

Labor Arbitration of Discrimination Claims After *14 Penn Plaza v. Pyett*: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them

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I. INTRODUCTION

The Supreme Court has decided that an agreement between defendants and potential defendants can deprive a plaintiff of a Congressionally authorized cause of action, forcing plaintiffs instead into labor arbitration that a plaintiff never chose, does not want, cannot influence, and, on the facts of the case, will never take place anyway.¹ A collective bargaining agreement in which a union and employer agree to arbitrate claims of discrimination will now serve, at least some of the time, to require courts to dismiss discrimination claims made by employees who are not party to that agreement and cannot enforce the agreement, or, now, their individual statutory rights.

It is likely that the Court anticipated this ruling would divert many discrimination claims from federal court to labor arbitration. This Article argues that, if this was the hope, it will be disappointed. Hereafter, employees represented by labor unions, who believe they are victims of discrimination, will be in federal court twice. The first round will come before arbitration, when the employee sues the employer. The employer will move to dismiss the claim on the grounds that the employee's claim should have been arbitrated by the union. Many of these motions to dismiss will be granted, following *Pyett*. Other motions will raise difficult questions of judicial interpretation of the arbitration clause in a collective bargaining agreement, in which *Pyett* is in considerable tension with precedent on judicial interpretation of arbitration clauses. These difficult motions to dismiss will predictably generate numerous conflicts among lower courts, and some have already appeared.² In addition to these interpretive problems, there will be cases in which the arbitration clause clearly covers the employee's case,

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¹ 14 Penn Plaza LLC. v. Pyett, 129 S. Ct. 1456 (2009).

² See *infra* note 105, note 142, and note 152.

but in which it will appear to be a “waste of time,” to send the employee to labor arbitration.

The second round of appearances in federal court will occur after the employee (as expected) loses the arbitration, which is why the employee sued in the first place. After the labor arbitrator rules in favor of the employer, the employee will return to federal court, alleging both discrimination by the employer and a denial of fair representation by the union. The adverse arbitration ruling will, in this context, be offered as further evidence of the employer’s discrimination and union’s denial of fair representation. I will show below that current legal standards for evaluating these claims, already vague and controversial, will prove inadequate for resolving the new post-*Pyett* generation of statutory rulings by labor arbitrators.

Pyett reverses a previously unbroken line of precedent, keeping employees’ rights under collective bargaining agreements separate from their rights under state and federal statutes and common law. The Court has now equated the two rights without explaining by what alchemy individual rights under federal law transform into a union claim against an employer under a collective bargaining agreement. Under a broad, though plausible, reading of *Pyett*, employees represented by unions now have literally no employment rights under state or federal law, except the rights that unions choose to arbitrate. This creates a significant disincentive to representation by labor unions. Under any reading, however, *Pyett* will now lead to a lengthy future chain of cases to determine: (1) which employee legal claims may be stripped by collective agreements and sent to arbitration; (2) whether particular language in collective bargaining agreements will be needed to strip employees of statutory rights; (3) which demands (if any) to waive claims will constitute demands for individual bargaining, hence bargaining in bad faith; (4) whether other dispute resolution institutions might substitute for arbitration; (5) whether standards for fair representation need to be revised if unions are representing employee statutory claims; and (6) whether the role of courts changes when reviewing arbitration awards that deal with statutory rights. This Article will discuss these issues.

Stephen Pyett’s age discrimination claim has been kicking around since 2003, and now will never be tried or arbitrated. In Pyett’s account, he has been employed since 1970 continuously at the office building 14 Penn Plaza in various positions. Pyett was initially employed by the building owners, and after 1982, by a maintenance contractor.³ From 1989 to 2003, Pyett was a night

³ Employment of janitors and security guards by contractors rather than building owners is directly related to low wages and benefits. Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors*

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watchman employed by the maintenance contractor. In 2003, a security company which Pyett claims is an affiliate or subsidiary of the maintenance contractor was hired.⁴ Pyett soon found himself transferred to the less desirable and less remunerative position of night porter, while his former job went to an employee of the security company both younger and with less seniority. Pyett and two fellow employees with similar experiences sued the building company and maintenance contractor alleging age discrimination.⁵

Pyett's case was never tried due to the employer's claim that its arbitration agreement with Pyett's union stripped Pyett of his statutory right to litigate.⁶ Pyett, in fact, had taken his discrimination claim to the union, but the union, having agreed to the hiring of the security company, felt that it could not complain about the impact on Pyett.⁷

The employers moved to dismiss Pyett's discrimination case on the grounds that the arbitration clause in Pyett's collective bargaining agreement deprived the court of jurisdiction.⁸ The district court and court of appeals denied this motion, but the Supreme Court reversed, holding that it should have been granted. The result is that Pyett's age discrimination case will never be heard. A labor arbitrator cannot hear it unless the union pursues it, which the union refuses to do. Now no court can hear it either.

14 Penn Plaza and the contractors did not argue that Pyett signed any agreement to arbitrate his discrimination (or any other) claims, or in any way gave individual consent to arbitrate rather than sue.⁹ Rather, they argued, and the

and Guards (UC Berkeley: Inst. for Research on Labor & Emp., Working Paper No. 171-08, 2008), available at <http://escholarship.org/uc/item/6s89498v>. Janitors and guards employed by contractors earn less with fewer benefits than similar janitors and guards employed directly by the ultimate recipient of their services. *Id.* The employees of contractors are also more likely to be female, African-American, or Latino. *Id.*

⁴ *Pyett v. Pa. Bldg. Co.*, 2006 U.S. Dist. LEXIS 35952 (S.D.N.Y. June 1, 2006), *aff'd* 498 F.3d 88 (2d Cir. 2007), *rev'd*, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, (2009).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ 14 Penn Plaza v. Pyett, 129 S. Ct. at 1461–62.

⁹ Agreements between individual employees and their employers to arbitrate disputes are presumptively enforceable as a matter of federal law. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (individual agreement to arbitrate is covered by Federal Arbitration Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (individual agreement to arbitrate federal discrimination claim is enforceable); *Perry v. Thomas*, 482 U.S. 483 (1987) (individual agreement to arbitrate wage claims arises under Federal Arbitration Act and

Court held, that a collective bargaining agreement between Pyett's union and employer, where the union and employer agreed to arbitrate *the union's* disputes arising under that collective bargaining agreement, deprived Pyett of the age discrimination suit that Congress provided *him*.¹⁰ Pyett was thus stripped of his discrimination suit twice: first, when his union and employer agreed, for their own purposes, to take it from him; and second, in his individual case, when his union refused to take his discrimination claim to arbitration.

The Supreme Court decided this precise question in Pyett's favor a generation ago. It permitted an employee to litigate a discrimination case despite an adverse ruling by the arbitrator under the collective bargaining agreement finding him to have been discharged for cause.¹¹ Congress expressly approved this decision in enacting the Americans with Disabilities Act in 1990 and the Civil Rights Act of 1991.¹² The Supreme Court did not technically overrule

preempts state law purportedly forbidding waivers of suit). However, Pyett signed no such individual agreement.

¹⁰ Both the building and the maintenance company have allegedly signed the collective bargaining agreement. *Pyett v. Pa. Bldg. Co.*, 2006 U.S. Dist. LEXIS 35952, at *4 (S.D.N.Y. June 1, 2006), *aff'd* 498 F.3d 88 (2d Cir. 2007), *rev'd*, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, (2009).

¹¹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974). *Alexander* was a weaker case for the employee than Pyett's. *Alexander* had actually submitted his discrimination claim to labor arbitration between his union and employer, and that arbitrator had determined that *Alexander* has been dismissed for cause. Nevertheless, the Supreme Court held unanimously that *Alexander* retained his right to sue the employer under Title VII. The arbitrator's ruling adverse to *Alexander* was not preclusive. It was admissible "as evidence and entitled to such weight as the court deems appropriate" but did not preclude that court's obligation to consider the discrimination case *de novo*.

In Pyett's case, by contrast, the union refused to submit his discrimination case to arbitration. *Pyett v. Pa. Bldg. Co.* 498 F.3d 88, 91 (2d Cir. 2007), *rev'd*, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, (2009).

¹² Each of those acts contains language expressing support for alternative dispute resolution without compelling its use. Americans with Disabilities Act (ADA) § 513, 42 U.S.C. § 12212; Civil Rights Act of 1991 § 118, 42 U.S.C. § 1981. Congress explained those provisions in the same language; for brevity I quote only the report on the ADA:

[T]he Committee believes that any agreement to submit disputed issues to arbitration, *whether in the context of a collective bargaining agreement or in an employment contract*, does not preclude the affected person from seeking relief under the enforcement provisions of this Act . . . The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver* applies equally to the ADA. . . .

H.R. REP. NO. 101-485, pt. 3, at 76-77 (1990)(emphasis added). *See generally* Joseph R.

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Alexander in deciding *Pyett*, since the recent case ordered dismissal of the discrimination suit, rather than determining the status of an earlier arbitration award in an ongoing discrimination suit. However, the Supreme Court stated its willingness to overrule *Alexander* should the occasion arise.¹³ As mentioned, the occasion to overrule *Alexander* will arise soon enough. When an employee loses in arbitration, returns to federal court alleging that the employer's ongoing discrimination and union's denial of fair representation, deprive the arbitrator's ruling of finality; the Court will then overrule *Alexander* and hold that the discrimination case may not proceed de novo. The Court will then face the issue, on which it will divide sharply, of how to evaluate the employee's claim of discrimination and unfair representation in light of the adverse arbitration.

II. THE SUPREME COURT OPINION

Writing for a five-justice majority, Justice Thomas began by setting forward the arbitration clause in the collective bargaining agreement between *Pyett*'s employer and *Pyett*'s union.¹⁴ The agreement provided for arbitration between the union and the employer, and expressly covered employee claims of discrimination.¹⁵ Since 1947, collective bargaining agreements in private employment have been enforceable contracts in federal court,¹⁶ governed

Grogin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 30–35 (1996). *Pyett*'s suit by contrast arises under the Age Discrimination in Employment Act (ADEA), a 1967 statute that contains no language encouraging alternative dispute resolution. The absence of any reference to alternative dispute resolution in the ADEA did not prevent the Court from inserting it. The Court quoted the above language from the ADA and Civil Rights Acts as if they applied to the ADEA, which they do not.

¹³ 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456, 1469 n.8 (2009) (“strong candidate for overruling”).

¹⁴ Labor Management Relations (Taft-Hartley) Act added Section 301 to the National Labor Relations (Wagner) Act, 29 U.S.C. § 185 (2006), creating federal jurisdiction for suits to enforce collective bargaining agreements.

¹⁵ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52–53 (1974). (“[A] contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee”).

¹⁶ The Labor Management Relations Act was enacted in 1947. See LMRA, 29 U.S.C. 185 (2006).

ultimately by federal common law, which favors arbitration of differences between unions and employers, for whom they “substitute for industrial strife.”¹⁷

The sole question presented by *Pyett* was whether to overrule the Court’s previous holding and Congress’ express direction that such collective agreements, however binding on unions and employers for the resolution of *their* disputes, do not extinguish individual employees’ rights to sue in court to redress discrimination.¹⁸ Justice Thomas, en route to the decision, made numerous assertions about the collective bargaining agreement I believe irrelevant to the case before him, in some cases undisputed (but in others novel, and likely to produce litigation). The following list shows my tally of Justice Thomas’s irrelevant, or false reasoning:

- The union had broad authority over contract negotiation, subject to a duty of fair representation owed to employees that it represents.¹⁹
- The employer had a duty to bargain in good faith with the union.²⁰
- In this case, the employer and union had bargained in good faith.²¹
- The subjects of an arbitration clause are mandatory subjects of bargaining.²²

¹⁷ See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

¹⁸ 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456, 1461 (2009).

¹⁹ *Pyett*, 129 S. Ct. at 1463 (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)). Undisputed and irrelevant. The case raised no issue of whether the negotiation of a clause requiring arbitration between the union and employer of their disputes denied fair representation.

²⁰ *Id.* (citing National Labor Relations Act (NLRA) 29 U.S.C. § 158 (a)(5)). Undisputed and irrelevant. The outcome of the case does not depend on whether the subject of arbitration concerned a mandatory or permissive subject of bargaining.

²¹ *Id.* at 1464. Obviously the Court does not know how the negotiations proceeded. It would be accurate, though irrelevant, to observe that neither the union nor the employer complained about the other’s bargaining. The issue was the effect of that bargain on individual employees’ statutory rights, not the relationship between the union and employer.

²² *Id.* Dubious at this level of generality. Employer demands to exclude permissive subjects from arbitration clauses are themselves permissive subjects of bargaining, unless the Court means to overrule *First Nat’l. Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (employer decisions to downsize business are normally not mandatory subjects of collective bargaining).

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- “Respondents, however, contend that the arbitration clause here is outside the permissible scope of the collective-bargaining process because it affects the employees’ individual, non-economic statutory rights.”²³
- “[T]here is no legal basis for the Court to strike down the arbitration clause in this CBA. . . .”²⁴
- “Congress has chosen to allow arbitration of ADEA claims.”²⁵

After eleven pages of this obiter, the Court got down to the task at hand, eviscerating *Alexander v. Gardner-Denver Corp.*, which held that an individual might pursue discrimination claims in court despite the finding by an arbitrator, to whom the discrimination claim had been submitted by the union, that he was discharged for cause.²⁶

The Court first attempted to distinguish *Alexander* on its facts. *Alexander* rested on “the narrow ground that arbitration was not preclusive because the collective bargaining agreement did not cover statutory claims.”²⁷ This statement is false on two grounds. First, it is false as to the facts of *Alexander*’s collective

²³ *Id.* at 1464. Totally false. No one has suggested that unions and employers are legally constrained from arbitrating any matter in dispute *between them*. Thus no one suggested that the arbitration clause in *Pyett* was improper, or outside the permissible scope of bargaining. For example, neither employer nor union had asserted that the other had violated the statutory duty to bargain in good faith, NLRA Sections 8(a)(5) and 8(b)(3). The issue was whether the results of such arbitration, or the bare existence of the clause, could affect rights of individuals not party to the contract.

²⁴ *Pyett*, 129 S. Ct. at 1466. True but irrelevant. No one asked the Court to “strike down” any clause in any collectively bargained agreement. The clause is perfectly fine and binding as between the parties that signed it, namely the employer and the union. Federal courts have no general power to “strike down” clauses in collective bargaining agreements, and Justice Thomas’s suggestion and loose language to the contrary will cause great mischief in the future.

²⁵ *Id.* at 1466. Totally false. The ADEA is completely silent on arbitration. The Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that claims under the ADEA might be arbitrated when individuals “agreed” to do so (the contract was actually *Gilmer*’s form registration as a securities representative). It is accurate to state that ADEA claims may be arbitrated but false to assert that Congress has said anything about this. The Court’s textualism without a text has been searchingly criticized in Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825 (2010). Unlike *Gilmer*, *Pyett* never agreed to arbitrate anything.

²⁶ *Alexander v. Gardner-Denver Co.*, 45 U.S. 36 (1974).

²⁷ 14 Penn Plaza v. *Pyett*, 129 S. Ct. at 1467.

bargaining agreement, which did cover statutory claims; and second, it is false as to the Court's holding in *Alexander*.²⁸

The arbitration clause in the CBA at issue in *Alexander* covered the employee's discrimination claim against his employer, which is why the arbitrator decided whether Alexander had been discharged for discriminatory or valid reasons. This ruling by the arbitrator was unsurprising. The Court had long held, before the *Pyett* decision, that federal collective bargaining law employs a heavy "presumption of arbitrability."²⁹ Under this presumption, an arbitration clause covers any dispute plausibly within its scope, including any dispute over which the union cannot strike, such as claims by individual employees.³⁰ It has

²⁸ As summarized by the *Alexander* Court, 415 U.S. at 39–42 (footnotes omitted) (Under Art. 4 of the collective-bargaining agreement, the company retained "the right to hire, suspend or discharge [employees] for proper cause." Article 5, § 2, provided, however, that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry," and Art. 23, § 6 (a), stated that "no employee will be discharged, suspended or given a written warning notice except for just cause." The agreement also contained a broad arbitration clause covering "differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant." Disputes were to be submitted to a multi-step grievance procedure, the first four steps of which involved negotiations between the company and the union. If the dispute remained unresolved, it was to be remitted to compulsory arbitration. The company and the union were to select and pay the arbitrator, and his decision was to be "final and binding upon the Company, the Union, and any employee or employees involved." The agreement further provided that "the arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement." The parties also agreed that there "shall be no suspension of work" over disputes covered by the grievance-arbitration clause.)

²⁹ *AT&T Techs., Inc. v. Commc'n Workers*, 475 U.S. 643, 650 (1986) ("[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.") (quoting *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960))).

³⁰ *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) ("There is no exception in the 'no strike' clause and none therefore should be read into the grievance clause, since one is the quid pro quo for the other."); *Warrior & Gulf*, 363 U.S. at 581 ("Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions. . . ."); *Id.* at 584–85 ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . ."); *AT&T Techs.*, 475 U.S. at 652

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never been part of federal labor law to scrutinize closely the language of ambiguous arbitration clauses, since they are presumed to cover all disputes between employers and unions, except those expressly excluded. “Doubts should be resolved in favor of coverage.”³¹

Pyett will have mischievous results if it upends this established practice of broadly interpreting arbitration clauses; especially if offered solely as a specious distinction with a precedent which the Court has tired and would prefer to overrule. I am confident, however, that *Pyett* will have just this effect on lower court practice. Suits to compel arbitration, not just motions to dismiss individual claims pending arbitration, will send district courts into closely parsing arbitration clauses in order to determine whether they include the dispute in question (similar to the clause in *Pyett*) or do not cover it (as the clause in *Alexander* is now retrospectively, and falsely, characterized). I will return to these implications of *Pyett* in Part IV.A, when I address more specifically the problems it will create.

III. CRITIQUE OF *PYETT*: THE FAILURE TO UNDERSTAND THE DISTINCTION BETWEEN INDIVIDUAL CLAIMS AND UNION CLAIMS

Pyett's infidelity to precedent is important in a practical, not just pedantic, sense. As Part IV will show, an enormous number of practical problems will bedevil federal courts over the next few years trying to reconcile *Pyett* with precedent on the interpretation of arbitration clauses and the review of arbitrators' awards. In order to understand this, it is necessary to discuss in more depth the fundamental conflicts.

The modern employment relationship, to invoke a trite metaphor, is a bundle of sticks. Employees have numerous legal claims on employers, with diverse origins, including individual contracts, collective bargaining agreements, state and federal statutes, and state common law.

The bright-line *Alexander* rule was that claims arising from collective bargaining agreements must normally be submitted to dispute resolution institutions created by those collective bargaining agreements, which usually was arbitration. All other claims were held by employees as individuals, and were enforced through administrative or litigation mechanisms contemplated by state or federal legislation.

As we shall see, this rule was easy to administer, and generated no difficulty or confusion. No good reason has been suggested for departing from it. *Pyett*

(“express exclusion or other forceful evidence”).

³¹ *Warrior & Gulf Navigation Co.*, 363 U.S. at 583.

should have applied directly controlling precedent and maintained the historic distinction between the union's legal claims and the union member's legal claims. Before examining just how much law has been upset by *Pyett*, it is necessary to review the evolution of collective bargaining law up to 2009, specifically the evolution of the bright line between union claims and member claims. The argument proceeds in four parts.

First, collective bargaining arbitration was granted its legal privileges as a preferred way of resolving disputes between unions and employers, expressly *not* as a substitute for litigation.

Second, the Court, on at least eleven separate occasions before *Pyett*, reaffirmed that employees represented by unions nevertheless retain statutory, contractual, and other common law rights. Moreover, these rights are to be resolved individually and are not subject to binding results in labor arbitration, unless the employee chooses to submit them. These cases, taken together, establish what we are calling the bright line rule under which each employee's legal claim against an employer is enforced through its own mechanism. The Court in *Pyett* discusses few of them and thus immediately casts doubt on at least eleven Supreme Court labor cases and their countless applications by lower courts.

Third, labor arbitration has evolved as an institution in response to these two precise parameters. It worked efficiently to resolve disputes between unions and employers. However, it has historically contributed nothing of value to the resolution of statutory or common law claims by individual employees against employers. There is no reason to think that labor arbitration can suddenly turn into a kind of labor court, or master labor institution to resolve statutory and common law claims beyond its competence or experience.³²

Fourth, requiring arbitration in *Pyett* will create pressure to eliminate other lawsuits that Congress clearly intended to regulate overreaching unions and employers. For example, the labor titles of the Employee Retirement Income Security Act of 1974 (ERISA),³³ and the Americans with Disabilities Act of 1990,³⁴ will essentially become dead letters for unionized employees if they cannot sue on their claims, but are instead forced against their will by decision of their employers and unions to submit them to collective bargaining arbitration. Similarly, labor law decisions on arbitration have always been taken to apply to other institutions resolving disputes under collective bargaining agreements, such

³² See *infra* Part IV.E.

³³ 29 U.S.C. §§ 1001–1461 (2006).

³⁴ 42 U.S.C. §§ 12101–12213(2006).

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as joint grievance committees under Teamster contracts.³⁵ These committees are particularly poorly suited to resolve individual statutory claims.³⁶

Thus, the Supreme Court's apparent decision to abandon the *Alexander* bright line rule will launch the Court into a new lengthy line of cases to determine exactly which statutory claims may be appropriated by collective bargaining agreements. The Court should not operate under the illusion that reversing *Alexander* will rid its docket of discrimination claims by workers represented by unions. On the contrary, *Pyett* opens an enormous list of cases, each presenting different versions of the defense that the presence of a collective bargaining agreement extinguishes the employee's claim.

A. *The Relationship Between Arbitration Under Collective Bargaining Agreements, a "Substitute for Industrial Strife,"³⁷ and Rights Under Collective Bargaining Agreements*

The opinion of the Court in *Pyett* relies on a unitary concept called "arbitration." Under this concept, all kinds of arbitration are more or less fungible devices for private resolution of disputes, all of which substitute for litigation. This view of the world originates in 1991, when the Court in *Gilmer* enforced an individual contract in which an individual securities representative agreed³⁸ to arbitrate disputes with his employer.³⁹ Having decided *Gilmer*, the Court in *Pyett* held it was obligated to treat arbitration clauses in collective bargaining agreements as waivers of employees' right to sue under the same Age Discrimination in Employment Act⁴⁰ involved in *Gilmer*.⁴¹

³⁵ See *infra* Part IV.C.

³⁶ Gregory E. Zimmerman, Comment: *The Teamster Joint Grievance Committee and NLRB Deferral Policy: A Failure to Protect the Individual Employee's Statutory Rights*, 133 U. PA. L. REV. 1453 (1985).

³⁷ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

³⁸ At least according to the Court.

³⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The contract was actually *Gilmer's* form registration as a securities representative.

⁴⁰ 29 U.S.C. §§ 621–34 (2006).

⁴¹ "The *Gilmer* Court's interpretation of the ADEA fully applies in the collective-bargaining context. Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456, 1465 (2009). This statement is historically false. Before *Pyett*, the Court always distinguished the two, often explicitly. It

This argument is little more than a pun on the word “arbitration,” symbolizing the power of that word to confuse good minds.⁴² In truth, the mind needs little more than command of the English language to understand the difference between an employee agreeing to arbitrate with, not sue, his or her employer, and a union and employer agreeing between themselves that an individual will not sue *them*. Gilmer agreed to arbitrate. Pyett never did. As the Supreme Court noted, there is “no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process.”⁴³ Throughout this Article, I will follow ordinary legal usage, referring to *Gilmer* arbitration, agreed to by an individual employee, as “individual contract arbitration,” and Pyett’s situation, in which the only parties agreeing to arbitrate are the union and employer, as “collective bargaining arbitration” or “labor arbitration.”

would have been far more accurate to state: “Nothing in the law before today has ever equated arbitration agreements signed by an individual employee, which substitute for litigation, and those agreed to by a union representative, which substitute for industrial strife.”

It is now an open question how many of these distinctions have now been effaced. Among the more obvious: (1) arbitration agreements signed by individual employees arise under the Federal Arbitration Act, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111–19 (2001). This has never been held to be the case for collective bargaining agreements. (2) Arbitration agreements signed by individual employees are employment contracts under state law, governed by general state contract law except where the FAA preempts it as hostile to arbitration. Collective bargaining agreements by contrast arise under federal common law which completely preempts any application of state law. *See generally Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394–95 (1987) (discussing difference). (3) Arbitration agreements signed by individual employees are interpreted like ordinary contracts of employment, while arbitration clauses in collective bargaining agreements cover individual claims only when “clear and unmistakable.” *Wright v. Univ. Mar. Serv. Corp.*, 525 U.S. 70 (1998).

⁴² “‘Arbitration’ is a blessed word, like ‘Mesopotamia.’ It tinkles pleasantly on the ear, and suggests a quick and short route by which the terrors of the courts may be avoided in every case. This, I am convinced, is a popular illusion, treasured in the minds of many until put to the crucial test.” Joseph Rylands, *Introduction*, to Roger S. Bacon, *COMMERCIAL ARBITRATION* (1928), quoted (but misattributed) in Philip G. Phillips, *A General Introduction*, 83 U. PA. L. REV. 119, 121 (1934).

⁴³ *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 875 (1998) (quoting *Miller v. Air Line Pilots Ass’n*, 108 F.3d 1415, 1421 (D.C. Cir. 1997) (emphasis in original) (union members may sue directly in federal court for refunds of unauthorized dues assessments and need not exhaust union’s arbitration system)). The contrast between *Pyett* and *Miller* is amusing. Union members have immediate and unmediated access to federal court to enforce rights that the Supreme Court made up, but must arbitrate rights that Congress created.

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However, examination of the relevant labor law reveals that arbitration under collective bargaining agreements has *always* been treated by the Court, and rightly so, as something different from arbitration under other contracts. The most important consequence of this distinction is the line of cases to be discussed in Part III.B of this Article, which uniformly retained litigation for statutory and common law employment rights that individual employees had not individually consented to arbitrate.

It is, however, also worth examining the Court's earliest confrontations with labor arbitration under collective bargaining agreements, because they illustrate how labor arbitration has been kept distinct from other contractual arbitration. Judicial deference to labor arbitration reflects its status as "the substitute for industrial strife," and not a "substitute for litigation."⁴⁴

Those confrontations came in the famous labor law cases known as *Lincoln Mills* and the *Steelworkers Trilogy*, in 1957 and 1960 respectively. The Court developed a highly deferential stance toward labor arbitration. It held that executory promises to arbitrate would be presumptively enforceable;⁴⁵ that the Norris-La Guardia Act was no obstacle to injunctive enforcement of the promise to arbitrate,⁴⁶ that a presumption of arbitrability would require federal and state courts to send even dubious claims to arbitration;⁴⁷ that state law hostile to arbitration was preempted,⁴⁸ and that arbitrators' rulings would normally be enforced judicially without review on the merits.⁴⁹ The express basis for this treatment, in the Court's words, was that:

[T]he run of arbitration cases, illustrated by *Wilko v. Swan*,⁵⁰ . . . becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal

⁴⁴ *United Steelworkers of Am. v. Warrior & Gulf*, 363 U.S. 574, 578 (1960).

⁴⁵ *See id.* at 583.

⁴⁶ *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457–58 (1957).

⁴⁷ *Warrior & Gulf*, 363 U.S. at 584–85; *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 567–68 (1960).

⁴⁸ This was implicit in the Court's holding that the law of arbitration agreements under Labor-Management Relations (LMRA) (Taft-Hartley) Act §301(a), 29 U.S.C. § 301(a), was federal common law. *Lincoln Mills*, 353 U.S. at 456–57. Federal preemption was made explicit in *Local 174, Teamsters, Chaukfeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 102–04 (1962).

⁴⁹ *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

⁵⁰ *Wilko v. Swan*, 346 U.S. 427 (1953).

arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife.⁵¹

Although the federal Arbitration Act⁵² was in effect at the time of the *Steelworkers Trilogy*, and had been for thirty-five years, the Court did not assume that it had any relevance to labor arbitration.⁵³ Indeed, the Court was at pains to establish the law of labor arbitration as distinct federal common law under the Labor Management Relations Act.

Why was it important to establish that labor arbitration is not “the substitute for litigation”? The Court gave two reasons.

First, the Court held, collective bargaining agreements do not vest rights in the way that commercial contracts do. The collective bargaining agreement:

is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . 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. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators.⁵⁴

In other words, a promise in a collective bargaining agreement, like Pyett’s, that the employer will not discriminate, is not fungible even with identical language in an individual employment contract, or a statute (one might add). In a collective bargaining agreement, unlike an individual contract or statute, any

⁵¹ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

⁵² 9 U.S.C. §§ 1–16 (2006).

⁵³ In light of developments under the Federal Arbitration Act over the past forty years, the deference given to labor arbitration in the *Steelworkers Trilogy* may no longer appear to be a big deal. Today, executory promises to engage in commercial arbitration are also enforceable, and awards judicially enforceable without review on the merits. However, this was not the case in 1960.

The Court has never had occasion to hold whether arbitration under collective bargaining agreements is now governed by the Federal Arbitration Act. The *Steelworkers Trilogy* was premised on the idea that it was not, but, as noted, the substantive standards have become close if not identical. *Pyett* did not present the issue. Neither of the parties argued that the law under the Federal Arbitration Act would differ from the law of labor arbitration developed under LMRA §301.

There is no prospect that the Federal Arbitration Act could supplant the law of labor arbitration developed under LMRA § 301, since the latter, but not the former, creates federal jurisdiction.

⁵⁴ *Warrior & Gulf*, 363 U.S. at 578–81.

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such promise takes on meaning only as part of the ongoing relationship between the employer and union.⁵⁵ Thus, under the law before *Pyett*, Stephen Pyett may have had at least three sources of his right to be free of age discrimination: (1) federal and (2) state law vested in him and enforced through litigation and (3) his collective bargaining agreement created and controlled by his union and employer. While all three protect him against age discrimination, they were not fungible before *Pyett*. The right under the collective bargaining agreement is not vested in Pyett as an individual; he cannot enforce it; and it means, as the Court correctly stated in the *Trilogy*, just exactly what his union and his employer think it means.

Second, the Court held in the *Steelworkers Trilogy* that collective bargaining agreements are not enforced like commercial agreements. They typically provide for enforcement by labor arbitration, which is not the same thing as commercial arbitration. “The labor arbitrator performs functions which are not normal to the courts. . . .”⁵⁶ Labor arbitration “is the substitute for industrial strife.”⁵⁷ That is, it covers differences between unions and employers; differences that, absent arbitration, can and do give rise to strikes and lockouts. “There is no exception in the ‘no strike’ clause and none therefore should be read into the grievance clause, since one is the quid pro quo for the other.”⁵⁸ Public policy encouraged labor arbitration because the alternative—constant industrial conflict over the meaning of collective bargaining agreements—was unacceptable. By contrast in “the run of arbitration cases,”⁵⁹ which in 1960 meant commercial arbitration cases, litigation was an alternative. The inquiry was simply what means of dispute resolution did the parties select? Courts in “the run of arbitration cases” employ no presumption of arbitrability, and certainly do not interpret arbitration clauses in *pari materia* with no-strike clauses.

The employer in *Pyett* thus successfully invoked the highly deferential federal law of labor arbitration in a case that presented none of the issues that led to that deferential law. For Stephen Pyett, arbitration *is* the alternative to litigation and should have been evaluated as such. That is, his claim was a

⁵⁵ That is exactly what happened to Stephen Pyett’s attempt to invoke the antidiscrimination language of his collective bargaining agreement. The union refused to take his claim to arbitration on the grounds that, having agreed to the employer’s bringing in a new security firm, the union was precluded from complaining on behalf of incumbent employees who lost their jobs.

⁵⁶ *Warrior & Gulf*, 363 U.S. at 581.

⁵⁷ *Id.* at 578.

⁵⁸ *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

⁵⁹ *Warrior & Gulf*, 363 U.S. at 578.

statutory claim that did not arise from his collective bargaining agreement. Pushing him unwillingly into labor arbitration, which he did not select, does not avoid industrial strife. Viewed as a “run of the mill” arbitration case, the resolution should have been simple. Stephen Pyett, unlike plaintiffs in the *Gilmer* line of individual arbitration cases, never agreed to arbitrate his federal statutory claims.

B. *Pre-Pyett Supreme Court Precedent on the Relationship Between Collective Bargaining Arbitration and Individual Legal Rights*

The modern employment relationship is undoubtedly more complex legally than it was at the time of the *Steelworkers Trilogy*.⁶⁰ Any employee now holds a suite of rights of diverse origins against his or her employer. Congress has given employees rights against their employers in Title VII of the Civil Rights Act of 1964,⁶¹ the Age Discrimination in Employment Act of 1967,⁶² the Employee Retirement Income Security Act of 1974,⁶³ the Americans with Disabilities Act of 1990,⁶⁴ the Family and Medical Leave Act,⁶⁵ and various protection for whistle-blowers,⁶⁶ among others. State courts, in a burst of activism in the 1980s, developed such common law causes of action as tortious discharge in violation of public policy,⁶⁷ breach of the covenant of good faith and fair dealing implied in every contract,⁶⁸ and implied contract rights.⁶⁹ Employees may have rights under

⁶⁰ See generally David E. Feller, *The Coming End of Arbitration's Golden Age*, 29 PROC. NAT'L ACAD. ARBITRATORS 97 (1976).

⁶¹ 42 U.S.C. §§ 2000e–2000e-17 (2006).

⁶² 29 U.S.C. §§ 621–634 (2006).

⁶³ 29 U.S.C. §§ 1001–1461 is the “labor title” of ERISA.

⁶⁴ 42 U.S.C. §§ 12111–12117 are the employment provisions of the ADA; other provisions are also relevant.

⁶⁵ 29 U.S.C. § 2601.

⁶⁶ See, e.g., Sarbanes-Oxley Act of 2002, protecting whistle blowers 15 U.S.C. § 78j-1(m); 15 U.S.C. § 7245; 18 U.S.C. § 1514A; and 18 U.S.C. § 1513(e).

⁶⁷ See, e.g., *Petermann v. Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 344 P.2d 25, 27–29 (Cal. App. 1959); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 388–90 (Conn. 1980). Up-to-date treatment of the state law developments discussed in these cases is available at CLYDE W. SUMMERS, KENNETH G. DAU-SCHMIDT & ALAN HYDE, *LEGAL RIGHTS AND INTERESTS IN THE WORKPLACE* 78–111 (2007) and statutory supplement.

⁶⁸ See, e.g., *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.).

⁶⁹ See, e.g., *Scott v. Pacific Gas & Elec. Co.*, 904 P.2d 834, 840–47 (Cal. 1995); *Gilbert v. Durand Glass Mfg. Co., Inc.*, 609 A.2d 517 (N.J. App. 1992).

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their employer's handbook,⁷⁰ or oral or written promises made to them individually.⁷¹ State legislation protects whistle-blowers and those who assert claims under other state employment statutes, such as worker's compensation.⁷²

These rights, originating outside collective bargaining agreements, protect both employees who are and are not represented by labor unions. Indeed, the Supreme Court has held that they *must* protect those represented by unions equally with those who are not.⁷³

Thus, every employee protected by a collective bargaining agreement retains rights, independent of that agreement, under federal and state employment law. The argument has nevertheless been made repeatedly that unionized employees may be forced to enforce their rights, originating independently of their collective bargaining agreement, through labor arbitration, rather than the enforcement

⁷⁰ See, e.g., *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1259–66 (N.J. 1985).

⁷¹ See, e.g., *Rooney v. Tyson*, 697 N.E.2d 571 (N.Y. 1998); *Shebar v. Sanyo Bus. Sys. Corp.*, 544 A.2d 377 (N.J. 1988).

⁷² See, e.g., New Jersey Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-1–19-8 (West 2000); CAL. LAB. CODE §§ 1102.5–1106.

⁷³ *Livadas v. Bradshaw*, 512 U.S. 107 (1994). A California statute required employers to pay all wages owed at the time an employee is dismissed and placed responsibility for enforcement on the Labor Commissioner. *Id.* at 110. The Commissioner adopted a general policy of refusing to enforce timely payments under collective agreements, believing that the need to interpret or apply the agreement was exclusively federal law that preempted the state statute. *Id.* at 112–13. The Court unanimously rejected the Commissioner's position as without "even a colorable argument," *Id.* at 124, because deciding whether a penalty should be imposed was not a question of "contract, but [of] calendar." *Id.* at 124. Whether the employer "willfully failed to pay on time" was a "question of state law, entirely independent of any understanding embodied in the collective bargaining agreement." *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994). Nor could the Commissioner decide as a matter of enforcement priorities to avoid unionized employees with rights under collective bargaining agreements. A refusal by state officials to apply employment laws to employees covered by collective bargaining agreements deprived them, under color of state law (42 U.S.C. § 1983) of their rights under the National Labor Relations Act. *Livadas*, 512 U.S. at 126–34.

Livadas vividly demonstrates how employees represented by unions (like Stephen Pyett) retain all their individual employment rights under state and federal law, which they may enforce through the appropriate mechanism for each right. *Livadas* and her union did challenge her dismissal in labor arbitration and won her reinstatement, but chose not to submit her claim under California wage law to arbitration. They chose to invoke state administrative procedures, and the Court held that federal law guarantees their right to do so. Stephen Pyett wanted exactly what Karen Livadas had a right to: the right to invoke public processes for his public law claims, despite the existence of ongoing labor arbitration. If the Court is correct in *Pyett*, then *Livadas* would have to be overruled.

mechanisms created by Congress or state legislatures.⁷⁴ It has been rejected nearly as uniformly, and should have been rejected, for at least the twelfth time, in *14 Penn Plaza v. Pyett*.

In the last three decades alone, the Supreme Court has decided at least thirteen cases presenting the following pattern. An employee, currently represented by a labor union, sues in state or federal court under a state or federal employment statute, or state common law, and the defendant employer asserts either that the lawsuit should be dismissed so that the employee may submit his claim to his union for arbitration, or that the lawsuit is precluded by a previous arbitration ruling finding against the employee.

This defense nearly always loses. In eleven of the twelve pre-*Pyett* cases, the employee was permitted to sue in court, despite the existence of collective bargaining arbitration or, in some cases, an adverse arbitration ruling. Employees represented by labor unions may, despite collective agreements or adverse arbitral rulings, resort to court to establish their rights under the Civil Rights Act of 1964,⁷⁵ the Fair Labor Standards Act,⁷⁶ other federal wage statutes,⁷⁷ Section

⁷⁴ See *infra* note 73–83 and text accompanying.

⁷⁵ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (holding employee may sue employer under Title VII despite union's having taken his discharge to labor arbitration and arbitrator finding his discharge to have been for cause).

⁷⁶ *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981) (allowing an employee to sue employer in federal court under the Fair Labor Standards Act, seeking compensation for time spent inspecting trucks, despite collective bargaining agreement requiring compensation for all time spent in employer's service, and adverse ruling by joint employer-union grievance committee). The Court found it unnecessary to resolve a factual dispute over whether the drivers had intended to submit their FLSA claim to the grievance committee, since they "would not be precluded from bringing their action in federal court in either case." *Id.* at 731 n.4. *Barrentine* is squarely on point:

Two aspects of national labor policy are in tension in this case. The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective-bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights. A tension arises between these policies when the parties to a collective-bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures.

.....

Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to

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1983,⁷⁸ the Federal Employers Liability Act,⁷⁹ state common law contracts of employment outside the collective bargaining agreement,⁸⁰ state tort law

provide minimum substantive guarantees to individual workers.

Id. at 734–35, 737. Obviously these observations apply equally to *Pyett*. The Court did not address them.

⁷⁷ U.S. *Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 357 (1971) (holding a seaman may assert wage claim in federal court under the Seaman's Wage Act, 46 U. S. C. § 596, even though he had not previously pursued arbitral remedies provided by contractual grievance procedures); *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 268–70 (1958) (employee returning from military service need not pursue grievance and arbitration procedure prior to asserting seniority rights in federal court under Universal Military Training and Service Act).

⁷⁸ *McDonald v. City of West Branch*, 466 U.S. 284, 285 (1984) (public employee may sue under 42 U.S.C. § 1983, alleging discharge for public speech, despite ruling of labor arbitrator that he was discharged for cause); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (upholding an individual agreement to arbitrate a discrimination claim and distinguished *Alexander*, *Barrentine*, and *McDonald*, as cases in which “employees there had not agreed to arbitrate their statutory claims . . .”). *Pyett*, like *Alexander*, *Barrentine*, and *McDonald*, did not agree to arbitrate his statutory claims.

⁷⁹ *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 564 (1987). The court held:

The fact that an injury otherwise compensable under the Federal Employer's Liability Act was caused by conduct that may have been subject to arbitration under the Railway Labor Act does not deprive an employee of his opportunity to bring an FELA action for damages. . . . It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion.

Id. Similarly, *Pyett* should not have been denied recovery under the ADEA “simply because he might also be able to process a narrow labor grievance. . . .” *Id.* at 565

⁸⁰ *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394–95 (1987). *Caterpillar* focused on an employee's ability to sue in state court to enforce oral promises allegedly made to them that contradict the collective bargaining agreement. The court stated employees may sue in whichever forum is available:

Respondents allege that *Caterpillar* has entered into and breached individual employment contracts with them. Section 301 says nothing about the content or validity of individual employment contracts. It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under § 301. As masters of the complaint, however, they chose not to do so.

Id. Similarly, *Pyett* chose not to assert any rights under the collective agreement but chose to assert only his rights under federal statute. *See also Belknap, Inc. v. Hale*, 463 U.S. 491

protecting workers compensation claimants against retaliation,⁸¹ state statutory and common law protection for whistle blowers,⁸² and state laws requiring timely wage payments.⁸³ The underlying logic is uniform and forcefully expressed in each case: employees as individuals hold rights that do not originate

(1983) (allowing employees to sue in state court to enforce promises allegedly made to them to induce them to accept positions as strike replacements and allegedly breached in strike settlement with union):

It is said that respondent replacements are employees within the bargaining unit, that the Union is the bargaining representative of petitioner's employees, and the replacements are thus bound by the terms of the settlement negotiated between the employer and "their" representative. . . . such an argument was rejected in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

Belknap, 463 U.S. at 491. In the latter case the employer was found to have refused to bargain with the union, citing individual employment contracts as the excuse. The Court upheld the Board's order that the employer discontinue the individual contracts, but modified it "without prejudice to the assertion of any legal rights the employee may have acquired under such contract or to any defenses thereto by the employer. . . ." *Id.* at 541 n.14. Pyett, however, unlike Hale, may not sue directly, but must be bound by the settlement between his union and employer, which in his case was to extinguish his claim.

⁸¹ *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407-10 (1988) (permitting employee to sue in state court alleging that her discharge was in retaliation for filing workers compensation claim, since state law remedy is independent of the collective bargaining agreement). In *Lingle*, an arbitrator had found that Lingle was discharged for cause. Under the rule of *Alexander*, this did not preclude her suit in state court.

⁸² *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256-63 (1994). Norris, an airplane mechanic, was fired for refusing to certify that an aircraft was safe. The Federal Aviation Agency agreed with Norris, proposing to fine the airline \$964,000 and revoke the license of Norris's supervisor; that case eventually settled. Norris pursued grievances under the collective bargaining agreement, but the arbitrator upheld his discharge on the grounds that he had been "insubordinate." The Court held unanimously that he could pursue his remedies in state court alleging violation of a "whistle-blower" statute and tortious discharge in violation of federal policy. The Court reviewed an unbroken line of cases dating as far back as *Mo. Pacific R. Co. v. Norwood*, 283 U.S. 249, 258 (1931), holding that railway workers covered by collective bargaining agreements need not submit their claims under state or federal employment statutes to the arbitration processes of the Railway Labor Act. The Court noted, that the principles of cases like *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, cited *supra* n.62, are equally applicable to deciding both the relationship between federal statutes, and preemption of state law. *Norris*, 512 U.S. at 259 n.6

⁸³ *Livadas v. Bradshaw*, 512 U.S. 107 (1994), discussed *supra* n.73. The one exception to this line of cases involved an employee who simply characterized a claim for benefits, originating under the collective bargaining agreement, as a state common law claim; this was held preempted. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 221 (1985). This has no relevance to Pyett's federal statutory claim.

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in collective bargaining agreements; such rights need not be submitted to labor arbitration under those agreements; and, if submitted, adverse decisions by an arbitrator do not preclude independent litigation.

Instead of discussing all these cases, the Court in *Pyett* discussed only *Alexander*, *Barrentine*, and *McDonald*. It purported to distinguish them as cases in which the arbitration clause did not cover the employee's statutory claim.⁸⁴ The distinction is specious, as shown above. In all three cases there was not only a general arbitration clause, but also an actual arbitrator's ruling that the case was within his jurisdiction.

In other words, *Alexander* is not a sport or anomaly in labor law that may be easily reversed, but a foundational brick in a now-rather-thick wall, separating rights that belong to employees from rights that belong to their unions.⁸⁵ Collective agreements never waive individual legal rights; sometimes they add to them. But even when the collective bargaining agreement contains the same language as a statute or individual contract, it creates a different right, for reasons discussed in *Steelworkers v. Warrior & Gulf*: rights in a collective bargaining agreement, unlike individual rights, normally contemplate definition by employers and unions through negotiation and arbitration.⁸⁶

Consider how collective agreements add rights. No American employee (outside Montana) has a background default right to be discharged only for cause. The default rule everywhere else is employment at will. Consequently, complaints about discharge normally belong to unions that negotiate them in collective bargaining agreements. However, the rare employee who *does* have statutory or common law grounds for challenging a discharge does not lose them just because an arbitrator has found that he or she was discharged for cause under the collective bargaining agreement.⁸⁷ By contrast, the right to get paid for

⁸⁴ 14 Penn Plaza LLC. v. Pyett, 129 S. Ct. 1456, 1467–68 (2009).

⁸⁵ At oral argument in *Wright*, Justice Scalia asked counsel for the Solicitor General to distinguish an employee's right to be paid for his work, which Justice Scalia assumed could only be enforced by a union, from his right to be free of discrimination, governed by *Alexander*, which Justice Scalia took to be anomalous. Transcript of Oral Argument at *7, *Wright v. Universal Mar. Serv., Corp.*, 1998 U.S. Trans. LEXIS 84 (No. 97-889). The answer to this question is that there is no anomaly. No legal right that is independent of the collective bargaining agreement ever becomes extinguished because of the existence of that agreement, or the existence of an arbitration clause, or even an adverse ruling by an arbitrator. See, e.g., *Livadas*, 512 U.S. at 110; *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981).

⁸⁶ See, e.g., *United Steelworkers of Am. v. Warrior & Gulf*, 363 U.S. 574, 578 (1960).

⁸⁷ *Norris*, 512 U.S. at 249 (whistle blower statute); *Lingle*, 485 U.S. at 407 (anti-

one's work is a common law contractual or quasi-contractual right that predates collective bargaining.⁸⁸ For most workers covered by collective bargaining agreements, a claim for such pay involves interpretation of the agreement to an extent that makes labor arbitration far preferable to state contract or quasi-contract claims.⁸⁹ However, the rare worker with a wage claim that does not require interpretation of the collective bargaining agreement does not waive that claim, need not submit it to arbitration, may pursue state law remedies⁹⁰ and is not bound by an adverse arbitral ruling.⁹¹

It is true that in none of these cases, so far as the reported decisions reveal, was there an express clause in the relevant collective bargaining agreement purporting to waive employee individual rights. The Court in *Pyett* made much of this supposed distinction.⁹² Of course, in at least five cases in the sequence, the union and employer had already arbitrated the employee's claim under the collective bargaining agreement. All five arbitrators found the claim arbitrable under the collective bargaining agreement and decided it adversely to the employee on the merits. Obviously in at least those five cases there was an arbitration clause in the collective bargaining agreement that covered the employee's claim.⁹³ The Supreme Court held in each of these five cases that the employee could nevertheless sue on his or her statutory or common law claim. The Court's holdings did not assume that the claim was not arbitrable. Arbitrators had found the claims under the collective agreement to have been arbitrable, and that conclusion was not challenged. In holding that the employees might nevertheless sue in court, the Court rested instead on the basic structure of labor law, under which labor arbitration resolves disputes between unions and employers, but does not preclude employee recourse to the courts.

More importantly, reading a collective bargaining agreement for "waiver" of employee rights just begs the question. A purported waiver only matters if it is

retaliation statute); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974) (discrimination statute).

⁸⁸ See, e.g., *Britton v. Turner*, 6 N.H. 481, *11 (N.H. 1834) (quasi-contractual claim to compensation for work actually done).

⁸⁹ See, e.g., *Allis-Chalmers*, 471 U.S. at 221.

⁹⁰ See, e.g., *Livadas v. Bradshaw*, 512 U.S. 107, 110 (1994).

⁹¹ See, e.g., *Barrentine, v. Arkansas-Best Freight System, Inc.*, 450 U.S. 782, 745 (1981).

⁹² *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1469 (2009).

⁹³ *Alexander*, 415 U.S. 36; *Barrentine*, 450 U.S. at 730; *McDonald v. City of West Branch Mich.*, 466 U.S. 284, 285 (1984); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 399 (1988); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 249 (1994).

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assumed to deal with something waivable, which employees' individual employment rights were not before *Pyett*. As the Supreme Court has noted, there is "no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process."⁹⁴ Searching for a waiver in a collective bargaining agreement assumes the point at issue.⁹⁵

The express negotiated waiver in *Pyett's* collective bargaining agreements reflects signals from the Court, rather than constituting some kind of state of nature. Nobody ever bothered to negotiate a waiver of employee rights in a collective bargaining agreement, after *Alexander* rendered them otiose, until the Court invited such clauses in *Wright*.⁹⁶ Before that case, it was settled law that arbitration clauses in collective bargaining agreements cover disputes between the union and employer under that agreement, and do not, and cannot, require employees to submit their individual statutory and common law claims to arbitration. The Court's holding in *Pyett* obviously invites the increased drafting in collective bargaining agreements of clauses purportedly directing any or all employee claims against the employer to labor arbitration. We will discuss *infra* Part IV.B whether there are any limits to this process.

⁹⁴ *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 875 (1998).

⁹⁵ *Pyett's* suit alleged violations of the Age Discrimination in Employment Act (ADEA). Unlike the other federal antidiscrimination statutes, the ADEA expressly provides for *individual* waivers of statutory claims. It is common for late-career employees and their employers to negotiate terms of the employee's retirement, and employers normally expect that, as part of these settlements, the employee will waive any claims of age discrimination. Lack of clarity about the standards governing these negotiated buyouts led Congress in 1990 to enact the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990), which added a new section 7(f), 29 U.S.C. § 626(f), to the ADEA. The Act permits individual waiver of ADEA rights only if the waiver is "knowing and voluntary," and spells out in considerable detail the steps that must be followed before such a waiver is considered "knowing and voluntary." It must be in plain English, specifically refer to ADEA rights, advise consultation with an attorney, and permit 21 days to consider the offer and 7 days opportunity to revoke consent. It also provides that settlement of an action filed in court by the individual or the individual's representative, alleging age discrimination . . . may not be considered knowing and voluntary "unless at a minimum" these procedural steps are followed. *Id.* The *Pyett* decision makes no reference to Congress's standards for waiver of ADEA claims and permits unions to waive ADEA claims in a way that employees could not do for themselves. I owe this point to Samuel Davenport.

⁹⁶ *Wright v. Universal Mar.Serv. Corp.*, 525 U.S. 70, 78-82 (1998) found that a generic collectively-bargained arbitration clause providing for arbitration of "[m]atters under dispute" did not waive employees' right to sue under the Americans with Disabilities Act, but expressly reserved whether an arbitration clause, clearly encompassing statutory discrimination claims, might call for different treatment.

Any employee, of course, can agree individually to any kind of arbitration.⁹⁷ But a union and employer, both potential defendants in discrimination suits, could not, before *Pyett*, agree between them to have an arbitrator (paid by them) decide whether I gave them my car.

A union and employer agree to an arbitration clause to resolve their problems, and nobody else's. This was what everybody thought before *Pyett*, because it is what the Court said.⁹⁸ As two academics summarized:

A grievance arbitrator may use external statutory law as a tool for interpreting the collective bargaining agreement. For example, an arbitrator interpreting a contractual prohibition on race discrimination may look to law developed under Title VII. The arbitrator at all times, however, is interpreting and applying the contract. Thus, when an arbitrator misreads statutory law, the apparent errors in legal interpretation merge with the arbitrator's interpretation of the contract. Because the parties have agreed to be bound by the arbitrator's interpretation of the contract, they still get what they bargained for and a court should not release them from their bargain. *There is no adverse effect on public values because the employee's statutory claim is distinct from the grievance and may still be pursued in court.*⁹⁹

The Supreme Court relied on arguments of this type in *Alexander v. Gardner-Denver*.¹⁰⁰

⁹⁷ *Perry v. Thomas*, 482 U.S. 482 (1987); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001). For descriptions of these cases, see *supra* note 9.

⁹⁸ See *infra* notes 75-83 and text accompanying.

⁹⁹ Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Litigation from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1205 (1993) (footnotes omitted, emphasis added). This is why an employer violates the duty to bargain in good faith by insisting on a waiver clause under which an employee who files a charge with a federal or state agency waives his right to submit a contractual grievance. As explained in the individual opinion of Chairman Stephens, this would be giving the employee the right to preempt the union's right to bargain *in its own name* about statutory claims. *Kolman/Athey Div. of Athey Prods. Corp. and Allied Indus. Workers of Am.*, 303 N.L.R.B. 92, 92-94 (1991). Applying the bundle-of-sticks again: an employee's statutory right to be free of discrimination is not fungible with the union's interest, and neither pre-empts the other. Under this settled labor law, the arbitration clause in Stephen Pyett's collective bargaining agreement was an enforceable promise between union and employer to arbitrate *their* differences about possible discriminatory work practices. It did not, and could not, affect Pyett's statutory rights.

¹⁰⁰ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52-53 (1974).

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IV. THE ISSUES ARISING AFTER *PYETT*

The *Pyett* decision thus invents a question-begging concept of union waiver of employee individual statutory rights; treats labor arbitration as fungible with commercial arbitration; calls for unprecedentedly close reading of arbitration clauses in collective agreements; and puts into question numerous Supreme Court labor cases. The opinion is unclear whether it is to be read broadly, as a major rethinking of the role and nature of labor arbitration set out in the *Steelworkers Trilogy*, or narrowly, containing limits that do not appear in the opinion. As we shall see, the initial set of post-*Pyett* decisions in federal district court replicate this confusion

These uncertainties will be confronted in numerous cases raising the following issues which we will now discuss, in the following order. First, the pre-arbitration phase: employee sues employer in federal or state court. Defendants seek dismissal on the grounds that the employee should have resorted to labor arbitration.

(A) Must the employee's rights be specifically waived in the union contract? Will a blanket waiver of all employee claims be effective? Will courts employ the traditional presumption of arbitrability?

(B) Does the duty to bargain in good faith place any limits on employer's ability to insist to impasse on waivers of employee lawsuits, or on union insistence on clauses preserving employee lawsuits?

"[A] contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government. As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties: 'An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.'

Id. (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

(C) Are there employee rights that cannot be waived and diverted by the union to labor arbitration?

(D) Even where the labor arbitration clause clearly covers the employee's claim, will there be cases in which district courts find it a waste of time to dismiss the claim pending labor arbitration that, for example, will either never happen or be flawed if it does?

The second set of issues will arise after the employee loses in arbitration and returns to federal court, again accusing the employer of discrimination or other violations of employee rights; now offering the arbitration decision as additional evidence of this very hostility to rights; and now accusing the union of a breach of the duty of fair representation.

(E) Will it be necessary to allege breach of the union's duty of fair representation in order to lift the bar of finality of the arbitral ruling? If so, what standard will be used to evaluate whether the union has breached this duty?

(F) What standard will be employed for review of the arbitrator's decision on the statutory issue? Will the arbitrator be entitled to the traditional deference to his or her decision on the merits, developed when the arbitrator's ruling was the substitute for "industrial strife," not the substitute for "litigation"? or will the statutory claim be understood as calling for a more searching review of the arbitrator's legal analysis? Will it matter whether the arbitrator is a lawyer or made any attempt to apply the law of discrimination?

(G) Will such non-arbitration institutions of grievance processing, such as joint grievance committees, be entitled to the same respect as arbitration?

None of these questions has an obvious answer. Their answers will emerge in the litigation that will be encouraged by the Court's decision in *Pyett*.

A. Which Arbitration Clauses in Collective Bargaining Agreements Will Effectively Prevent Employees from Suing on Individual Claims?

As mentioned, the biggest uncertainty created by *Pyett*, from which most of the other uncertainties stem, is its lack of fit with traditional rules for interpreting arbitration clauses in collective bargaining agreements.

Until *Pyett*, arbitration clauses covered everything not expressly excluded; thus doubts were resolved in favor of inclusion. Arbitration clauses covered

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anything over which the union had agreed not to strike. These principles applied if the union wanted to arbitrate a dispute while the employer resisted,¹⁰¹ and equally if the employer sought an injunction against a strike because the union passed up a chance to arbitrate the underlying strike demand.¹⁰² Under this presumption of arbitrability, not overruled in *Pyett*, arbitrators in earlier cases like *Alexander*, *Barrentine*, *McDonald*, *Lingle*, and *Norris*,¹⁰³ concluded that general arbitration clauses permitted them to arbitrate discipline or discharge of employees who claimed to have been discharged in violation of federal or state employment law. When those cases reached the Supreme Court, the Court did not (at that time) challenge the arbitrator's ability to rule on the discipline, thus settling the union's claim against the employer. The Court held, rather uniformly that these arbitral rulings did not preclude subsequent employee suit on the statutory claim.¹⁰⁴

In order not to overrule these cases, the first three of which the Court mentioned by name, *Pyett* distinguished them as cases in which the arbitration clause in the collective agreement made no specific reference to employee statutory claims. This is a puzzling distinction, because for other legal purposes, general arbitration clauses like those in *Alexander*, *Barrentine*, *McDonald*, *Lingle*, and *Norris* are agreements to arbitrate issues affecting employees. This is true, for example, if the union seeks an order requiring a reluctant employer to arbitrate, or if the employer seeks an injunction against a strike.

The question thus arises whether the novel *Pyett* approach to construing arbitration clauses (close parsing of language; no presumption of arbitrability) can co-exist with the traditional *Warrior & Gulf* approach (everything not expressly excluded is arbitrable, and even exclusions are narrowly read).

There are obviously several ways in which this anomaly may be resolved in future years, and we can anticipate lower court decisions adopting the entire range of positions until the matter is resolved by the Supreme Court or Congress. Some courts will understand *Pyett* as a disapproval of *Warrior & Gulf* and

¹⁰¹ *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960), *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960).

¹⁰² *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253 (1970), made available such injunctions, against strikes over arbitrable issues, as a partial exception to the Norris-La Guardia Act, 29 U.S.C. §§ 101 et seq. See also *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 385-88 (1974) (enjoining strike in protest of employer reinstatement of two foremen indicted for falsifying safety reports), made clear that the presumption of arbitrability would apply in *Boys Market* suits.

¹⁰³ *Supra*, Section III.B.

¹⁰⁴ *Supra*, Section III.B.

Gateway Coal, and begin closely scrutinizing the text of all arbitration clauses, in all contexts, to see whether the particular dispute is included.¹⁰⁵ Unions will be denied orders to arbitrate because courts will read general arbitration clauses as lacking a specific commitment to arbitrate the particular dispute that has arisen, thus effectively reversing *Warrior & Gulf*.

A second group will maintain the presumption of arbitrability and extend it to individual suits, like *Pyett*. This will mean overruling *Alexander*, *Barrentine*, *McDonald*, *Lingle*, and *Norris*. That is, they will dismiss any lawsuit brought by an employee covered by a collective bargaining agreement with a general arbitration clause. These courts will employ the presumption of arbitrability, hold that the general arbitration clause waived the employee's statutory rights, and dismiss the employee's suit.

A third group will preserve the presumption of arbitrability in the order-to-arbitrate (*Warrior & Gulf*) and strike injunction (*Gateway Coal*) situations, but not in the employer-motion-to-dismiss-employee statutory claim context. This will preserve the maximum number of precedents. However, since this distinction is both unprecedented and unprincipled, it is impossible to predict how it will be employed.

Consider an arbitration clause in a collective bargaining agreement purporting to waive any and all employee legal claims of any nature and instead requires the union to arbitrate these claims with the employer. In light of *Pyett*, some employers will now seek such clauses, and unions will agree to them for the right price. I see no distinction between this clause and the clause in *Pyett*, because I believe that the presumption of arbitrability still applies. Doubtless, however, some court will find a blanket waiver of this kind not "clear and unmistakable."¹⁰⁶ Perhaps courts will make distinctions between waivable and unwaivable employee rights. It will be said that *Pyett*'s right to be free of age discrimination was shared with other employees, hence waivable by his union; while his right to be paid for his work was "individual" and thus not waivable.

¹⁰⁵ See, e.g., *Shipkevich v. Staten Island Univ. Hosp.*, No. 08-cv-1008, 2009 U.S. Dist. LEXIS 51011, *2 (E.D.N.Y. June 16, 2009) (holding a collective agreement forbidding discrimination and containing general arbitration clause does not waive employee's right to sue); *Catrino v. Town of Ocean City*, No. WMN-09-505, 2009 US Dist LEXIS 59783, *10 (D. Md. July 14, 2009).

¹⁰⁶ *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 (1998) held that a generic collectively-bargained arbitration clause providing for arbitration of "[m]atters under dispute" did not waive employees' right to sue under the Americans with Disabilities Act, but expressly reserved whether an arbitration clause, clearly encompassing statutory discrimination claims, might call for different treatment.

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There is no solution to this problem that does not involve overruling some Supreme Court precedent. My preference would be to overrule *Pyett*, retain the presumption of arbitrability in all contexts, but limit the preclusive effect of arbitral awards to the union and employer. However, as *Pyett* was just decided, this is politically unlikely.

B. Does the Duty to Bargain in Good Faith Place Any Limits on Employer Ability to Insist to Impasse on Waivers of Employee Lawsuits, or on Union Insistence on Clauses Preserving Employee Lawsuits?

A different group of issues will arise as employers demand that unions agree to broad waiver clauses, waiving individual employees' rights to litigate legal claims. Unions may instead propose language guaranteeing employees the individual right to litigate individual claims. Analysis of clauses of this type creates difficult issues under sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act, obligating employers and unions to bargain in good faith, which the National Labor Relations Board has long interpreted as authorizing it to regulate the subjects of the bargaining process and the kinds of pressure that may be used pursuing particular demands.

There is no general objection to individual bargaining coexisting with collective bargaining, and some is entailed by the "bundle of sticks" theory of employee legal rights. In industries like entertainment and sports, individual contracts have long coexisted with collective bargaining agreements.¹⁰⁷ An employer whose employees are represented by a union normally commits an unfair labor practice by negotiating directly with those employees without having obtained the union's consent.¹⁰⁸ However, if the union consents to individual negotiations, over individual arbitration or anything else, the employer may conduct them.¹⁰⁹ To date, demands for "individual contracts" have come from

¹⁰⁷ See, e.g., *Brown v. Pro Football, Inc.*, 518 U.S. 231, 234–35 (1996) (collective negotiations followed by employer implementation of new salary); *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 713–23 (1981) (collective bargaining agreement with theatrical producers, and mandatory terms in individual contracts between actors and agents).

¹⁰⁸ *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684–85 (1944) (holding employer violates duty to bargain in good faith by directly negotiating wage increase with individual employees represented by a union).

¹⁰⁹ If the union does not agree to permit the employer to negotiate individual arbitration clauses, the employer has other options. The legal analysis of these is somewhat uncertain.

employers and been resisted by unions. After *Pyett*, with the world upside-down, employers will demand that unions agree to submit all employee legal claims whatsoever to arbitration, while some unions will insist that employees hold some legal claims as individuals, meaning the employer must deal with them as

They were not before the Court in *Pyett*.

The Board has not decided whether a clause permitting individual negotiations with employees over statutory rights is a mandatory or permissive subject of bargaining. If it is permissive, the employer may implement it unilaterally. If it is mandatory, the employer may normally implement it unilaterally after bargaining to impasse with the union. An employer may insist on some versions of individual bargaining that substantially limit the union's role, *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 408 (1952) (proposal exempting most management decisions from arbitration). The Ninth Circuit and the Board have found that there is a limit to this argument, and that an employer may not insist to impasse on a clause that totally substitutes individual for collective bargaining. *Retlaw Broad. Co.*, 324 N.L.R.B. 138 (1997), enforced *Retlaw Broad. Co. v. NLRB* 172 F.3d 660, 664–65 (9th Cir. 1999).

The Board has found a third, intermediate possibility: proposals that may be bargained to impasse but may not be implemented unilaterally. An employer bargained to impasse over its proposal to substitute individual pay determinations in place of contractual wages. The Board held that the employer could not unilaterally implement this proposal, even after impasse, because of its potentially destructive impact on collective bargaining. *McClatchy Newspapers*, 321 N.L.R.B. 1386, 1388 (1996), enforced *McClatchy Newspapers v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). Courts of appeals have, distinguishing *McClatchy*, permitted unilateral implementation, after impasse, of wage criteria limiting employer discretion. *Edward S. Quirk Co. v. NLRB*, 241 F.3d 41, 43–44 (1st Cir. 2001); *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 118 (D.C. Cir. 2000).

Suppose now, after *Pyett*, that an employer proposes that the union agree to let it impose agreements on individual employees in which each would waive any litigation against the employer and agree instead to arbitration. Suppose the union does not agree. And suppose the employer imposes this term unilaterally. The union might file refusal-to-bargain charges with the NLRB. National Labor Relations Act (NLRA) § 8(a) (5), 29 U.S.C. § 158(a) (5) (2006). The Board would have to decide whether the employer's proposal was a permissive subject of bargaining; or, if mandatory, whether an impasse had been reached permitting unilateral imposition by the employer; or whether such individual bargaining was so destructive of collective bargaining that it demonstrated bad faith absent actual union consent. The outcome of this analysis is not easy to predict. For one attempt, see Ann Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513 (2001).

I have noted elsewhere my lack of sympathy for the entire Board apparatus of mandatory and permissive subjects of bargaining, which, as this example indicates, often encourages brinkmanship and discourages negotiations. Alan Hyde, *The Story of First National Maintenance Corp. v. NLRB: Eliminating Bargaining for Low-Wage Service Workers*, in *LABOR LAW STORIES* 281, 311–14 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

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individuals. Much as one might hope that the Board refrains from deciding that any of these demands is bad faith bargaining, it is likely instead to regulate the area.

C. Are There Any Employee Rights that Cannot Be Waived by Unions into Labor Arbitration?

The Court's analysis in *Pyett* makes no specific reference to the Age Discrimination in Employment Act, except to its nonexistent language said to favor arbitration, language the Court found in other antidiscrimination statutes and pretended was part of the Age Discrimination Act as well. Obviously unions may thus waive employee claims under other discrimination statutes such as Title VII. Whether they may waive claims under federal statutes requiring compensation for injury depends on the continuing force of cases such as *Buell*.¹¹⁰ The application of *Pyett* to the Americans with Disabilities Act, and to the Employee Retirement Income Security Act, is particularly difficult.

1. The Americans with Disabilities Act Under Labor Arbitration

The application of *Pyett* to employee claims under the Americans with Disabilities Act will be particularly unfortunate. A claim of discrimination under the Americans with Disabilities Act¹¹¹ has a different structure than other discrimination claims. It starts with a highly individualized inquiry into whether the employee (or other plaintiff) is "disabled." This involves more than a medical diagnosis; in each case the trier of fact must determine whether this individual's impairment "substantially limits one or more of the major life activities of such individual."¹¹² This inquiry, made individually, normally examines everyday

¹¹⁰ *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 564 (1987) ("The fact that an injury otherwise compensable under the Federal Employer's Liability Act was caused by conduct that may have been subject to arbitration under the Railway Labor Act does not deprive an employee of his opportunity to bring an FELA action for damages. . . . It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion.").

¹¹¹ Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2006), amended by Americans with Disabilities Act Amendments Act of 2008, P.L. 110–325, 122 Stat. 3553 (2008).

¹¹² ADA § 3(1)(A).

tasks which vary among employees, not work tasks common amongst them.¹¹³ An employee who is found disabled proposes some way the employer might “reasonably accommodate” her disability.¹¹⁴ While the employer is not obligated to accept the employee’s proposal, it must normally engage in an “interactive process” with that employee,¹¹⁵ until either a reasonable accommodation is discovered, or can be shown not to exist without “undue hardship” to the employer.¹¹⁶ The result may, unlike other discrimination statutes, directly obligate employers to spend money accommodating individual employees,¹¹⁷ money that, although the point is not uncontroversial, probably typically is redistributed from the majority of employees to the disabled individual.¹¹⁸

It is hard to think of a legal obligation less suitable for labor arbitration. The usual economic analysis of labor unions is that they readjust the signals and incentives of employers away from the marginal worker toward the median worker.¹¹⁹ Unions’ organization, legal privileges, and legal obligations both

¹¹³ ADA § 3(2) (defining “major life activities”).

¹¹⁴ ADA § 102(b) (5) (A) (defining “not making reasonable accommodations” as statutory discrimination).

¹¹⁵ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 407 (2002) (Stevens, J., concurring); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 902–03 (8th Cir. 2006); 29 C.F.R. Part 1630 App., § 1630.9

¹¹⁶ ADA § 102(b) (5) (A) (providing that the employer is not required to make otherwise reasonable accommodations if it “can demonstrate that the accommodations would impose an undue hardship on the operation of the business. . .”).

¹¹⁷ Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197 (2003).

¹¹⁸ See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000); Sharon Rabin-Margalioth, *Cross-Employee Redistribution Effects of Mandated Employee Benefits*, 20 HOFSTRA LAB. L. J. 311 (2003); Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation, and Universal Mandates: Aren’t They All the Same?*, 26 BERK. J. EMP. & LAB. L. 111 (2003). These authors offer different models, but under each, costs imposed by accommodation mandates, such as the duty to reasonably accommodate the disabled, are borne largely by fellow employees.

¹¹⁹ RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 6–12 (1984); Richard B. Freeman, *What Do Unions Do?—The 2004 M-Brane Stringtwister Edition*, 26 J. LAB. RES. 641 (2005) (updating book in light of twenty years’ research, but not revising this conclusion). The standard economic critique of unions does not challenge the claim of redirection of incentives from the marginal to the median worker; it argues that more workers lose than benefit from the redistribution toward the median.

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reflect and reinforce this obligation toward the median worker.¹²⁰ Unions have no history or competence of preparing presentations to show that a given employee is “disabled” in the legal sense, that is, suffers in daily life from the effects of a diagnosed impairment, though such presentations are normal for the plaintiff’s personal injury lawyer. Unions have no expertise in developing particular applications of the concept of reasonable accommodation. Most importantly, unions are in flat conflict of interest in negotiating reasonable accommodation for an individual that, in many or most cases, will be paid by other employees. It simply defies belief to assume that Congress—which only six months before the *Pyett* decision expanded the Americans with Disabilities Act to overcome restrictive interpretations by the Supreme Court¹²¹—meant to grant disabled employees only such accommodation as their co-workers choose to pay, as opposed to Congress’s more sweeping definition.¹²²

¹²⁰ For example, an employer’s obligation to bargain with a union is limited to subjects described as “bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (quoted in *First Nat’l. Maint. Corp. v. NLRB*, 452 U.S. 666, (1981) (not subjects of interest only to small minorities of employees)). See *Allied Chem. and Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172–73 (1971) (holding an employer was not required to bargain with union over changes in benefits to already-retired employees; they lack the mutuality of interest which “serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit.”). Unions must observe democratic procedures designed to ensure responsiveness to the will of the majority. Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401–531 (2006).

¹²¹ Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2006), amended by Americans with Disabilities Act Amendments Act of 2008, P.L. 110–325, 122 Stat. 3553 (2008).

¹²² ADA §101(9) notes:

The term “reasonable accommodation” may include (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

2. ERISA

Even more absurd, if possible, will be the application of *Pyett* to employee claims under ERISA. The Employee Retirement Income Security Act was enacted in 1974 precisely to control the employers and unions, who, after *Pyett*, will now judge their own conduct in labor arbitration.

Well-publicized incidents revealed how precarious most employees' claims were to their pensions before ERISA.¹²³ Employer promises of pensions were often unenforceable at common law, and equitable principles of trusts had not prevented pension plans that were underfunded, mismanaged, or looted by corrupt managers or union leaders.¹²⁴ ERISA makes pension benefits nonforfeitable.¹²⁵ While enforcement is complex and involves federal officials,

¹²³ MICHAEL S. GORDON, SENATE SPECIAL COMM. ON AGING, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 6–25 (1984), *reprinted in* JOHN H. LANGBEIN ET. AL., PENSION AND EMPLOYEE BENEFIT LAW 83-93 (5th ed., 2010) [hereinafter GORDON, ERISA, THE FIRST DECADE]; JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY (2004).

¹²⁴ As reported in Gordon's history:

Except for restrictions on plan investments in a plan sponsor's securities, the President's [1965] committee report had virtually dismissed out-of-hand the need for Federal fiduciary standards for private plans. In the same year that the report was released, however, the Senate Permanent Subcommittee on Investigations, a unit of the Senate Government Operations Committee, led by Chairman John L. McClellan, conducted an investigation of the Allied Trade Council and Local 815 of the International Brotherhood of Teamsters, two small New Jersey unions. . . . [The Subcommittee] discovered . . . that one George Barasch, the founder of the two New Jersey unions involved, had managed to manipulate and divert the funds of the employee benefits plans connected with the unions in such a way as to make himself a prospective multimillionaire. Among other things, Barasch, who was a trustee of the plans, had set up a commercial benefit consulting organization which virtually ran the plans and collected huge consulting fees for the benefit of Barasch. At the time of the McClellan investigation, Barasch was in the process of liquidating the two benefit funds and transferring \$4 million of their assets to two so-called charitable corporations, established in Liberia and Puerto Rico, of which Barasch was the organizer and principal shareholder. McClellan's committee was told by executive branch representatives that all of the foregoing could not be prevented under existing laws. This testimony so dismayed Senator Jacob K. Javits, a member of the Government Operations Committee, that within less than 2 weeks after the committee had concluded the Barasch investigation, he introduced the first bill to impose fiduciary standards on employee benefit funds.

GORDON, ERISA, THE FIRST DECADE, *supra* note 123, at 87.

¹²⁵ Employee Retirement Income Security Act (ERISA) § 203, 29 U.S.C. § 1053

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employees participating in plans may sue to enforce their rights to benefits or to correct failings of fiduciaries.¹²⁶

While ERISA covers employees who are, and are not, represented by unions, the most heavily regulated plan is the defined benefit plan which in practice is found primarily among employees covered by collective bargaining agreements.¹²⁷ A defined benefit plan promises employees a fixed amount (often expressed as a percentage of their final paycheck) on retirement. Sponsoring employers are legally obligated to pay that amount, regardless whether there are sufficient funds in the plan. Defined-benefit plans thus necessitate a trust, holding sufficient assets to pay anticipated claims that must be funded adequately.¹²⁸ The existence of these assets under the control of plan managers, typically corporate officers and sometimes union leaders, creates temptations that ERISA tries to deter. Managers are fiduciaries charged with various specific and general obligations of prudence and diversification.¹²⁹

Following *Pyett*, arbitration clauses in collective bargaining agreements will soon require employees to arbitrate through unions and employers, rather than litigate, any claims they might have to retirement benefits, or complaints about breaches of fiduciary obligation. Perhaps not all collective bargaining agreements will adopt such language. However, corrupt unions and employers that necessitated ERISA protection for employee pensions will adopt these arbitration clauses. For example, as late as twenty-five years after the adoption of ERISA, Teamsters Local 815 was controlled by the very same Barasch interests whose corruption is said to have led Sen. Javits to include fiduciary standards in the legislation.¹³⁰ Teamsters Local 815, and the employers with which it negotiates,

(2006).

¹²⁶ ERISA § 502; *see also* *Varity Corp. v. Howe*, 516 U.S. 1075 (1996) (individual relief for fiduciary violations).

¹²⁷ Sixty-nine percent of union workers in the private sector have access to defined benefit pension plans, while only fifteen percent of nonunion workers do. U.S. DEPARTMENT OF LABOR, U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 2007, *available at* <http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf>, Tbl. 1, at 7.

¹²⁸ ERISA § 302.

¹²⁹ ERISA § 404.

¹³⁰ One reporter writes:

The International Brotherhood of Teamsters has taken control of its Englewood Cliffs local and removed two union leaders accused of defrauding it of \$144,000. Teamster President James Hoffa placed Local 815 in trusteeship. . . .

The children of founder George Barasch are administrators of the local's affiliated benefit funds, and in 1997 companies the children owned were paid over \$2 million

will be certain to negotiate arbitration clauses requiring employees to arbitrate their claims against the pension plan.

It defies belief that Congress would have created its detailed regulation of defined benefit plans, plans that, in practice, enroll almost exclusively employees represented by unions, only to turn that regulation over to arbitration controlled by the subjects of regulation. It equally defies belief that Congress intended to leave an employee, whose pension was frittered away by inept or corrupt decisions by his employer or union, to their mercies in determining when plans are adequately administered or fiduciary obligations fulfilled.

It is one thing to remove employees covered by collective bargaining agreements from the Age Discrimination in Employment Act. While, we have argued, incorrect, this decision will affect only those employees. Since only 7.2% of private sector employees are represented by a union,¹³¹ the overall course of age discrimination law will not be greatly affected if union representees have no access to courts. It is something else again to take a detailed body of regulation, applying only or primarily to employees under collective bargaining agreements, out of the federal courts where Congress placed it, and into the arms of an arbitration system created and controlled in some cases by the very unions and employers (and individuals) who created the problem.

D. Are There Situations in Which a Labor Arbitration Clause Covers a Particular Employee Claim but the Federal Court May Hear the Claim Anyway?

from four of the affiliated funds. For 20 years, the founder has been leasing the local its offices . . . under an agreement that requires the local to pay rent and 40% of the landlord's taxes, utilities, maintenance, and fire insurance costs. . . .

The local entered into at least three "sham" collective bargaining agreements with companies owned by union members; held only eight membership meetings since 1994 instead of monthly as required, and has not had a contested election for 25 years. . . .

The allegations involving Barasch and his children are similar to those lodged 35 years ago. In 1965, Barasch was called before a U.S. Senate subcommittee investigating allegations that \$4 million in union funds had been transferred to foundations affiliated with him or his relatives. He invoked his 5th Amendment right against self-incrimination.

Louis LaVelle, *2 Leaders of Union in Cliffs Ousted*, RECORD (Bergen Co., N.J.), Dec. 29, 1999 at A1, available at LEXIS, News Library, News & Business, Individual Publications, The Record (Bergen Co., N.J.).

¹³¹ U.S. DEPARTMENT OF LABOR, UNION MEMBERS—2009, USDL-10-0069 (Jan. 22, 2010), available at <http://stats.bls.gov/news.release/pdf/union2.pdf>

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An exception to *Pyett* has already been recognized when the union refused to invoke arbitration. The court held that in that case the employee might proceed directly to court without having to prove that the refusal was a breach of the union's duty of fair representation (discussed *supra*, Section III.E).¹³² I predict that other exceptions to *Pyett* will be recognized in cases where the facts similarly make labor arbitration an unappealing prospect. Perhaps plaintiff's allegations of racial or sexual hostility from both employer and union will ring true, so that dismissing her claim and requiring her adversaries to arbitrate it will seem a waste of time (since the case will be coming back anyway after the arbitration). Some federal judges will send even such a case to arbitration. The empirical legal scholars report unusually high rates of dismissal of discrimination cases.¹³³ Others, however, will be troubled. They will create an exception to *Pyett* for cases where arbitration is unappealing.

Such cases will be highly fact-specific and resistant to generalization. They will point out the weak theoretical basis of *Pyett*'s insistence that unions can negotiate whatever they please for the workers they represent; so why not waive all their rights to sue? Earlier cases, such as *Barrentine*,¹³⁴ were more thoughtful in understanding that there are, at least, countervailing values when private bargaining purports to destroy public claims. These difficult issues will not go away just because *Pyett* ignores them.

Discrimination plaintiffs represented by unions will thus, despite *Pyett*, continue to sue directly in federal court, alleging that the history of discrimination by employer and union makes it more appropriate for the federal court to hear the case rather than requiring useless arbitration. Federal courts will divide on how to evaluate these claims. Some will insist that *Pyett* requires dismissal. Others will develop three-part balancing tests in which they weigh the plaintiff's likely success on the merits against the public and private interest in an arbitral first look. Others will develop different balancing tests. The Supreme Court will eventually rule on this class of exceptions to *Pyett*, and its decision will, perhaps, clarify the applicable standard.

¹³² *Kravar v. Triangle Serv., Inc.*, 2009 U.S. Dist. LEXIS 42944 (S.D.N.Y. 2009).

¹³³ Laura Beth Nielsen et al., *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States*, AM. BAR FOUND. RESEARCH PAPER 08-04, 2008) (low rate of plaintiff success; no correlation between EEOC evaluation of complaint and judicial outcome); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEG. STUD. 429 (2004) (lowest win rate of any class of plaintiffs in both federal district and appeals courts).

¹³⁴ See *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 731 n.4 (1981); see also *supra* note 76 and accompanying text.

E. *After the Employee Loses the Arbitration, Will She Have to Allege Breach of the Union's Duty of Fair Representation to Get a Court to Look at Her Discrimination Case?*

We know, roughly, the circumstances on which an employee who loses an arbitration on a claim *under the collective bargaining agreement* can get a court to set aside that award. If *Pyett* concerned only claims under the collective bargaining agreement, it would work to make most, but not all, arbitrations final and binding on federal courts. Of course, *Pyett* concerned a statutory claim, not a claim made by an employee under a collective bargaining agreement, so that will add new uncertainty to an already uncertain area of law.

But let us start with the known case: employee complains her employer violated the collective bargaining agreement, but the union either refuses to take the case to arbitration, or takes it to arbitration and loses. In either case, the employee may sue to enforce her rights under the collective agreement only by alleging that the union has violated its duty of fair representation.¹³⁵ Proof of such a violation by the union also removes the arbitration award as a bar of finality on a claim against the employer.¹³⁶ Proving a breach of the duty of fair representation requires plaintiff to demonstrate union conduct leading to the loss of the grievance that was “arbitrary, discriminatory, or in bad faith.”¹³⁷

While this much is uncontroversial, this formula has proven incapable of generating consistent results. Co-authors and I reviewed cases involving the duty of fair representation recently in a casebook, and I do not propose to do so again here.¹³⁸ Briefly, the same factual patterns are litigated over and over again and there is no way of reconciling the outcomes. A common pattern involves the union representative's physically losing the employee's grievance and missing the filing deadline. Cases sometimes find this “arbitrary.”¹³⁹ The Supreme

¹³⁵ *Vaca v. Sipes*, 386 U.S. 171, 190–95 (1967).

¹³⁶ *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567–72 (1976).

¹³⁷ *Vaca*, 386 U.S. at 190.

¹³⁸ SUMMERS et. al., *supra* note 66, at 681–87.

¹³⁹ *Compare, e.g.*, *Foust v. Int'l. Bhd. of Elec. Workers*, 572 F.2d 710 (10th Cir. 1978) (late filing is breach of duty of fair representation), *cert. denied on this issue* 439 U.S. 892 (1978), *with Steamfitters Local 342*, 336 N.L.R.B. 549 (2001) (negligence is not breach of duty of fair representation), *review denied Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003).

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Court's most recent decision on the duty of fair representation comprised an avalanche of metaphors.¹⁴⁰

Cases following *Pyett* will put this rickety structure under severe, if not fatal, pressure. Some unquantifiable, probably large, number of discrimination and other statutory claims by union employees will be diverted to the grievance process. Unions are not ready to handle this. Unions are beleaguered and can hardly maintain competent levels of processing grievances limited to violations of collective bargaining agreements. Union negligence, sometimes hostility, will lose many potentially meritorious claims of discrimination. Some courts, probably most, will apply the *Vaca* formulation ("arbitrary, discriminatory, or in bad faith") strictly, and refuse to let plaintiffs revive discrimination cases lost through union carelessness. Others will try to cabin the *Vaca* formulation within the law of collective agreements, and develop new, more generous tests for lifting the bar of arbitration of statutory claims. The Supreme Court will eventually have to resolve the question of defining fair representation of statutory claims.

One possibility is that union refusals to arbitrate will not be analyzed as potential breaches of the duty of fair representation. Rather, *Pyett* may be read to give the union only an option to arbitrate. Should the union decide not to take an employee's claim to arbitration, this would simply reinstate the employee's discrimination suit. Justice Souter, dissenting in *Pyett*, suggested this result.¹⁴¹ A district court has applied this, refusing to dismiss a discrimination suit under the same collective agreement involved in *Pyett*, because the union refused to arbitrate the employee's discrimination claim.¹⁴² This theory is not easy to square with the facts of *Pyett*, in which the union similarly refused to arbitrate Mr. Pyett's claim. This theory will open up the question of when to apply either of the two standards for evaluating union refusals to arbitrate: when such a refusal

¹⁴⁰ *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991). In *O'Neill*, the court found union agreement to a particular strike settlement not to be in breach of its duty of fair representation, analogized the union to a fiduciary, trustee, attorney with a client, corporate officer or director, and legislature; it also pointed out through litotes that the settlement "was by no means irrational. . . . [and] . . . was certainly not illogical." *Id.* at 79. Anyone can find a legal standard to like on this list.

¹⁴¹ *14 Penn Plaza v. Pyett*, 129 S. Ct 1456, 1481 (2009) (Souter, J., dissenting) ("On one level, 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 employees' claims in arbitration, which is usually the case [.]") (citations omitted).

¹⁴² *Kravar v. Triangle Serv., Inc.*, No. 1:06-cv-07858-RJH, 2009 U.S. Dist. LEXIS 42944 (S.D.N.Y. May 19, 2009).

simply restores the claim to the employee, and when it does so only when the union's refusal is a breach of its duty of fair representation.

What can we expect from union arbitration of statutory claims? In the decades before *Pyett*, unions occasionally arbitrated statutory violations as breaches of collective bargaining agreements, although, as noted before, these were *always*, and without dissent, understood as distinct from members' statutory claims. The results have been unimpressive. Arbitration has contributed little or nothing to the development of the law of discrimination and other workplace claims. In fact, there are very few studies of labor arbitration of statutory issues.

Pauline Kim contrasted lawsuits and arbitration decisions challenging employer drug testing.¹⁴³ Arbitrations largely challenged discipline imposed on individual employees and did not address broader values of privacy. When unions wished to raise privacy concerns on behalf of groups of employees, they litigated rather than arbitrated.¹⁴⁴ David Weil studied the implementation of federal employment regulation in workplaces with unions.¹⁴⁵ The presence of a union made inspections and compliance more likely, but certainly did not substitute for federal regulation. Unions actively sought federal agency enforcement of federal employment law. They did not seek to arbitrate claims under federal employment law.¹⁴⁶

The deficiencies of grievance arbitration as a mode of processing discrimination cases were noted by the Court in *Alexander*. Although the *Pyett* court rejected these observations, for reasons it chose not to disclose, the *Alexander* Court's discussion of labor arbitration is as accurate now as it was thirty years ago. Note that it concerns, not arbitration in general, and certainly not *Gilmer* arbitration between individuals and employers (which did not exist in 1974). Rather, the Court discussed in *Alexander* exclusively the subject of *14 Penn Plaza v. Pyett*: labor arbitration under collective bargaining agreements:

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties

¹⁴³ Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 LA. L. REV. 1009 (2006).

¹⁴⁴ *Id.*

¹⁴⁵ David Weil, *Regulating the Workplace: The Vexing Problem of Implementation*, 7 ADV. IN INDUS. & LAB. REL. 247 (1996).

¹⁴⁶ *Id.*

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rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-583 (1960). Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . And as this Court has recognized, "arbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S., at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.¹⁴⁷

In a footnote following, the Court commented that:

A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. See *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. See, e. g., *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). And a breach of the union's duty of fair representation may prove

¹⁴⁷ *Alexander v. Gardner-Denver*, 415 U.S. 36, 56-58 (1974).

difficult to establish. See *Vaca v. Sipes*, supra; *Humphrey v. Moore*, 375 U.S. 335, 342, 348-351 (1964). In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers. See 42 U.S.C. § 2000e-2 (C).¹⁴⁸

This aspect of *Alexander*, far from dated, is at least as relevant today as a generation ago. None of its facts has changed. Labor arbitrators are still chosen, by unions and employers, for their expertise in labor relations, not law. There has been no change in arbitral practice. Labor arbitrations are conducted by unions and employers. While some, perhaps most, unions are vigorous opponents of employment discrimination, some still engage in the practice.¹⁴⁹ No legal changes have made it easier for employees to demonstrate a union breach of the duty of fair representation.

Indeed, the Court's catalogue of weaknesses in labor arbitration as a tool against discrimination is arguably even more relevant today than thirty years ago. Labor arbitration has evolved in path-dependent response to cases like *Alexander* and the ten similar cases discussed in Section III of this Article.¹⁵⁰ Had *Alexander* and similar cases come out differently, labor arbitration might have evolved in unknown ways to deal better with statutory and common law claims. Instead, as we have seen, *Alexander* and similar cases built a wall between labor arbitration and legal claims not created by collective bargaining agreements. As a result, we have no good examples of labor arbitration playing an important role in the definition or enforcement of rights against discrimination or other employment rights reflecting public values.¹⁵¹

¹⁴⁸ *Alexander*, 415 U.S. at 58 n.19.

¹⁴⁹ See, e.g., *EEOC v. S.S. Clerks Union Local 1066*, 48 F.3d 594 (1st Cir.), cert. denied, 516 U.S. 814 (1995) (all-white union; requirement that new members be sponsored by existing members had disparate racial impact). Involvement of unions in public employee negotiations over comparable worth increases, not decreases, pay disparities between men and women. Peter F. Orazem & J. Peter Mattila, *The Implementation Process of Comparable Worth: Winners and Losers*, 98 J. POL. ECON 134 (1990); Peter F. Orazem, J. Peter Mattila & S. Weikum, *Comparable Worth and Factor Pay Point Analysis in State Government*, 31 INDUS. REL. 195 (1992).

¹⁵⁰ See supra notes 75–83 and text accompanying.

¹⁵¹ For example, the innovative approaches to combating employment discrimination surveyed in Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 489–535 (2001), include only one unionized workforce, clerical employees at Harvard, and no use of arbitration.

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F. *Under what standard will federal courts review decisions of labor arbitrators denying statutory claims by employees?*

Following *Pyett*, labor arbitrators will issue decisions finding that individual employees have not been victims of unlawful discrimination. Employees will then sue their employer and union alleging the same discrimination. The employer and union will offer the arbitrator's award as a bar to suit. The employee will offer to show that the award itself, in attempting to cover up the discrimination that the employee offers to prove, is part of the discriminatory conduct. Under what standard will the court evaluate these claims?

Presumably if the underlying collective bargaining agreement does not "clearly and unmistakably" waive the employee's statutory claims into arbitration, the arbitral award is in the same posture as *Alexander*'s and no bar to employee suit.¹⁵² The difficult question arises under collective bargaining agreements that do waive employee suit; the arbitration has taken place; found against the employee; and the employee alleges that the arbitration is part of the discrimination. The court will have a difficult choice, and will continue to have a choice until the Court or Congress resolves the issue.

The court might hear the discrimination case, admitting the arbitration award only for whatever persuasive value it has. Since this is the square holding of *Alexander*, and since the Court did not reverse *Alexander*, the district court arguably must take this course. That is, the court will, as the Supreme Court ordered it to do in the years before *Pyett*, "treat the arbitrator's award as if it represented an agreement between [the employer] and the union as to the proper meaning of the contract's words 'just cause.'"¹⁵³ *Pyett* would then turn out to be a case that permitted unions and employers to negotiate an arbitral "first look" at employee statutory claims, but would not deprive employees of the ultimate right to sue on those claims. This is the reading of *Pyett* that strikes me as most respectful of precedent, particularly *Alexander*.

The court might treat the arbitral award as a potential bar to suit, but only if it correctly analyzes the statutory issue. This would create tension with precedent

¹⁵² See, e.g., *St. Aubin v. Unilever HPA NA*, No. 09 C 1874, 2009 U.S. Dist. LEXIS 55626 (N.D. Ill. June 26, 2009) (denying employer motion to dismiss); *Jones v. Verizon Commc'ns, Inc.*, No. 09-10525-RGS, 2009 U.S. Dist. LEXIS 98735 (D.Mass. Oct. 23 2009) (same). *But see* *Tewelde v. Owens & Minor Distrib. Inc.*, No. 07-4075(DSD/SRN), 2009 U.S. Dist. LEXIS 49098 (D. Minn. June 10, 2009) (according "great deference" to an arbitral ruling without examining whether the underlying collective agreement waived the right to individual suit).

¹⁵³ *E. Associated Coal Corp. v. United Mine Workers*, Dist. 17, 531 U.S. 57 (2000).

holding that “[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.”¹⁵⁴

The court might treat the arbitral award as a bar to suit, unless its enforcement would violate “public policy.” This would analogize to a line of cases, developed in rather different circumstances, on “public policy” review of labor arbitration awards.¹⁵⁵

The court might treat the arbitral award as a complete bar to suit, refusing to review it on the merits. A court might reach this result by any of three paths. It might invoke the usual refusal of courts to review labor arbitration awards on the merits.¹⁵⁶ Or it might decide that labor arbitration of individual statutory claims arises under the Federal Arbitration Act, with its highly limited grounds of review. Or the court might simply hold the award to be claim preclusive.¹⁵⁷

¹⁵⁴ *United Steel Workers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

¹⁵⁵ The Supreme Court has recognized the possibility of judicial nonenforcement of labor arbitration awards that violate “public policy,” but has yet to find the circumstances warranting such nonenforcement. In all the cases in this line, an arbitrator has ordered reinstatement of an employee after some transgression, and the employer has argued, unsuccessfully, that “public policy” prevents enforcement of the reinstatement award. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983); *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987); *E. Associated Coal Corp. v. United Mine Workers Dist. 17*, 531 U.S. 57 (2000). In the last-named, the most recent case in the sequence, the Court was unanimous in upholding the reinstatement award, but divided on its rationale. The Court, through Justice Breyer, stated that an arbitral award violates public policy only when the public policy derives from “laws and legal precedents” and is “explicit,” “well defined,” and “dominant.” *E. Associated Coal Corp.*, 531 U.S. at 62–63. Justice Scalia, joined by Justice Thomas, concurred in the result but disagreed with the Court’s standard. They would deny enforcement only to arbitral awards that violate “some positive law.” *Id.* at 68.

Following *Pyett*, these concerns will arise in a different posture. Now they will be raised by individual employees who lose arbitrations, not just by employers. And the employees’ claim will be a little different. They will claim that the arbitrator denied them their positive legal rights, not merely that the arbitrator required them to reinstate a troubled employee.

The application of the *Grace-Misco-Eastern* line of cases to individual employees after *Pyett* is thus somewhat conjectural. The following outcomes are all possible:

1. Admit the arbitral award only for its evidentiary value (*Alexander*).
2. Adhere to the arbitral award only if it correctly applied discrimination law, rejecting review for public policy (Scalia view).
3. Adhere to the arbitral award only if it both correctly applied discrimination law and was in no tension with public policy (*Grace-Misco-Eastern*).
4. Treat the arbitral award as a bar to the employee suit, overruling *Alexander*.

¹⁵⁶ See generally, *Enter. Wheel & Car Corp.*, 363 U.S. at 593.

¹⁵⁷ *Mathews v. Denver Newspaper Agency*, No. 07-cv-02097-WDM-KLM, 2009 U.S.

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G. Will Non-Arbitral Institutions That Deny Employee Statutory Claims Receive the Same Deference as Arbitration?

Since labor arbitration, in the years before *Pyett*, settled only disputes between unions and employers, its favorable legal treatment has been extended to other institutions that settle disputes between unions and employers, without regard for whether these are in any way appropriate to hear complaints of discrimination. This question will surely come before the Court after *Pyett*.

The most significant substitute for arbitration is the joint grievance committee, common in collective bargaining agreements of the International Brotherhood of Teamsters. Grievances are submitted by local union officials to joint committees consisting of equal representation of higher level union officials, and management representatives. If that committee deadlocks, the grievance may be heard by higher level committees. Some Teamster collective bargaining agreements do not include any recourse to arbitration, and in such cases, the union may strike over accumulated grievances. Other Teamster collective bargaining agreements permit arbitration if the highest grievance committee deadlocks, but I am informed by a lawyer who frequently represents Teamster dissidents that recourse to arbitration is theoretical since a deadlocked committee at the highest level is “a very big deal, and a rarity.”¹⁵⁸

Joint grievance committees were developed by Teamsters President James R. Hoffa, father of the current president, reflecting his distrust of arbitration and preference for having multiple disputes with employers at any given time, opening the way to swaps and compromises.¹⁵⁹ The descriptions we have of the actual work of joint grievance committees date from the long ago Hoffa era, but there is no reason to assume that anything has changed. The institution is created and designed for deal-making. In one settlement observed in 1962 by two professors of industrial relations, the Teamsters gave approval for one company’s extensive change in operations in exchange for its pledge of cooperation with, and dropping lawsuits against, certain locals headed by favored leaders, while initiating a huge damage suit against a rebellious local which the leadership “didn’t have under control yet.”¹⁶⁰

Dist. LEXIS 37697 (D. Colo. May 4, 2009).

¹⁵⁸ Barbara Harvey, Esq., correspondence to Alan Hyde, (March 22, 2008) (on file with author).

¹⁵⁹ RALPH C. JAMES & ESTELLE DINERSTEIN JAMES, *HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER 167–85* (1965).

¹⁶⁰ *Id.*

Teamster joint grievance committees have nevertheless always been treated by law as the complete functional equivalent of arbitration. They have the power to determine a grievance under the collective bargaining agreement, and their disposition is final against the individual grievant unless he or she can demonstrate that the representation by the local union denied him or her “fair representation.”¹⁶¹ Some of us over the years have questioned this equivalence and have argued that treating all provisions in a negotiated agreement as potentially tradable in grievance processing denies those agreements the meaning that Congress intended them to have in LMRA § 301.¹⁶² However, as the Court has observed, “the policy of the Labor Act can be effectuated only if the means chosen by the parties for settlement of *their* differences under a collective bargaining agreement is given full play.”¹⁶³

Whatever may be the deficiencies of Teamster joint committees, as devices for settling union-employer conflicts and interpreting collective bargaining agreements, pale into insignificance when one contemplates Teamster joint committees as devices for enforcing individual employees’ statutory rights. Joint

¹⁶¹ See generally, *Gen. Drivers, Warehousemen & Helpers, Local Union 89 v. Riss & Co., Inc.*, 372 U.S. 517 (1963) (holding final award of joint grievance committee is enforceable in § 301 action); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (remanding employees’ claim against employer; negligent representation before joint committee would make its award not final or binding); *Bianchi v. Roadway Express, Inc.*, 441 F.3d 1278 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 397 (2006) (grievant who suspects that union representative is not providing fair representation must make that charge at the grievance hearing or be held to have waived it); *Jones v. United Parcel Serv.*, 461 F.3d 982 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2088 (2007) (applying *Alexander* to Teamster joint grievance committee; award against plaintiffs is final and binding unless plaintiffs can demonstrate breach of the duty of fair representation by union advocate; however it does not extinguish their federal statutory claims, considered on the merits). Only the union advocate owes the grievant a duty of fair representation. The union representatives on the joint committee do not.

¹⁶² Clyde W. Summers, *Teamster Joint Committees: Grievance Disposal Without Adjudication*, 37 PROC. NAT. ACAD. ARB. 130 (1985), *reprinted in* 7 INDUS. REL. L. J. 313 (1985); Zimmerman, *supra*, note 36; Clyde W. Summers, Harry H. Wellington & Alan Hyde, *CASES AND MATERIALS ON LABOR LAW* 1197 (2d ed. 1982). Occasionally a court has raised doubts about according this free-for-all the same respect as arbitration. *Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987); *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986); *Barrentine v. Arkansas-Best Freight Syst., Inc.*, 615 F.2d 1194, 1201 (8th Cir. 1980), *rev’d on other grounds* 450 U.S. 728 (1981); *Gen. Drivers & Helpers Union Local 554 v. Young & Hay Transp. Co.*, 522 F.2d 562, 567 n.5 (8th Cir. 1975); *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974).

¹⁶³ *Riss & Co.*, 372 U.S. at 519 (quoting *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960) (emphasis added)).

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committees do not purport to enforce statutory rights. They are not set up to do so. They frankly treat all individual claims as bargaining chips with which the union can obtain settlements of greater interest to the membership at large, or the leadership.

The Supreme Court will soon be faced with a discrimination suit by an employee whose claim was traded away in a Teamster joint committee.¹⁶⁴ This will be a difficult case to decide. The Court could distinguish its decision in *Pyett*, and limit union extinction of employee statutory claims to arbitrators. This, however, would guarantee a long and novel line of cases, testing which dispute resolution processes would suffice, and which be inadequate, for hearing employee statutory claims. Or the Court could adhere to its traditional position, developed in the context of union-employer disputes, that Teamster joint committees are in all legal ways equivalent to arbitration. This would effectively tell employees working under Teamster agreements that they have only such rights to be free of discrimination as the union leadership chooses to extract in trade with management.

IV. CONCLUSION

It is difficult to think of a Supreme Court labor case of the last forty years that will create as much uncertainty as *Pyett*. *Pyett*'s impact will be felt in every negotiation of a new collective bargaining agreement, and every lawsuit brought by an employee working under a collective bargaining agreement.

At the bargaining table, employers will propose various "waiver" clauses under which unions agree that employees will not sue the employers over anything but will instead submit claims to labor arbitration. The precise impact of some of these clauses cannot be known by either side, particularly under the Court's novel *Pyett* methodology of close textual scrutiny of arbitration clauses. Unions will have to decide whether to agree to such clauses and, if so, what price to try to extract. Thereafter, as this article has shown, *Pyett* will not end individual lawsuits by employees. Indeed, it practically invites them. Courts will struggle with which employee lawsuits to dismiss, and, after arbitrations, how to review arbitrators' rulings and union representation. These largely procedural wrangles will do little to advance either employee rights or industrial democracy. Of course, it is remotely conceivable that labor arbitration will rise to the

¹⁶⁴ *E.g.*, *Jones*, 461 F.3d at 982. That case, correctly applying the pre-*Pyett* law of *Alexander* and its progeny, kept separate the employees' claims under the collective bargaining agreement, and their federal statutory claims. The decision of the joint committee was final as to the contractual claim and irrelevant to the statutory claim.

challenge and provide more effective deterrence to discrimination, and other violations of labor rights, than it has historically. I see little evidence to suggest that this is likely.

There are three ways of fixing *Pyett*. First, and least likely, the Court could, when the occasion arises, reaffirm *Alexander*, which, as noted, has not been overruled. *Pyett* will be understood as only a kind of exhaustion rule, novel but limited. Employees whose unions have waived their right to sue must exhaust labor arbitration procedures. However, they would retain their *Alexander* rights. Employees could sue after the arbitration, and the arbitrator's award would be admitted only for whatever persuasive value it has. This is possible, and I favor it, but unlikely to occur.

Second, Congress could reverse *Pyett*, most likely as part of a package of amendments to the civil rights laws, similar to the Civil Rights Act of 1991. Congress could put in legislation what it stated in committee reports: that *Alexander* states the law, and employees represented by labor unions at all times retain their individual rights under civil rights law.

Third, and most likely, state legislatures and courts could reject *Pyett* as to their own antidiscrimination laws. In California and New Jersey, for example, well-counseled plaintiffs in discrimination cases normally invoke only their rights under those states' more generous laws.¹⁶⁵ At least some state legislatures will respond to *Pyett* by amending their antidiscrimination laws to provide that plaintiffs need not exhaust individual or labor arbitration and that such rulings, when issued, do not preclude court jurisdiction. At least some state courts will construe their antidiscrimination statutes and precedents as already providing for this. In this way, *Pyett* will contribute to the dissolution of federal labor law and of the golden age of labor arbitration.

¹⁶⁵ As attorney Nancy Erika Smith always tells my employment law class when we are fortunate enough to have her speak, "In New Jersey, filing a discrimination case in federal court is malpractice per se."