support two limitations on the enforcement of arbitration agreements contained in contracts of adhesion: there must be a truly neutral arbitrator[58] and a "modicum of mutuality."[59] Will these limitations be acceptable to the Supreme Court? The answer may depend on the approach that the Court takes toward state law in these matters. In the case of labor arbitration under section 301 of the Labor Management Relations Act,[60] the Court has insisted on absorbing state common law into a uniform body of federal common law principles to which states must conform,[61] and it seems likely that the Court will move in that direction under the FAA as well. For a Court that is concerned with federalism, *Circuit City* represents a somewhat incongruous push in the direction of national control.

II. MANAGEMENT PERSPECTIVE

JAMES WALTERS*

One area that is different in perspective from the Supreme Court cases reviewed by Justice Grodin is that of the lower court judges who get inundated with employment cases. I have heard any number of federal judges say they don't like employment cases. They say their dockets on the criminal side are loaded with drug cases, and on the civil side with employment cases. If there were some way to clean up the civil side, that would ease a lot of the workload. I think our federal judges are by and large overworked. We keep adding new laws and not enough new judges.

I have some statistics I would like to share with you, one of which is anecdotal in nature. I subscribe to an electronic service called CaseStream. When I log on to my computer in the morning, I get an icon that says there has been activity in my preselected dockets.

Because I am a labor-employment specialist, I get only federal filings, usually from the day before, in labor and employment cases. Maybe twice a week there is a Railway Labor Act[1] case. Maybe 10

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[58] *Graham v. Scissor-Tail*, 28 Cal. 3d 807, 106 LRRM 2914 (1981).
[59] *Armendariz v. Foundation Health*, 24 Cal. 4th 83, 83 FEP Cases 1172 (2000).
[60] 29 U.S.C. §141 et seq.
[61] *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).
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[1] 45 U.S.C. §151 et seq.

times a week there are section 301 cases.[2] The other 250–300 cases filed every day are employment cases under Title VII of the Civil Rights Act of 1964,[3] the Family and Medical Leave Act,[4] the Age Discrimination in Employment Act,[5] and so forth. That's fairly scary—250–300 cases filed every day.

I do not disagree with anything Justice Grodin said, with the minor exception that I wish the Supreme Court, which does have the luxury of culling its own case load, would perhaps be a little more enthusiastic in allowing employment cases to be heard in alternative dispute resolution. I'm glad *Circuit City* was decided the way it was. I think it possibly could have been articulated a little better. I think this bodes well from the standpoint of unclogging at least the federal court docket.

I guess this begs the question of why there has been, at least in my mind, a general reluctance to take the practices, principles, and procedures of nearly a century of labor arbitration and apply them to employment disputes. If you look at the statutes relating to labor disputes, they have platforms that in some cases strongly suggest alternative dispute resolution.

The Railway Labor Act, enacted in 1926, has several sections that strongly suggest arbitration. For example, section 152, First,[6] imposes a duty on carriers, officers, agents, and employees to exert reasonable effort to make and maintain agreements and to settle all disputes, whether arising out of the application of such agreement or otherwise.

Subsequent sections of the Act set up the National Railroad Adjustment Board.[7] Section 153[8] provides for system or regional boards of adjustment. As most of you know, arbitration cases with railroad and airline employees are very, very common.

Similarly, but to a lesser extent, when the National Labor Relations Act[9] was passed and subsequently amended, it suggested arbitration. As we all know, 98 percent of all collective bargaining agreements have grievance and arbitration provisions.

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[2]29 U.S.C. §185.
[3]42 U.S.C. §2000e et seq.
[4]29 U.S.C. §2601 et seq.
[5]29 U.S.C. §621 et seq.
[6]45 U.S.C. §152.
[7]45 U.S.C. §153.
[8]*Id.*
[9]29 U.S.C. §§101–115.

In addition, the first major civil rights employment discrimination law was instituted in 1964,[10] and many more were passed in the 1990s, including the Family and Medical Leave Act, the Americans with Disabilities Act,[11] and, most importantly, the Civil Rights Act of 1991.[12]

The system of federal litigation requires and permits pretrial discovery so that each side knows every aspect of the other side's case, and therefore a settlement is more apt to happen and the case will be taken off the docket. One of the charms of arbitration is that with minimal discovery there is an opportunity for trial by surprise.

Besides economy, the second factor in favor of arbitration, whether in labor or employment disputes, is speed. Plaintiffs' lawyers will tell you that if the case is filed in federal court, it may be 2 years or longer before the case is actually heard. With arbitration, by the time an arbitrator is picked, say, in a discharge case, it may be only 2–4 months before the case is heard.

To that end, I don't have any problem with the Supreme Court's decision in *Eastern Associated Coal*[13] or cases before it involving finality of awards. I think one of the examples of speed is also the component of finality. In fact, it kind of makes you wonder why the employer in *Eastern Associated Coal* wanted to go to the Supreme Court over whether James Smith should be driving one of its trucks.

What you really have to look at is risk management. I think that is what employers look at, and that is why going to the Supreme Court was viewed as necessary. The employer had an employee who was randomly tested for drugs twice and was discharged both times. Someone in the company's management was thinking to himself or herself, What happens if the employee gets busted a third time and it is not a random test but a post-accident test after he's run his bulldozer into a school bus carrying third-grade children? I think that is the sort of thought that goes through management's mind.

Management wanted an affirmative defense if that sort of accident were to happen. And if parents and relatives of injured schoolchildren sue, those lawsuits are going to have claims for negligent retention and so forth. The best affirmative defense I think a company like Eastern Associated Coal could have in that sorry circumstance would be to say that it wanted to get rid of the

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[10]Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §2000e et seq.
[11]42 U.S.C. §12101.
[12]Pub. L. No. 102-166, 105 Stat. 1071–1081, codified at 42 U.S.C.A. §1981a.
[13]*Eastern Associated Coal Corp. v. Mine Workers (UMW)*, 531 U.S. 57, 165 LRRM 2865 (2000).

employee, but a majority of U.S. Supreme Court justices told it that they had to take him back.

The third reason I think many employers favor arbitration is simply this: Before the Civil Rights Act of 1991, if an employment dispute was decided by a federal judge, it was decided by someone who had some experience in the area, as well as the time and inclination to sort out complex fact situations. I am, frankly, not a big believer in the jury system for civil cases; I certainly am for criminal cases, but not civil. Over 90 percent of all the jury trials conducted on this planet every year are conducted in the United States—90 percent!

Frankly, I think that—from an employer's standpoint in a labor dispute or certainly in an employment dispute—an employer is more willing to pay somebody $800 a day in the case of private arbitration, someone who has some experience and a postgraduate degree to decide fairly and unemotionally the dispute, than it is willing to pay 12 people $25 a day. I'm not an intellectual elitist; I am saying that this is what goes through an employer's mind in preferring arbitration to jury trials.

Other than that, I have no disagreement with Justice Grodin's excellent remarks.

III. EMPLOYEE PERSPECTIVE

EDWARD BUCKLEY III*

In my view, if federal judges are complaining about their case loads and that they have too many employment cases, they either should not accept the job or they should find another job in private practice. They should not sit there and say that we just ought to have a policy change—that is for Congress to decide. And the Supreme Court determined that it was going to make a policy decision when it decided *Circuit City*.

The Court had to mangle the FAA in order to arrive at the conclusion it made. It completely ignored the provision in the Civil Rights Act of 1991 that says employees are entitled to a jury trial in disparate treatment cases.[1]

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[1]42 U.S.C. §1981a(c).