J. Souter, dissenting)

Westinghouse[147] prior to *Pyett*, the incentive to deal with these grievances responsibly will not diminish. As the Court said in *Carey*, the presence of third party adjudication – in that case involving jurisdictional disputes – need not possess finality and can be therapeutic in resolving strife without resort to other further litigation.[148] The parties should resolve these matters through arbitration if possible. As I have previously written, not only is it bad policy for them to remove employment discrimination cases, my view is that, if the parties attempt to remove employment discrimination cases from the grievance-arbitration machinery now because of the awkwardness produced by *Pyett*, they would or should be liable under both anti-discrimination law and public policy for so doing in any context.[149] So many of the *Gardner-Denver* opponents

[147] Carey v. Westinghouse, 375 U.S. 261, 272 (1964) ("[T]he therapy of arbitration is brought to bear in a complicated and troubled area").

[148] Notwithstanding what the Court said in *Boys Markets* about the decline of an "incentive" to arbitrate without injunctive relief, the fact is in the eight years between *Sinclair and Boys Markets* there was no appreciable decline in the negotiation of grievance arbitration provisions. If anything, the opposite was true. *Cf.* William B. Gould IV, Book Review, 16 WAYNE L. REV. 384 (1969). Professor Harry Wellington was of the view that the Steelworkers Trilogy itself had "no effect" contributing to labor piece. H. WELLINGTON, LABOR AND THE LEGAL PROCESS, 119-20, 353-54, n. 62 (1968).

[149] Gould, *Kissing Cousins*, *supra* note 34, at 651:

> The arbitration of public law, employment discrimination, and related public-statute cases is worthy of promotion given: (1) the use of public and external law by arbitrators in both the *Gilmer* and *Gardner-Denver* contexts, promoted as it is by those by those opinions; (2) the inaccessibility of the courts to many employees due to the expense involve with sometimes lengthy proceedings and legal representation … This view is consistent with the idea of resolving disputes expeditiously, informally, and with less expense. Under this logic, the Court of Appeals for the First Circuit had it all wrong when in *New England Health Care Employees Union v. Rhode Island Legal Services* it held that the exclusion of discrimination grievances from the collective bargaining agreement as non-arbitrable did not constitute a violation of either public policy or public law. The singling out of grievances protesting discrimination or those pending before an administrative agency or judicial agency—which is what was involved in *New England Health Care*—is itself discriminatory, retaliatory, and inconsistent with public policy. Moreover, by sanctioning such case segregation, the court of appeals contradicted the Supreme Court's *Goodman* holding, notwithstanding Goodman's condemnation of the same refusal to process grievances in *New England Health Care* where the agreement did not sanction it. Public policy favors the resolution of employment discrimination matters through arbitration and the Court of Appeals should have so held. Ultimately, I think that the judiciary will see this decision to be a flawed one and an inappropriate departure from *Goodman*.

See also Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 989 (D.C. Cir. 1973) (finding that unions have a duty "to negotiate actively for nondiscriminatory treatment"); Howard v. Int'l Molders & Allied Workers, 779 F.2d 1546, 1548 (11th Cir. 1986) (finding that a union violated 42 U.S.C. § 2000e-2(c)(3) because it did not take "every reasonable step to ensure that the employer complies with Title VII"); EEOC v. Bd. of Governors of State Colls. & Univs., 957 F.2d 424, 426 (7th Cir. 1992) (holding that a collective bargaining agreement which provided that grievances could not proceed to arbitration if employee brought age discrimination claim violated the ADEA.); but see Richardson v. Commission on Human Rights & Opportunities 532 F.3d 114, 121 (2d Cir. 2008) (allowing a

seem to be consumed with the idea that employees will have numerous bites at the same apple that they ignore the fact because of both finance and complexity, most cases will not proceed to the courts. In fact, as Professors Stallworth and Heyman have noted, the overwhelming number of such cases are factual and are not appealed beyond the rendering of the arbitration award whatever the rule about finality.[150] Similarly, whether *Pyett* is reversed or not, anti-discrimination clauses should be a mandatory subject to bargaining – the Court of Appeals for the District of Columbia notwithstanding.[151] As *Carey* has so well demonstrated in the context of jurisdictional strikes, the importance of arbitration lies not only, or perhaps even primarily, in its finality but rather in its therapeutic value as the writings which supported *Steelworkers Trilogy* articulated.[152]

Arbitrators, both diverse and expert, can play a role in fashioning public law under no-discrimination clauses in collective bargaining agreements. This was so long before *Gardner-Denver*, though it must be recognized that individual grievants must be direct participants and that some of the remedies, like the award of attorneys' fees and costs in favor of victorious employees, runs against the grain and traditional culture of the arbitration process which provides for neither in all non-public law cases.[153] The lack of tri-partite participation, I submit, is responsible for much of the confusion that has arisen in the courts subsequent to *Pyett* – though most of the confusion is attributable to the murkiness and ambiguity in the *Pyett* opinion

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collective bargaining agreement with a provision requiring employees to choose between grieving a complain using the grievance-arbitration procedure and litigating the discrimination complaint in court). *See generally* Mark Berger, *A Step to Far:* Pyett *and the compelled arbitration of statutory claims under union-controlled labor contract procedures*, 60 SYRACUSE L. REV. 55 (2009).

[150] Michelle Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 ARB. J. 49 (1984).

[151] Airline Pilots Ass'n Int'l v. Nw. Airlines, Inc., 199 F.3d 477 (D.C. Cir. 1999).

[152] Carey, *supra* note 147, at 272.

[153] *But see* Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669, 682 (Cal. 2000) ("The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed.").

itself.

In the first place, some courts have found that no-discrimination clauses in collective bargaining agreements do not contain clear and unmistakable waivers referencing statutes.[154] Where the employee proceeded to arbitration but declined to use a union representative and retained and paid his own counsel who worked independently, the complaint was dismissed because "… the matter was fully litigated in an arbitration hearing and the dispute was resolved…"[155] Considering the same collective bargaining agreement involved in *Pyett*, one court has said that in the absence of a showing that the union precluded resort to arbitration or some form of union hostility, the complaint will be dismissed where the employee declined to pursue the arbitration.[156] Sometimes the failure to include the no-discrimination clause in the arbitration clause itself is regarded as fatal to any attempt to claim *Pyett* as precedent.[157] In *Borrero v. Ruppert Housing Co., Inc.*,[158] Judge Baer in New York has held that the collective bargaining agreement involved in *Pyett*, though it requires union involvement, will only permit litigation where the plaintiff "attempts to arbitrate his claims [and is] … thwarted by the Union…" In *Kravar v. Triangle Services, Inc.*[159] the court explicitly held that the collective bargaining agreement "… operated to preclude [the plaintiff] from raising her disability-discrimination claims in any forum" because "… an individual union member does not have an

[154] Edwards v. Cascade County Sheriff's Department, 354 Mont. 307 (Mont. 2009); Betancourt v. A.M. Ortega Construction, Inc., 2009 WL 3246390, *4 (Cal. App. 4 Dist. 2009) ("Nowhere in the CBA does it express or imply that claims based on federal statutes must be arbitrated."); Catrino v. Town of Ocean City, 2009 WL 2151205 (D.Md. 2009); Figueroa v. District of Columbia Metropolitan Police Dept. , 658 F.Supp.2d 148, 154 (D.D.C.,2009) ("Here, plaintiffs' CBA does not state that it covers statutory claims."); Shipkevich v. Staten Island University Hospital and Aramark, Inc., 2009 WL 1706590 (E.D.N.Y. 2009); Markell v. Kaiser Foundation Health Plan of the Northwest, 2009 WL 3334897 (D.Or. 2009).
[155] Mathews v. Denver Newspaper Agency, LLP, 2009 WL 1231776, *3 (D.Colo. 2009).
[156] Johnson v. Tishman Speyer Properties, L.P., 2009 WL 3364038 (S.D.N.Y. 2009).
[157] Aubin v. Unilever HPC NA, 15 Wage & Hour, 2009 WL 1871679 (N.D.Ill. 2009).
[158] *Borrero v. Ruppert Housing Co., Inc.*, 2009 WL 1748060, *2 (S.D.N.Y. 2009).
[159] *Kravar v. Triangle Services, Inc*., 2009 WL 1392595, *3 (S.D.N.Y. 2009).

unfettered right to demand arbitration of a discrimination claim" as much as the union "may" demand arbitration if it finds that the claim has some merit or is "colorable."

Kravar has been stayed before the Second Circuit Court of Appeals pending the outcome of an arbitration involving *Pyett* itself as to the meaning of this aspect of the collective bargaining agreement.[160] An arbitrator will determine this issue. When the *Pyett* dispute itself has been submitted and an arbitration award has been rendered, what should be the proper judicial review of such an award? What should be the standard of review in *Pyett* type cases? Arbitration is important in resolving such cases. Avoidance of more costly litigation is desirable. But whether it is costly and cumbersome will depend upon which judicial review avenue we take, *i.e.*, Section 301 or the FAA. The Supreme Court in *Pyett* resolved the issue before it under the Federal Arbitration Act of 1925, without any discussion of the matter – presumably. Presumably therefore these cases like other cases involving alleged violations of collective bargaining agreements can be heard under that statute as well as Section 301, the traditional forum established by both *Lincoln Mills* and *Steelworkers Trilogy*. But the issue has not been definitively resolved. On the matter of judicial review the Federal Arbitration Act, hidden from the Court's view by the parties or ignored by the Court in *Lincoln Mills* and noted only by Justice Frankfurter in *Lincoln Mills* would have constituted the best avenue.

The Federal Arbitration Act is superior to Section 301 of the NLRA in a number of respects. First, it contains an explicit requirement that arbitration be ordered and that a lawsuit by stayed[161] where the parties have entered into an arbitration agreement and the Court has

[160] Though the Supreme Court has held that the issue of arbitrability is for the courts in the absence of explicit language or intent, the parties have frequently proceeded to arbitration to determine both the issues of arbitrability and the merits. *See generally* William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the* Steelworkers Trilogy: *The Aftermath of* AT&T *and* Misco, 64 NOTRE DAME L. REV. 464 (1989).
[161] 9 U.S.C.A. § 3

previously fashioned a pro-arbitration policy under the 1925 law and language similar to that of the *Steelworkers Trilogy* itself, albeit within the commercial arbitration context.[162] The FAA provides for interlocutory appeals[163] and it expedites enforcement of the award inasmuch as FAA litigation is "not subject to scheduling conferences and other pretrial case-management tools…" and establishes "streamlined processes for having judgment entered on, and challenging the enforcement of an award." These applications are treated as motions rather than complaints, thus expediting the process.[164]

But what of judicial review under the Federal Arbitration Act? Here there is good news and bad news, triggered by the Supreme Court's ruling in *Hall Street Associates v. Mattel, Inc.*[165] In this non-labor FAA case the Court established extremely narrow bases for review of arbitration awards and concluded that the standards set forth in the FAA are exclusive – albeit within the context of a decision which reviewed attempts by parties to expand the statutory grant of review set forth in the statute. Said the Court:

> Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: 'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' 'exceed[ing]… powers,' 'evident material miscalculation,' 'evident material mistake,' 'award[s] upon a matter not submitted;' the only ground with any softer focus is 'imperfect[ions],' and a court may correct those only if they go to '[a] matter of form not affecting the merits.' Given this emphasis on extreme arbitral conduct, the old rule of *ejusdem generis* has an implicit lesson to teach here.[166]

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[162] For the Court's pro-arbitration policy in the context of commercial arbitration clauses governed by the FAA, *see* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). For the Court's pro-arbitration policy in the context of employment arbitration clauses governed by the FAA, see Gilmer, *supra* note 115, at 35.

[163] 9 U.S.C. §§ 16(a)(1)(A)-(B).

[164] Seth Galanter & Jeremy M. McLaughlin, *Does the Supreme Court Decision in* 14 Penn Plaza *Augur the Unification of the FAA and Labor Arbitration Law*, DISPUTE RESOLUTION J., May/July 2009, at 59.

[165] Hall Street, *supra* note 34.

[166] *Id*. at 9. The opinion goes on to spell out the lesson taught by this canon of construction:

> Under that rule, when a statute sets out a series of specific items ending with a general term, that general

This is infinitely preferable to Section 301 and *Enterprise and Wheel* and more compatible with the spirit of that decision if not its troublesome language which has produced so much litigation. The 25% reversal rate alluded to by Judge Sutton could be history – unless the Court concludes that it mistakenly assumed FAA applicability in *Pyett*.

But here is the next irony. In my view, the future *Pyett* litigation dictated either by the Court – perhaps taking back some of the more erroneous themes in its opinion – or Congress will and should mean that special and diverse panels be available and called upon to hear and decide these cases. If the collateral attack upon the National Labor Relations Act, to use Justice Thomas' language, is to be avoided a number of standards are a pre-requisite. Aggrieved employees must be at least consulted with or involved in arbitral selection. The union must be able and willing to utilize the relevant statutes expertly – and, where necessary, employees should have third party representation. Finally, the arbitrator must actually utilize his or her expertise under the relevant statute in resolving the case.

Are these standards as a pre-requisite for judicial review compatible with the FAA? The Supreme Court of California has adopted remarkably similar standards under that state's arbitration statute.[167] Perhaps a failure to meet these pre-requisites can be viewed as "evident partiality" or "misconduct." The question of whether a manifest disregard of the law remains a basis for a challenge to an award under *Hall Street* has not been definitively resolved – though it is possible that these grounds, even though they do not constitute an independent basis for review, can be seen as subsumed within the statutory language. Moreover, *Hall Street* itself has

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term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. "Fraud" and a mistake of law are not cut from the same cloth.

[167] *See* Armendariz, *supra* note 153.

said:

> In holding that §§10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.[168]

One way or another, the due process and fairness issues under either the FAA or Section 301 will not go away. In the non-labor arena the circuit courts have already addressed the issue.[169] The *Pyett* fallout in labor arbitration litigation is yet to begin.[170]

IV. Job Security and Entrepreneurial Concerns

One of the most important progeny of *Steelworkers Trilogy* is the line of authority which began to emerge in the 1960s involving the duty to arbitrate and to bargain with a union in the wake of some form of corporate re-organization. A quartet of decisions – though a trilogy are the driving force – by the Supreme Court have attempted to address these issues but have left the state of law on this 50th anniversary in considerable confusion.

The first of these cases is *Wiley v. Livingston*[171] which was an action by a union pursuant to Section 301 to compel arbitration under the agreement with the company, had merged with another employer. In this case, authored by Justice Harlan the Court held that "the

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[168] Hall Street, *supra* note 34, at 13.
[169] Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349 (5th Cir. 2009); Stolt-Nielsen SA v. Animalfeeds Intern Corp., 548 F3d 85 (2d Cir. 2008); Ramos-Santiago v. United Parcel Service, 524 F.3d 120 (1st Cir. 2008).
[170] Generally speaking, the circuit courts – the Supreme Court has not yet addressed this issue – have been receptive to compelling arbitration where the parties have negotiated neutrality provisions providing for recognition where the question is what facility is covered by the agreement. *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v. TriMas Corp*. 531 F.3d 531 (7th Cir. 2008). The same holds true for first contract arbitration. *South Bay Boston Management, Inc. v. Unite Here, Loca*l 26, 587 F.3d 35 (1st Cir. 2009). However, in *Rite Aid of Pennsylvania, Inc. v. UFCW, Local 1776*, _F.3d_ , 2010 WL 521102 (3d Cir. 2010), a 2-1 majority held that under a recognition clause union access to newly acquired facilities could not be arbitrated.
[171] Wiley v. Livingston, 376 U.S. 543 (1964).

disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement."[172] The Court noted the central role of arbitration as it relates to national labor policy under the *Steelworkers Trilogy* and concluded that where "the business entity remains the same,"[173] duty to arbitrate could survive. Here the Court emphasized the fact that "negotiations ordinarily not concerned the well being of the employees…" and that objectives of national labor law dictated the balancing of the employer's right to re-arrange its business with "…some protection to the employees from a sudden change in the employment relationship."[174] The Court, however, noted that not every change in ownership of corporate structure would allow the duty to arbitrate to survive. Said the Court:

> …there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. So too, we do not rule out the possibility that a union might abandon the right for arbitration by failing to make its claims unknown.[175]

The Court's next crack at this issue, arising within the duty to bargain provisions of the National Labor Relations Act moved the law in another direction. In this case, *NLRB v. Burns International Security Services*[176] the issue was the assertion of bargaining rights by a union where one company, Burns, providing security service replaced another, Wackenhut Corporation, which had previously provided these services at the Lockheed Aircraft Service

[172] *Id*. at 914.
[173] *Id*. at 549.
[174] *Id*.
[175] *Id*. at 551.
[176] NLRB v. Burns International Security Services, 406 U.S. 272 (1972).

Company. Here, the question was whether Burns, which refused to bargain with a union representing a majority of the employees in an appropriate unit could be obliged by Board order to observe the terms of the collective bargaining agreement with Wackenhut when Burns had not voluntarily assumed it. The Court, stressing the precise facts involved here, answered the question in an opinion by Justice White in the negative. The issue here was the Board's bargaining order which was fashioned by the agency and the Court, though it upheld a duty to bargain with the union in the successor enterprise inasmuch as the employer could not entertain a good faith doubt about the majority status in light of the hiring of Wackenhut's employees, held that there was no obligation to adhere to the substantive terms of the collective bargaining agreement between the union and the predecessor employer. Here the Court distinguished *Wiley* and relied upon *H.K. Porter*[177] in which it had held that the Act precluded the imposition of contractual terms even as a remedy for a statutory violation. The Court noted that it did not find *Wiley* controlling under the circumstances, notwithstanding that decision's conclusion that a collective bargaining agreement is not an ordinary contract but rather an outline of common law in a plant or industry. The Court stressed the "limited accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes…"[178] and held that the duty to bargain provisions did not oblige a successor employer to honor the predecessor collective bargaining agreement. The Court noted that *Burns* did not involve a duty to arbitrate at a Section 301 suit as was true in *Wiley*. It stressed that decision's "narrower" holding against the backdrop of state law which held a surviving corporation liable for the disappearing one in a merger. The opinion went on to note that here the employers were simply competitors for the same work and there was no merger or sale of

[177] H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970)
[178] Burns, *supra* note 176, at 286.

assets or dealings between the employers at all.

From a policy perspective the Court had much to say that was not present in the *Wiley* analysis as well:

> …either the union or the new employer are bound to the substantive terms of an old collective bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignments, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. … A union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policies manifest in the act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the party.[179]

But even though the Court had found that a successor employer may "ordinarily" impose new contract terms the Court said that there might be instances where it is "perfectly clear" that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.[180] Thus the duty to bargain could arise in successorship cases even at the time that the terms were set, notwithstanding the fact that the contract would not carry over.

The Board has held in the 1970s that in the wake of *Burns* that this perfectly clear obligation to notify and bargain related only to situations where the employer had misled employees about the wages, hours, and conditions of employment or where had the employer had failed to clearly announce its intent to establish a new set of conditions prior to inviting

[179] *Id*. at 288
[180] *Id*. at 294-95.

former employees to accept employment.[181] My Board held that an employer could unilaterally set wage rates that differed from those paid by his predecessor under the collective bargaining agreement under the perfectly clear exception. But in a concurring opinion, I expressed the view that the Board precedent established an "[u]nduly restrictive reading of the Supreme Court's definition of circumstances in which a successor employer must bargain about initial terms and conditions of employment."[182] My view was and is that the Board, by imposing the perfectly clear obligation to notify and bargain obligation relating to initial terms of employment only when there was deception prior to or simultaneously with its invitation to the previous workforce to accept employment under those terms, grafted an additional requirement or impediment to effective recognition not contained in *Burns* itself. The Board majority eliminated instances where employers expressed an intent to provide changed employment conditions from the obligation to bargain under the perfectly clear standard. I wrote in this case:

> The fact is that in many, if not most, business re-arrangements, the successor employer perceives a need for change or greater flexibility in the employment relationship. This is the essential dynamic involved in the instant cases as well as countless others. To eliminate instances where employers express an intent to provide changed employment conditions from the obligation to negotiate under the 'perfectly clear' standard announced in *Burns* would both render the holding on this point meaningless and also disregard the careful balance between competing interests articulated by the Court … [under extant Supreme Court authority].[183]

My view was attacked with an argument that has arisen in a number of contexts, *i.e*., that it would create a disincentive for the employer to hire the old work force. But there are already a considerable number of disincentives in place as we see from the next important Supreme Court

[181] Spruce Up Corp. 209 N.L.R.B. 194 (1974), *enforced without opinion*, 529 F.2d 516 (4th Cir. 1975).
[182] Canteen Co. 317 N.L.R.B. 1052, 1054 (1995) (Chairman Gould concurring), *enforced*, 103 F.3d 1355 (7th Cir. 1997).
[183] *Id*. at 1055.

decision, *Howard Johnson Co. v. Detroit Local Joint Executive Board*.[184] In this case, another case, like *Wiley*, involving a Section 301 action, the Court distinguished a case involving a merger from one involving a sale of assets when the initial corporate entity remains viable. This meant that the union could pursue contractual obligations possessed by the predecessor, with an arbitration commenced which would explore whether the predecessor had breached successorship provisions in their collective bargaining agreement. Moreover, stated the Court in an opinion authored by Justice Marshall, only 9 of the 53 employees were hired by the successor the arbitration would be to compel the hiring of such workers. Such an obligation, said the Court in *Howard Johnson*, would be inconsistent with what had been already set forth in *Burns* and therefore an action to compel arbitration could not be required given the lack of a substantial continuity of identity in the workforce. *Howard Johnson* more clearly than the other cases simply opened the door for a successor employer to rid itself of any obligations by refusing to hire the predecessor's employees. The only constraint on that is the prohibition against discrimination in hiring, something often difficult to prove.[185]

And finally, in the 1980s, the last of the quartet of cases emerged, *Fall River Dyeing v. NLRB*[186] where the successor was required to bargain with the predecessor's union when it hired a large number of the predecessor employees after a hiatus of seven months between the initial closing. The Supreme Court enforced a Board order requiring Fall River to bargain holding that a proper time to determine the union's majority status which is presumed is when an employer has hired a "substantial and representative complement" of the workforce.[187] The balance here, notwithstanding a premature demand for recognition in advance of the hiring was struck in favor

[184] Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974).
[185] *See, e.g.*, Daufuskie Club, Inc., 328 N.L.R.B. 415 (1999), *enforced*, 221 F.3d 196 (D.C. Cir. 2000).
[186] Fall River Dyeing v. NLRB, 482 U.S. 27 (1987).
[187] *Id*. at 52.

of the union and employees.

As might be expected, the Circuit Courts of Appeals adopted a wide variety of responses to this irreconcilable series of decisions. These cases are at odds with one another and are difficult to reconcile – and that has meant that the circuit courts have spoken with increasing frequency in this century. Two of the most prominent in the past decade have arisen in the Third Circuit and the Second. As might be expected both decisions are split, 2-1 with strong dissenting opinions in each.

The former is *Ameristeel Corporation v. International Brotherhood of Teamsters*.[188] In *Ameristeel*, the court was confronted with the following fact pattern: Ameristeel, a successor corporation engaged in the manufacturer and sale and steel products, purchased assets of Brocker Rebar manufacturing facility in York, Pennsylvania and commenced operations there. IBT Local 430, having represented employees at the facility, had a collective bargaining agreement with Brocker and a purchase agreement between Ameristeel and Brocker contained various provisions stating that Ameristeel was not to be bound by the terms of the collective bargaining agreement. This was a posture taken by Ameristeel towards the union after hiring approximately fifty employees to work at York, all but six of Local 430 members being hired. Out of this a bargaining process commenced between the parties but broke down when Ameristeel withdrew recognition because of a letter "purportedly" signed by a majority of the unionized employees in which they stated that they no longer wanted to be represented by the union. Unfair labor practice litigation commenced.

The union filed a grievance challenging unilateral changes in working conditions when the purchase agreement was consummated. Subsequently Ameristeel filed a complaint in federal

[188] Ameristeel Corporation v. International Brotherhood of Teamsters, 267 F.3d 264 (3d Cir. 2001).

district court attempting to enjoin arbitration proceedings which gave rise to the instant case. The Court of Appeals for the Third Circuit, subsequent to the district court's grant of a preliminary injunction, stated that it was called upon to "…navigate treacherous waters of the Supreme Court's labor law successorship doctrine which has, at times, imposed extra-contractual duties upon successor employers."[189]

In *Ameristeel*, as the dissenting opinion of Judge Becker noted, the company had hired all but six of the predecessor employees to work at the same facility "doing the same job that they performed before the sale … Ameristeel also hired the predecessor['s] top supervisory personnel at the plant (… in contrast to *Howard Johnson* where the successor hired none of the predecessor's supervisors). The York plant is situated in exactly the same location where it was before and produces the exact same product using the same inventory, the same equipment, the same physical set-up, and the same production methods … this is virtually nothing changed at the plant when Ameristeel took over except for the name on the door."[190] Nonetheless the majority concluded that the mandate of *Burns* is that a "nonconsenting successor employer cannot be bound by the substantive terms of a CBA negotiated by its predecessor - … [and this provides] … more persuasive guidance than the limited holding in *Wiley*." Speaking through Judge Rendell, the majority rejected the idea that *Howard Johnson* had in any way implicitly or explicitly modified *Burns*' hostility to the imposition of a substantive collective bargaining agreement upon the new employer.

The Court of Appeals for the Second Circuit came down at the other end of the spectrum. In this case *Local 348-S, UFCW, AFL-CIO v. Meridian Management Corp.*,[191] a motion to

[189] *Id*. at 267.
[190] *Id*. at 280.
[191] Local 348-S, UFCW, AFL-CIO v. Meridian Management Corp., 583 F.3d 65 (2d Cir. 2009).

compel arbitration was brought alleging that Meridian had failed to contribute to the union's Health and Welfare Fund as required by the collective bargaining agreement between the union and the predecessor company Cristi Cleaning Services Inc. Meridian successfully bid for a contract with the Port Authority of New York and New Jersey to provide engineering and janitorial services at a terminal for a three-year period. Then Meridian contracted the services out to Cristi, Local 348 representing Cristi employees who worked at JFK International Airport. Meridian then gave subcontract Cristi amended its collective bargaining agreement to apply to Cristi employees who worked at the terminal and Meridian then gave Cristi a notice of an attempt to terminate its subcontract janitorial services. Local 348 sought recognition with Meridian for its employees doing janitorial work at the terminal and for refusal to recognize as well as to arbitrate brought this matter before the court.

The Second Circuit stated that the case law "… compels the conclusion that a successor employer is not automatically bound by the substantive terms of a pre-existing CBA, even if that successor employer retains a majority of its predecessor's workforce."[192] But nonetheless the court affirmed the district court judgment that Meridian was obligated to arbitrate the question of the extent to which it was bound by substantive terms. Judge Hall, writing for another 2-1 majority, examined the case law in detail and concluded that the important elements here were that Meridian "… retained a majority of Cristi's employees after assuming the cleaning duties previously performed by Cristi"[193] and that the employees performed "substantially the same duties." The only difference between *Wiley*, said the court, was that *Wiley* involved a merger – but the court focused upon the fact that *Howard Johnson* had placed great stress upon substantial continuity relating to the identity of the workforce. The court stressed the fact that Meridian had

[192] *Id*. at 68.
[193] *Id*. at 74.

"knowingly and voluntarily elected to carry out its obligation by hiring a subcontractor that employed workers represented by Local 348, pursuant to a collective bargaining agreement negotiated by Local 348."[194] Meridian had simply eliminated the middleman entering into a direct employment relationship which involved performance of the same work and the same product for the same customer, notwithstanding the fact that there was no sale or transfer of assets. Judge Livingston in a dissent as vigorous as that employed by Judge Becker for the Third Circuit, noted the obvious that – the ruling would create (just as *Howard Johnson* did) a disincentive to hire a predecessor's employees.

The virtue of the strength of these Section 301 cases from plaintiffs' perspective in both *Ameristeel* and *Meridian* is that they involve motions to compel arbitration where *Burns* is not directly offended because the entire collective bargaining agreement is not necessarily assumed. The court assumed that the extent of contract obligations was for the arbitrator, as in *Wiley* itself, a point which Judge Livingston characterized as a "freewheeling" approach by the majority.

I think that the Second Circuit has the better part of this argument, but the basic conflict will surely come to the Supreme Court again[195] and its handling of other labor law cases—particularly those involving the duty to bargain in connection with managerial rearrangements where there are partial closures[196] —does not give me much confidence.

V. Interest Arbitration – The Last Frontier of the Arbitration Process Itself Is Interest Arbitration

Curiously, though the *New York Times* editorial about *Steelworkers Trilogy* explicitly

[194] *Id*. at 75.
[195] Other decisions which have struggled with the tension involved in these cases are Road Sprinkler Fitters Local 669 v. Ind. Sprinkler, 10 F.3d 1563 (11th Cir. 1994); New England Mechanical v. Laborers Local Union 294, 909 F.2d 1339 (9th Cir. 1990); Southward v. South Cent. Ready Mix Supply Corp, 7 F.3d 487 (6th Cir. 1993); Orange Place Limited Partnership v. National Labor Relations Board 333 3d. 646 (6th Cir. 2003). *See generally* Edward Rock & Michael Wachter, *Labor Law Successorship: A Corporate Law Approach*, 92 MICH. L. REV. 203 (1993).
[196] First Nat. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); William B. Gould IV, *The Supreme Court's Labor and Employment Docket in the October 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 5-18 (1981).

spoke of grievance arbitration awards and the facts of *Steelworkers Trilogy* did not extend beyond such, the fact is that in the wake of the early decisions the courts have been divided on the question of the enforceability of interest arbitration awards notwithstanding the fact that interest arbitration has deep historical roots in the United States – though fostered almost as much through statute as on a voluntary basis. When the Adamson Act of 1916 in the Wilson administration was resisted, the Supreme Court, notwithstanding a different era of Commerce Clause litigation, upheld its constitutionality because: "… the very absence of the scale of wages by agreement and the impediment and destruction of interstate commerce which was threatened called for the appropriate and relevant remedy, the creation of a standard by operation of law binding upon the carrier."[197] Ad hoc legislation has imposed such agreements upon railroads[198] and airlines[199] and, subsequent to the invocation of the emergency strike provisions[200] which have been applicable to longshore workers,[201] have been extended to that industry by special ad hoc statute as well.[202]

While the system of interest arbitration has been utilized frequently in both printing and newspapers[203] and the steel industry at one point in the 1970s when it negotiated the so-called

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[197] Wilson v. New, 243 U.S. 332, 352 (1917).
[198] Brotherhood of Loc. Fire. & Eng. v. Chicago, B. & O. R. Co., 225 F. Supp. 11 (D.D.C. 1964), *aff'd per curiam*, 331 F.2d 1020 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 918 (1977); Work Rules Dispute Resolution, 77 Stat. 132 (1963); 81 Stat. 122 (1967). *See also* Federal Legislation to End Strikes: A Documentary History, Subcomm. of the S. Subcomm. on Labor, 90th Cong. (1967).
[199] *See, e.g.*, 1988 S.J. Res 374, PL 100-429, 100th Congress (1988); S.J. Res. 186, 89th Congress (1966). *See also* Comment, *Ad Hoc Compulsory Arbitration Statutes: The New Device for Settling National Emergency Labor Disputes*, 1968 DUKE L.J. 905 (1968).
[200] United States v. United Steelworkers, 361 U.S. 39 (1959) (holding that evidence of the strike's effect on specific defense projects supported a judgment that the strike endangered the nation's safety). Justice Frankfurter's concurring opinion supplied a majority in the Steel Seizure Case, stated that the constitutional defect in President Truman's Seizure was that he had not pursued the emergency strike avenue made open to him by Congress in Taft-Hartley. Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579, 598-601 (1952) (J. Frankfurter, concurring).
[201] *See, e.g.*, U.S. v. Pacific Maritime Ass'n, 229 F.Supp.2d 1008, 1010 (N.D.Cal. 2002).
[202] *Cf.* The Bonner Bill, H.R. 1897, 87th Congress (1963); George Horne, *Congress May Act on Dock Walkout; Administration Is Voicing Concern Over Losses*, N.Y. TIMES, Dec 29, 1968, at A54.
[203] *Cf.* Note, *Interest Arbitration and the NLRB: A Case for the Self-Terminating Interest Arbitration Clause*, 86

Experimental Negotiating Agreement[204] providing for interest arbitration and has spread substantially through the public sector as a substitute for the right to strike,[205] there is no substantial movement toward or consensus about the system on a voluntary basis. The proposed Employee Free Choice Act would provide for so-called first contract interest arbitration where the parties have difficulty resolving a collective bargaining agreement subsequent to NLRB certification.[206] The California Agricultural Labor Relations Act of 1975 has been amended so as to provide for similar mediation-arbitration provisions, the constitutionality of which has been upheld.[207] The Postal Reorganization Act of 1970 provides that interest arbitration may be invoked.[208] Interest arbitration for new contracts at the expiration of a previous one or the first time around, once regarded as a "tool of the future" by one of my NLRB Chairman predecessors,[209] has never materialized as such.

The legal backdrop relating to interest arbitration involves not only *Steelworkers Trilogy*,

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YALE L.J. 715 (1977).

[204] *Cf.* Aikens v. Abel, 373 F. Supp. 425, 435 (W.D. Pa. 1974) (upholding Experimental Negotiating Agreement that included a clause in which the union prospectively waived its right to strike over unresolved new contract issues and agreed to binding interest arbitration).

[205] *See supra*, note 42. Interest arbitration awards in the public sector are judicially enforceable. *See, e.g.*, Fire Fighters Union v. City of Vallejo, 526 P.2d 971, 975 (Cal. 1974) (upholding compulsory arbitration for fire fighters).

[206] *See* Catherine Fisk, *Interest Arbitration in the Employee Free Choice Act: A Time-Honored and Tested Method to Ensure Good-Faith Bargaining*, in ACADEMICS ON EMPLOYEE FREE CHOICE 38 (John Logan ed. 2009), *available at* http://laborcenter.berkeley.edulaborlaw/efca09.pdf; Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47 (2009); Gould, "New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?," 70 LA. L. REV. 1, 17-27 (2009).

[207] Hess Collection Winery v. Cal. Agric. Labor Relations Bd., 45 Cal. Rptr. 3d 609, 627 (Ct. App. 2006) (upholding an interest arbitration statute against a constitutional challenge because the Act has adequate standards in place to allow for judicial review).

[208] Postal Reorganization Act of 1970, 39 U.S.C.A. § 1206 (b) ("Collective-bargaining agreements between the Postal Service and bargaining representatives recognized under section 1203 may include any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration, or the parties may adopt any such procedures by mutual agreement in the event of a dispute.")

[209] Sheet Metal Workers Int'l Ass'n Local No. 59, 227 N.L.R.B. 520, 522 (1976). *See also* Sheet Metal Workers, Local 38, 231 N.L.R.B. 699, 702 (1977) (Member Murphy, dissenting) ("In my view, it clearly is the collective-bargaining tool of the future, and I am surprised by the unwillingness of my colleagues to find it a mandatory subject of bargaining."); Roy Robinson Chevrolet, 228 N.L.R.B. 828, 832 (1977) (Chairman Murphy, concurring) ("With all due respect to the Fifth Circuit, I reaffirm my belief in interest arbitration as the collective-bargaining tool of the future[.]") .

Insurance Agents and its progeny but a decision which had issued two years earlier *NLRB v. Borg-Warner*.[210] In this case the Court held that, under the duty to bargain provisions applicable to both labor and management, there are mandatory and non-mandatory or permissive subjects of bargaining. Both sides have the right and indeed obligation to bargain to the point of impasse over mandatory subjects but the party which insists on bargaining to the point of impasse over non-mandatory or permissive subjects violates the refusal to bargain provisions of the statute.

Under *Borg-Warner per se* violations of the duty to bargain good faith obligation are found in these instances so as to facilitate the collective bargaining process – theoretically, at least. Labor law precludes imposition of a contract or a contract term upon the parties – but in yet another irony the Board and the courts in order to vouchsafe collective bargaining have characterized voluntarily negotiated interest arbitration as well as its second generation variant as non-mandatory, the insistence upon which violates the statute. This line of authority not yet addressed by the United States Supreme Court, is inconsistent with the idea of wide open robust collective bargaining promoted in *Insurance Agents*, precludes insistence on a dispute resolution mechanism which does not pass muster as a mandatory subject of bargaining in the view of the NLRB.

How is it that interest arbitration has been discouraged In the wake of *Steelworkers Trilogy* a number of the courts, repudiating the pre-*Lincoln Mills* rulings of the First Circuit,[211] held that *Steelworkers Trilogy* promoted the enforcement of interest arbitration awards under

[210] NLRB v. Borg-Warner, 356 U.S. 342 (1958).

[211] Boston Printing Pressmen's Union No. 67 v. Potter Press, 241 F.2d 787 (1st Cir. 1957), *cert. denied*, 355 U.S. 817 (1957). The Fifth Circuit has held that interest arbitration clauses do not survive the expiration of the collective bargaining agreement in which they were originally bargained for. *Austin Mailers Union No. 136 v. Newspapers, Inc.*, 226 F.Supp. 600 (W.D.Tex. 1963), *aff'd* 329 F.2d 312 (5th Cir. 1964), *cert. den*. 377 U.S. 985 (1964). The opposite is true for grievance arbitration which is a mandatory subject of bargaining that survives the expiration of a collective bargaining agreement. *Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190 (1991).

Section 301. Said Judge Sobeloff for the Court of Appeals for the Fourth Circuit: "[We read] … the Steelworkers trilogy … as not only recognizing arbitration as an acceptable method of resolving labor disputes, but actively encouraging it."[212] Judge McCree, also relying upon the *Steelworkers Trilogy* as well as *Lincoln Mills*, for the Court of Appeals for the Sixth Circuit soon followed suit: "The enforcement of an interest arbitration clause is within the scope and purpose of our national labor policies, and the parties here clearly contemplated the arbitration of new contract terms."[213]

Initially, the Board seems to have relied upon the Supreme Court post *Borg-Warner* jurisprudence which emphasized the extent to which other parties had incorporated a subject matter in their own collective bargaining agreements as a factor in determining whether insistence upon it was focused upon employment conditions within the meaning of the Act.[214] Consequently the Board, with little reasoning, concluded that interest arbitration was a non-mandatory subject[215] over a dissent – both persuasive and yet somewhat curious – by Chairman Murphy which did not resolve the mandatory-non-mandatory dispute but rather proceeded upon the assumption that a party could insist upon a clause as a condition of the execution of the agreement where interest arbitration was part of the longstanding tradition in the industry.

Of course, grievance-arbitration machinery has long been viewed as a mandatory subject of bargaining[216] even though it involves process and not the actual substantive conditions of

[212] Winston-Salem Printing Pressmen and Assistants' Union, 393 F.2d 221, 226 (4th Cir. 1968).
[213] Chattanooga Mailers Union Local No. 92 v. Chattanooga News-Free Press Co., 524 F.2d 1305, 1315 (6th Cir. 1975).
[214] Mechanical Contractors Assn. of Newburgh, 209 N.L.R.B. 1 (1973). Actually, the Board did not directly address interest arbitration in that case given its view that the dominance of the arbitration panel by labor and management representatives provided for collective bargaining under the rubric of arbitration stemmed from the Administrative Law Judge William Feldsman's thinking. *Id*. at 11-15.
[215] Columbus Printing Pressmen Assistants' Union No. 252, 219 N.L.R.B. 268 (1975).
[216] United States Gypsum, Co., 94 N.L.R.B. 112, n. 8 (1951) ("Respondent's contention that arbitration is not bargainable is rejected."). Accord, United Elec. Radio & Mach. Workers v. NLRB, 409 F.2d 150, 156 (D.C. Cir.

employment. How could interest arbitration be distinguished? Again, one objection can be that it is not as widespread throughout the country or industry as is the grievance arbitration process – yet this seems to be fundamentally inconsistent with the proposition that robust collective bargaining allows the parties to adapt their relationship spontaneously and creatively to their own needs. The courts, relying upon the *Pittsburgh Plate Glass*[217] decision, held that subject matter (in that case retired employees insurance benefits) would not be mandatory where the impact upon employment conditions of employees and employers was indirect or attenuated. Following this theme, the Court of Appeals for the First Circuit stated: "An agreement on interest arbitration settles nothing of substance immediately; it lacks the required direct, significant, relationship to wages, hours or terms or conditions of employment."[218] But this is no different from grievance-arbitration machinery where, as the Court told us in *Steelworkers Trilogy*, the arbitrator is appointed so as to address the gaps, ambiguities and unforeseen contingencies. Moreover, the relationship between actual conditions of employment at the time that the process is created is speculative and perhaps in some circumstances remote, the parties not knowing what will emerge from the process in a given dispute.

There is yet a third issue here which influenced the thinking of the Board in the '70s and '80s, *i.e.*, "… the very procedures in controversy can always be invoked to determine their

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1969). *See also* Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. NLRB, 501 U.S. 190, 199 (1991):

> Numerous terms and conditions of employment have been held to be the subject of mandatory bargaining under the NLRA. *See generally* 1 C. Morris, The Developing Labor Law 772-844 (2d ed. 1983). Litton does not question that arrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining. *See id.* at 813 (citing cases); *United States Gypsum Co.*, 94 N.L.R.B. 112, 131 (1951).

A no-strike pledge is a mandatory subject of bargaining. *Shell Oil Co*., 77 N.L.R.B. 1306 (1948). And a strike in violation of a negotiated no-strike provision is an unprotected activity. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

[217] Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division, 404 U.S. 157 (1971).

[218] NLRB v. Massachusetts Nurses Ass'n 557 F.2d 894, 898 (1st Cir. 1977).

continued force and effect, when the very real prospect of a perpetual existence for the non-mandatory contract term."[219] It may be argued that the perpetual existence of a waiver of the right to utilize either the strike or the lockout does indeed shift the balance against what might be viewed as the implications of the *Steelworkers Trilogy* and thus truly contradict *Insurance Agents* so as to deny its philosophy of the right to use economic weaponry by the parties. Yet, the first time around it seems clear that the waiver of the right to strike is the *quid pro quo* for arbitration – just as that is the case in connection with the *Steelworkers Trilogy* and *Lincoln Mills* promotion of grievance-arbitration.

Moreover, it is typical to distinguish the interest arbitration terms from other benefits which will occur beyond the expiration of the existing collective bargaining agreement such as wages and conditions of employment which will affect employees hired in the future.[220] True, the idea of continued self-perpetuation where, once interest arbitration is negotiated, a new interest arbitrator may award interest arbitration in the future is perplexing and the idea of a permanent waiver in perpetuity is troublesome. It may be that the law should promote the concept of a "self-terminating" interest arbitration clause.[221]

Concern about waiver in perpetuity is a view which obviously influenced the district court in Massachusetts in *Globe Newspaper Co. v. Int'l Ass'n of Machinists, Local 264*[222] when it concluded that the "second generation" interest arbitration was void against public policy. On balance, I think that the court was incorrect in vacating the award in *Globe* – but whether correct or not, it came to its conclusions for the wrong reasons. Again, it stressed the non-mandatory

[219] Sheet Metal Workers Ass'n, Local Union No. 59, 277 N.L.R.B. 520, 521 (1976). *Accord* Electrical Workers IBEW Local 135 (La Crosse Elec.), 271 N.L.R.B. 250, 251 (1984).
[220] NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 868 (5th Cir. 1966).
[221] "Interest Arbitration and the NLRB: A Case for the Self-Terminating Interest Arbitration Clause," 86 YALE L.J. 715 (1977).
[222] Globe, *supra*, note 44.

analysis which, as we have seen, stands on a shaky foundation. Hardly a mention was made of the decision of the Court of Appeals for the Second Circuit which had said that "[if] the parties elect to include in their agreement a provision governing a matter not subject to mandatory bargaining and also adopt a broad arbitration clause, nothing in [precedent] … labor law, or the Arbitration Act precludes arbitration of the dispute concerning the meaning or application of that provision."[223] Undoubtedly, some limitation must be placed on the problem of perpetual waiver. Though the matter is not free from doubt – Chairman Murphy, [224] again, provided a detailed dissent taking the position that arbitrators are not as self-aggrandizing as the Board and the courts have advertised them to be, I have always thought that arbitrators like the late Harry Platt were sound in their reluctance to fashion second generation awards where one party resisted.[225] Yet in some respects *Globe* was different. In *Globe* the parties had consented to the arbitration which gave rise to a second generation provision. But what was particularly important in that case and in some of the others like it was the fact that the parties were bargaining over a wide variety of issues. The union in that case – it could be the employer in another, obviously framed its position on an interest arbitration clause in light of its bargaining on other matters and the extent to which it thought it could realize its objective on the collective bargaining front *in toto*.

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[223] The Coca-Cola Bottling Company of New York, Inc. v. Soft Drink and Brewery Workers Union, Local 812, IBT, 39 F.3d 408, 410 (2d Cir. 1994). *Accord* Sheet Metal Workers v. Architectural Metal Works, 259 F.3d 418, 429 (6th Cir. 2001); Sheet Metal Workers v. Huggins Sheet Metal, Inc., 752 F.2d 1473 (9th Cir. 1985); Sheet Metal Workers, Loc. 252 v. Standard Sheet Metal, 699 F.2d 481 (9th Cir. 1983).

[224] *See supra* note 209.

[225] Pacific Neo-gravure, 51 LA 14, 25 (Platt, 1968):

> It would seem a fair conclusion that for an Arbitrator to order mandatory arbitration of new contract terms over the objections of either party would be, as the union states, "the equivalent of compulsory arbitration of a new contract." In the view of many—in both labor and management—imposition of such a requirement on a non-consenting party is incompatible with our system of free collect the bargaining. Nor is it unreasonable to suppose that such involuntary mandatory arbitration will adversely affect the parties bargaining relationship… [T]he availability of a procedure yielding compulsory awards tends to demoralize the bargaining process. Such procedures, it is widely believed, inhibit normal bargaining by inviting unreasonable offers and demands designed to compel arbitration … by deterring bargainers from assuming responsibility for a settlement when they believe better terms might be arrived at through terminal arbitration.

The court in *Globe* seemed totally unaware of this to the extent of dismissing without any articulated reasoning, the fact is that one side, the union in *Globe*, may have formulated its bargaining strategy in reliance upon interest arbitration and the employer's belated objection and may have undercut its expectations. For the court to intervene in this manner in the collective bargaining process is the very antithesis of the way in which national labor policy is to be properly fashioned both under *Insurance Agents* and *Steelworkers Trilogy*. Moreover, equally troubling was that the fact that the court, as an independent basis for concluding that the award must be set aside, held that since the subject matter was non-mandatory the incorporation of it in an award was unlawful and against public policy.

The emergence of so-called "final offer" or "baseball" or arbitration in interest disputes highlight the fundamentally flawed nature of the *Globe* opinion. Whether the arbitration takes place on an item by item basis or each side putting forward a package (both more hazardous and yet relatively productive in its settlement of new contract terms of new collective bargaining) if the parties are always going to be looking over their shoulder with a view towards determining how a court will characterize the subject matter in the collective bargaining process, the process is hardly furthered. In my view, it is perilous for the courts to invalidate interest arbitration clauses in arbitration awards and to interfere with arbitration awards under the public policy rubric or for some other reason.

True, the process is rather infrequent in comparison with grievance arbitration, though clearly the emergence of interest arbitration in the public sector has begun to change this calculation. While Chairman, I expressed the view that interest arbitration should be viewed as a mandatory subject of bargaining under the Act in a future case.[226] But as with so many other

[226] Sheet Metal Workers Local 162 (Dwight Lang's Enterprises), 314 N.L.R.B. 923, 926 n. 12 (1994):

matters, I never had the chance to follow this through to its conclusion.[227] The *Globe* decision is illustrative of both some of the excesses of *Borg-Warner* in the form of a kind of triumphalism which has been latched onto by courts of general jurisdiction which both lack expertise and also as a consequence disrupt the collective bargaining process. These holdings are both inconsistent with collective bargaining and arbitration and are out of touch with the Federal Arbitration Act's promotion of arbitral finality which now serves as guidance for judicial review of labor arbitrations along with *Enterprise and Wheel*. The *Globe*'s decision is just the most recent illustration of the fact that the public policy exception to the essence standard contained in *Enterprise and Wheel* has seen the courts run wild and cause more harm than help.[228]

Yet, Chairman Murphy notwithstanding, there remains the potential for self perpetuation. Self perpetuation over a non-consenting party would, it seems to me, be inconsistent with federal labor policy. *Globe*, it must be remembered, emerged from a fact situation where the parties had voluntarily submitted their differences to an interest arbitrator. If one party communicates at the outset, whether it is first or second generation arbitration that it objects to an interest arbitration clause, it seems to me an attack upon the award can be sustained as inconsistent with *Insurance*

> Chairman Gould finds that the policy favoring the peaceful settlement of disputes through arbitration expressed by the Supreme Court in the *Warrior & Gulf* case in the context of grievance arbitration applies with equal force to interest arbitration. In his view, that policy also compels the conclusion that interest arbitration is a mandatory subject of bargaining on which a party may insist to impasse. He would, therefore, overrule *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 (1976), and other cases holding that interest arbitration is a nonmandatory subject of bargaining.

Laidlaw Transit, Inc. 323 N.L.R.B. 867, 867 n. 1 (1997):

> Chairman Gould has previously expressed the view… that interest arbitration is a mandatory subject of bargaining on which a party may insist to impasse. Accordingly, he would overrule *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 (1976), and other cases holding that interest arbitration is a nonmandatory subject of bargaining. In the absence of a current Board majority to overrule that precedent, however, Chairman Gould agrees that the judge has correctly applied it here in concluding that the Respondent violated Sec. 8(a)(5).

[227] WILLIAM B. GOULD IV, LABORED RELATIONS, LAW, POLITICS AND THE NLRB: A MEMOIR (2000).

[228] The public policy exception, of course, is rooted in both Eastern Associated Coal Corp. v. United Mineworkers 531 U.S 557 (2000); W.R. Grace & Co. v. Rubber Workers 461 U.S. 757 (1983). Paperworkers v. Misco Inc. 484 U.S. 29 (1987).

Agents and its progeny. The problem in *Globe*, again, is that the collective bargaining process is disrupted where one party draws back at the eleventh hour or even subsequent to the commencement of negotiations. In a sense, the parties rely, just as they do in connection with timely notice for withdrawal from employer associations,[229] upon the process which will unfold in front of them in formulating their positions at the bargaining table. The judicial review engaged in *Globe* was mischievous in its analysis and in the result obtained.

This rule of timely withdrawal and the bargaining leading up to the successor interest arbitration clause seems to be the best approach and somewhat comparable to the position taken by the Court of Appeals for the Eighth Circuit.[230] Arbitrators properly proceed with caution into this new and relatively untested terrain. Perhaps in this way the tendency towards self-perpetuation on the part of arbitrators can be constrained.

Grievance arbitration, in contrast to interest arbitration, because it involves a system of dispute resolution relating to the terms and conditions of employment, has long been regarded as a mandatory subject of bargaining. From a legal perspective, I see no reason for distinguishing between the two.

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[229] Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404 (1982) (an impasse in collective bargaining is not sufficient to support a finding of unusual circumstances justifying a unilateral withdrawal from a multi-employer bargaining unit); Brown v. Pro Football, Inc. 518 U.S. 231, 245 (1996):

> Employers, however, are not completely free at impasse to act independently. The multiemployer bargaining unit ordinarily remains intact; individual employers cannot withdraw. *Bonanno Linen*[.] The duty to bargain survives; employers must stand ready to resume collective bargaining. *See, e.g., Worldwide Detective Bureau,* 296 N.L.R.B. 148, 155 (1989); *Hi-Way Billboards, Inc*., [206 N.L.R.B. 22, 23 (1973)]. And individual employers can negotiate individual interim agreements with the union only insofar as those agreements are consistent with "the duty to abide by the results of group bargaining." *Bonanno Linen, supra*, at 416.

Cf. Local Union No. 666, Intern. Broth. of Elec. Workers, AFL-CIO v. Stokes Elec. Service, Inc., 225 F.3d 415 (4th Cir. 2000) (holding that an employer's giving of notice that it desired to terminate collective bargaining agreement did not relieve it of its duty to submit to interest arbitration regarding unresolved issues concerning desire to terminate agreement even when the Regional Director of NLRB determined that the employer was relieved of its statutory duty to bargain); Sheet Metal Workers, Intern. Ass'n, Local Union No. 24 v. Architectural Metal Works, Inc. 259 F.3d 418, 422 (6th Cir. 2001) (finding that an interest-arbitration award binds a non-member employer that had voluntarily assented to a collective bargaining agreement between a union and a multi-employer association).

[230] Local Union 257, IBEW FL-CIO v. Sebastian Electric, 121 F.3d 1180 (8th Cir. 1996); Sheet Metal Workers' International Association, Local 14 v. Aldrich Air Conditioning, Inc., 717 F.2d 456 (8th Cir. 1983).

VI. Conclusion

Steelworkers Trilogy remains a landmark in the development of our arbitration procedures here in the United States, promoting and facilitating the voluntary process in particular – the major contribution that the United States has made in labor-management relationships which is of some use to the world. The major limitation in the *Trilogy* holdings themselves relates to the third decision, *Enterprise and Wheel*, which appeared in 1960 and its provision of finality to arbitration. But in fact, as we have seen, this has proved to be troublesome. In some measure, the Federal Arbitration Act of 1925 may play a role in tightening up the judicial review problem. One of the many ironies here is that the Court, initially appearing to distinguish labor arbitration as special and different from its commercial counterpart, has now allowed the commercial cases to drive arbitration, unwarrantedly presuming an arbitral expertise in statutory claims in *Gilmer* and *Pyett* which is largely absent. Yet, though the Court did not address the 1925 Act notwithstanding the fact that *Pyett* was heard under the statute, it would seem difficult (though not impossible) for it to draw back from a statute which for more than two decades it has said provides "guidance" to the labor arbitration to judicial review of labor arbitration awards.[231]

Boys Markets was the logical corollary of the *Steelworkers Trilogy* and rightly decided. The Court wandered off track in *Buffalo Forge*, in the teeth of Justice Stevens' brilliant dissent on behalf of four of the justices who would have promoted the policy of industrial peace contained in both *Steelworkers Trilogy* and *Boys Markets* and, in the process, arbitration (albeit

[231] United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 41 n. 9 (1987) (citations omitted):

> The Arbitration Act does not apply to "contracts of employment of ... workers engaged in foreign or interstate commerce," but the federal courts have often looked to the Act for guidance in labor arbitration cases, especially in the wake of the holding that § 301 of the Labor Management Relations Act 1947, empowers the federal courts to fashion rules of federal common law to govern '[s]uits for violation of contracts between an employer and a labor organization' under the federal labor laws.

of no underlying grievance) itself. The Court's rather lugubrious logic in *Buffalo Forge* threatened to push the new and important reverse *Boys Markets* decisions through which unions could obtain the status quo ante through which the arbitration process would be preserved off track – but this did not materialize. It was Justice Holmes who said that a page of history is worth a volume of logic and the lower courts – the Supreme Court has yet to address the issue – moved on promoting injunctions for both employers and unions in part, because of the concern with irreparable harm notwithstanding *Buffalo Forge*.

Just as the Court had properly accommodated the competing policies of the NLRA and Norris-La Guardia in *Boys Markets*, initially it did much the same in *Gardner-Denver* in connection with arbitration and discrimination. I would have preferred that Justice Powell had taken some of what was in the footnotes – 19 and 21 in particular – and placed it in the text and thus provided guidance for arbitrators in promoting finality. This is the one flaw in *Gardner-Denver* and in some respects it proved to be a vulnerable underbelly which a new Court, anxious and ambitious in its intent to reverse precedent (even though it claimed not to do so in this case) did in *Pyett*. With a confused and garbled record in *Pyett*, the Court was confused and garbled in its pronouncements for the future. *Pyett* will produce considerable litigation as it has already. But, if this Court is still there, when it gets another crack at the issue of external law the majority's philosophical predilections promise to shut off future employment discrimination litigation unless Congress steps in and retards or eliminates the Court's pursuit of its objective.

The brave new world of *Wiley* has diminished but it is not gone completely as the Third Circuit seemed to assume in *Ameristeel*. The Second Circuit's *Meridian* opinion is the better one. The issue of corporate rearrangement and job security cries out for a balanced and nuanced approach which has thus far escaped the Court in the successorship trilogy or quartet of decisions

which claim fidelity to *Steelworkers Trilogy*. Here also, it must be said, that the Court needs to clarify the ambiguities that have resulted from its decisions. My sense is that the balance will be struck for the freedom of contract note or the employers' position which was at the heart of *Burns*. My sense is that a future decision will expand that holding and push to one side both *Wiley* and *Howard Johnson* unless President Obama has new appointments to the Court which replace the conservative old guard which is now there.

Finally, without sufficient examination, the Board has pushed interest arbitration to one side realizing some of the worst fears of *Borg-Warner* critics and thus circumscribed bargaining and the substance of future collective bargaining agreements. The fundamental distinction between grievance arbitration and interest arbitration can only be rationalized on the ground that the former is more widespread than the latter. Admittedly, this attempt to influence the contours of collective bargaining by relying upon what others have done rather than promoting spontaneity in the parties' own relationship began with both *American National Insurance*[232] (even prior to *Borg-Warner*) and *Fibreboard*.[233] Coexistence of *Borg-Warner* with the so-called freedom of contract decisions of the Court – particularly *Insurance Agents* and the Court's lockout holding in *American Shipbuilding*, has always dramatized the schizoid nature of the NLRA.

But now, as the *Globe* decision so vividly demonstrates, judicial reliance upon what was thought to be a fairly narrow public policy exception to the finality of arbitration awards[234] has

[232] NLRB v. American Nat. Ins. Co., 343 U.S. 395 (1952) (holding that company's insistence on broad management rights clause and refusal of grievance arbitration demand not a per se unfair labor practice and did not show a refusal to bargain in good faith).

[233] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) (holding that an employer has to bargain collectively with the union representing its employees before contracting out work performed by union members because subcontracting is a mandatory subject of collective bargaining).

[234] Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17, 531 U.S. 57, 63 (2000):

> We agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to

opened the door to harmful meddling in the collective bargaining process. I do not know whether fifty years from now interest arbitration will be an important dispute resolution tool. But the law ought not to interfere with the way in which parties may wish to proceed in this arena.

This half century from Eisenhower to Obama, like the previous one from Lincoln to William Howard Taft, has produced enormous change – much of which could not be fully anticipated. In 2060 when our successors are here pondering these questions I think that we can safely say that there will be differences in the employment relationship and that the courts will be called upon to address them anew. The first two steps thus far – *Steelworkers Trilogy* and *Boys Markets* – show that can it be done well. One cannot say the same about the third and the fourth nor express much optimism about the fifth. The challenge for the new generation in the next century is to do better and get it right by 2060 – perhaps much earlier than 2060!

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instances where the arbitration award itself violates positive law. Nevertheless, the public policy exception is narrow and must satisfy the principles set forth in [*W.R. Grace and Co. v. Local Union 759, Intern. Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757 (1983)] and [*United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987)]. Moreover, in a case like the one before us, where two political branches have created a detailed regulatory regime in a specific field, courts should approach with particular caution pleas to divine further public policy in that area.