HART: I think you still have all those remedies. Why would you not? Courts try different kinds of cases together all the time; for example, legal cases with equitable cases for which different rules apply.

III. How Much Power Does a Labor Arbitrator Have? What the Latest Court Decisions Mean for Arbitrators, Employers, Unions, and National Labor Policy

Lise Gelernter*

Introduction

Judging by all the fine print in my credit card, telephone, and other consumer agreements, and the employment applications at many large employers, using arbitration to resolve contract disputes is now as popular in the United States in the consumer and employment arenas as it has been for many years in the labor arena.[1] The types of issues being arbitrated keep expanding and, due to a series of recent U.S. Supreme Court decisions, labor arbitrators in particular have experienced almost dizzying changes in the legal foundations of arbitration.

The latest big change came in 2009, in *14 Penn Plaza L.L.C. v. Pyett*,[2] when the Supreme Court threw a curve at the collective bargaining world by allowing unions to branch out beyond the collective representation of their bargaining units. The Court held (5–4) that, if expressed with "clear and unmistakable" contract language, unions could waive the rights of individual bargaining unit members to go to court to resolve employment-related statutory disputes and, instead, could agree that such disputes will be

*Teaching Faculty and Director, Externship Programs, University at Buffalo Law School (The State University of New York). I'd like to thank Jim Gardner for his support on all fronts as well as his editing.

[1] "Employment" arbitration refers to arbitration agreements in contracts between individuals and their employers. "Labor" arbitration refers to arbitration agreements in collective bargaining agreements between unions and employers.

[2] 129 S. Ct. 1456 (2009).

arbitrated. The Court viewed the arbitration of individuals' substantive statutory rights as an adequate substitute for litigation in court, reasoning that employees' rights would not be prejudiced if they were adjudicated by an arbitrator rather than by a judge. The Court had reached the same conclusion in non-union settings in *Gilmer v. Interstate/Johnson Lane Corp.*[3] and *Circuit City Stores v. Adams.*[4]

The *Pyett* decision presented unions with the possibility of a new type of relationship with bargaining unit members: representing them as individuals in employment-based statutory disputes that could be unrelated to the provisions of a collective bargaining agreement (CBA). *Pyett* thereby raised the specter of the Court merging the legal treatment of arbitration in the collective bargaining world[5] with the treatment of non-labor arbitration.[6] The Federal Arbitration Act (FAA)[7] had been perceived as the statute that governed non-labor or commercial arbitration, including employment-related arbitration, while Section 301 of the Labor Management Relations Act (§301)[8] had been seen as the statute applicable to labor arbitration.[9] Although courts had borrowed doctrines and concepts from one law to assist in the interpretation of the other, judges had treated the statutes as operating in two different worlds. That started to change in 2001 with the *Circuit City* case. In *Circuit City*, the Court held that the FAA applied to employment contracts (excluding the statutorily exempted contracts of seamen, railroad workers, and other transportation-related workers).[10] *Pyett* pressed the invocation of the FAA further, when neither the majority of the Court nor the dissent rejected the employer's use of the FAA to compel arbitration under a CBA.[11] The decision allowed unions to waive individual employees' rights, but did not address the distinction between labor and commercial arbitration. The Supreme Court's post-*Pyett* arbitra-

[3]500 U.S. 20, 26, 29–32 (1991).
[4]532 U.S. 105, 123–24 (2001).
[5]Arbitration arising from union contracts is commonly known as "labor arbitration."
[6]Non-labor arbitration will sometimes be referred to, in this paper, as "commercial arbitration."
[7]9 U.S.C. §§1–16 (2011).
[8]29 U.S.C. §185 (2011).
[9]See Seth Galanter & Jeremy M. McLaughlin, *Does the Supreme Court Decision in* 14 Penn Plaza *Augur the Unification of the FAA and Labor Arbitration Law?*, 64 Disp. Res. J. 56, 58 (2009).
[10]532 U.S. at 119.
[11]532 U.S. at 407.

tion decisions[12] have not further delineated the role of CBA arbitration in resolving individuals' statutory rights disputes.

Pyett raises the questions of whether the Court has effectively changed national labor policy without congressional legislation and, if so, whether its having done so squares with the labor policies Congress enacted in the 1935 National Labor Relations Act (NLRA) and the 1947 amendments of the Labor Management Relations Act (LMRA).[13] In enacting those laws, Congress sought to protect employee collective actions—through their unions—as a counterweight to employers' financial and managerial power, and also to promote labor peace. Labor arbitration has become a crucial part of the labor-management dispute resolution process—an alternative to the disruption of industrial strikes.

By conflating arbitral doctrines, the Court has engendered points of tension between the basic public policy goal of labor arbitration, which is to promote industrial peace, and the goal of commercial arbitration, which is to support private parties' freedom to contract for alternative ways in which to resolve contractual disputes. While these two goals can often be served by overlapping or congruent legal doctrines—because each is based on legislation favoring arbitration as a means of resolving disputes—a judicial "one size fits all" approach to labor and commercial arbitration may be misguided, because the two are different in practice. Labor arbitration is, at its core, a way to prevent something deleterious—a work stoppage—whereas there is no comparable element of harm associated with commercial arbitration, the purpose of which is to save time and money by not going to court.

Of course, the further encroachment of the FAA into the province of labor arbitration is not inevitable. In future cases, the Supreme Court and other federal courts may emphasize the demarcation between the doctrines applicable to each, especially if afforded the assistance of knowledgeable and insistent litigants from both the union and management camps.

This paper seeks to identify the legal trends that may affect labor arbitrators and the parties who appear before them. Part

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[12] *Granite Rock v. Int'l Brotherhood of Teamsters*, 130 S. Ct. 2847 (2010) (court, rather than arbitrator, had the power to resolve a dispute over the CBA ratification date); *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (arbitrator, not court, had the power to resolve a dispute over the unconscionability of an employment contract); *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (arbitrators may not permit class action arbitration if the contract is silent on the issue).

[13] 74 Pub. L. No. 198, 49 Stat. 449 (1935) (NLRA), as amended by 80 Pub. L. No. 101, 61 Stat. 136 (1947) (LMRA).

I provides brief histories of labor and non-labor arbitration and outlines the core principles of labor arbitration arising from §301 of the LMRA and of non-labor arbitration arising under the FAA. Those histories will establish that, during the twentieth century, labor and commercial arbitration were viewed as two distinct dispute resolution systems. Part II of this paper compares the core principles of the FAA and §301 and shows that they diverge most significantly on the public policy that arbitration serves for each, and in the corresponding roles of arbitrators in effectuating those policies. Part III traces how recent arbitration jurisprudence has crossed the historical divide between commercial arbitration under the FAA and labor arbitration under §301, and explores the problems that this may create both for labor arbitration as an institution, and for the consistent treatment of labor arbitration by the courts. Part IV highlights the ways in which the courts still view arbitration under CBAs and non-CBA contracts as dichotomous proceedings with different rules, and shows that, although federal policy favors arbitration of all kinds, the courts have sometimes, albeit subtly, guarded judicial turf against encroachment by arbitrators, a tendency that may have contributed to the ostensible confusion of recent decisions. Part IV also describes the new hybrid commercial/labor arbitrator that *Pyett* appears to contemplate, and discusses how arbitrators might fill that role without rendering decisions that undercut the principles of, or sacrifice the distinctions between, labor arbitration and commercial arbitration. Finally, the ramifications of recent court rulings for the institution of labor arbitration and national labor policy will be discussed.

Part I—The Legal Underpinnings and Core Principles in Arbitration Law and Policy

The historical and legal background of how legal and arbitral doctrine has evolved for labor and commercial disputes.

A. A Brief Overview of the Legal History of Labor Arbitration

Background

The 1947 Taft-Hartley Act[14] (also known as the Labor Management Relations Act or LMRA) was a congressional seal of approval

[14]Pub. L. No. 80-101, 61 Stat. 136 (1947).

for already well-established labor arbitration systems that had been created by CBAs. Section 201(b) of the Act states that the United States' policy is to encourage the resolution of collective bargaining negotiation disputes through "conciliation, mediation and voluntary arbitration."[15] Section 203(d) provides that grievance disputes should be resolved "by a method agreed upon by the parties," implying arbitration.[16] Section 301 of the Act[17] states that CBAs are enforceable in federal court.[18] Section 301 states, in relevant part, the following:

> *Section 301(a)* Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[19]

Prior to the Supreme Court's decision in *Textile Workers Union of America v. Lincoln Mills of Alabama,*[20] there had been disagreement among the federal circuit courts as to whether §301 granted them the authority to enforce CBA agreements to arbitrate.[21] In *Lincoln Mills*, the union sought to utilize the CBA's arbitration clause, and the employer refused to participate in the arbitration process. The Court ruled that §301 "authorizes federal courts to fashion a body of federal law for the enforcement of… collective bargaining agreements" including "promises to arbitrate grievances under collective bargaining agreements."[22] Justice William Douglas described the "federal law" that was to be "fashioned" by federal courts as follows:

> [T]he substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws. … The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning

[15] 29 U.S.C. §171(b) (2011).
[16] 29 U.S.C. §173(d) (2011).
[17] 29 U.S.C. §185.
[18] Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 Univ. Fla. L. Rev. 557, 582 (1983).
[19] 29 U.S.C. §185(a).
[20] 353 U.S. 448 (1957).
[21] *Id.* at 450–51.
[22] *Id.* at 451.

> a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.[23]

The Core Principles Underlying Labor Arbitration Law and Policy

In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[24] one of the trio of cases that became known as the Steelworkers Trilogy, the Supreme Court continued to develop the federal common law of labor relations by enunciating a core principle of labor arbitration: that arbitration is a way to avert work stoppages. Arbitration is the quid pro quo for explicit or implicit bans on union strikes and employer lockouts on grievable disputes[25] and this quid pro quo distinguishes labor arbitration from commercial arbitration. This distinction will be referred to as the first core principle of labor arbitration. In *Warrior & Gulf*, a union sought to compel arbitration of a grievance to stop the contracting out of work that union members had been performing. The Court emphasized the differing purposes of arbitration in the labor and commercial settings:

> [T]he run of arbitration cases, illustrated by *Wilko v. Swan*, 346 U.S. 427,[26] 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 arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.[27]

As noted by Professor Feller in his treatise *A General Theory of the Collective Bargaining Agreement*, labor arbitration "originated not as

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[23] *Id.* at 456–57.

[24] 363 U.S. 574 (1960).

[25] *Id.* at 578 & n.4; see also *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 104–106 (1962).

[26] *Wilko v. Swan* concerned an arbitration dispute between a securities broker and a customer. 346 U.S. 427 (1953).

[27] *Warrior & Gulf*, 363 U.S. at 578.

an alternative to litigation but as an alternative to strikes."[28] The National Academy of Arbitrators (NAA) reiterated this core principle in the amicus brief it submitted to the Supreme Court in the *Pyett* case. The NAA argued that, given the unique role of labor arbitration, the Court should treat CBA arbitration agreements differently from other arbitration agreements.[29]

The *Warrior & Gulf* decision described a second core principle of labor arbitration: that labor arbitration is part of the ongoing collective bargaining process, and that an arbitrator's award should be deemed the equivalent of an agreement by the parties, enforceable in the same manner as their CBA.[30]

Arbitration as an alternative to work stoppages leads to a third core principle: that courts should honor the parties' agreements to arbitrate and should broadly enforce the scope of such agreements. The Court held in *Warrior & Gulf* that "[a]n 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."[31]

Warrior & Gulf also enunciated a fourth core principle of labor arbitration: labor arbitrators are better able to decide CBA disputes than are judges. Justice Douglas observed that a CBA is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. … It calls into being a new common law—the common law of a particular industry or of a particular plant."[32] That industrial common law, the Court held, is best interpreted by an arbitrator, because it requires something different from legal expertise. Justice Douglas continued:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. …

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[28]See also Alan Hyde, *Labor Arbitration of Discrimination Claims After* 14 Penn Plaza v. Pyett: *Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 Ohio St. J. Disp. Res. 975, 987 (2010).

[29]Brief for the National Academy of Arbitrators as Amicus Curiae Supporting Respondents, *Pyett v. 14 Penn Plaza*, 129 S. Ct. 1456 (No. 07-581), 2007 U.S. Briefs 587 at 11, 16, 2008 U.S. S. Ct. Briefs 581 ("It is true that both employment arbitration and labor arbitration are called 'arbitration.' But just as hounds and greyhounds, mongrels and spaniels are all called dogs, *Macbeth*, Act III, scene 1, they're not the same animal.").

[30]*Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 61–62 (2000).

[31]*Warrior & Gulf*, 363 U.S. at 582–83.

[32]*Id.* at 578–79.

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. *The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.*[33]

The unspoken corollary of addressing "considerations which are not expressed in the contract" is that the authority of labor arbitrators is circumscribed by the CBA.

A fifth core principle—that the judicial review of labor arbitration awards is to be "very limited"—was enunciated in another Trilogy case, *United Steelworkers v. American Manufacturing Co.* In *Steelworkers*, the Court said:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. …
>
> *The courts, therefore, have no business weighing the merits of the grievance.*[34]

Other Supreme Court decisions further delineated the narrow areas in which courts would not uphold a labor arbitrator's decision. In the third Trilogy case, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, the Court said that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[35] Yet, the Court said, "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to

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[33] *Id.* at 581–82 (emphasis added).

[34] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567–68 (1960) (emphasis added).

[35] *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

dispense his own brand of industrial justice. … [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement."[36] Courts can refuse to enforce an award if the "arbitrator's words manifest an infidelity to this obligation."[37] In *United Paperworkers Int'l Union v. Misco, Inc.*,[38] the Supreme Court confirmed that, as was generally true under the common law for contracts, a court could also refuse to enforce an arbitration award "where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant,' and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[39]

Recap

Section 301 of the LMRA and the federal law that the Supreme Court has "fashioned" under §301 established five core labor arbitration principles:

(1) Labor arbitration is a "substitute for industrial strife";[40]
(2) Labor arbitration is part of the ongoing collective bargaining process;
(3) Courts must honor agreements to arbitrate and should read labor arbitration clauses broadly and presume that arbitration clauses cover a particular CBA dispute;
(4) Labor arbitrators are superior to judges for deciding CBA disputes; and
(5) Judicial review of arbitration awards is to be "very limited."[41]

B. A Brief Overview of the Legal History of the FAA

Background

Congress passed the United States Arbitration Act (later named the Federal Arbitration Act, or FAA) in 1925 in order to reverse

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[36] *Id.* at 597.
[37] *Id.*
[38] 484 U.S. 29 (1987).
[39] *Id.* at 43 (quoting *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983); *Muschany v. United States*, 324 U.S. 49, 66 (1945)).
[40] *Warrior & Gulf*, 363 U.S. at 578.
[41] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567–68 (1960).

the common law's antipathy to the enforcement of arbitration agreements.[42] Section 2 of the FAA states that arbitration agreements concerning "a maritime transaction or a contract evidencing a transaction involving commerce" are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[43] Sections 3 and 4 of the FAA authorize courts to enforce the agreements by staying any court proceedings on issues that the parties have agreed will be subject to arbitration, and by compelling the parties to the agreements to participate in the arbitration process.[44]

Not all arbitration agreements are covered by the FAA. The contracts must arise from a "maritime" transaction, meaning commerce involving seagoing vessels, wharfs, and other matters over which courts would assert admiralty jurisdiction, or "transaction[s] involving commerce," meaning contracts implicating interstate commerce.[45] However, Section 1 excludes from FAA coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[46]

The Core Principles Underlying FAA Law and Policy

Federal courts have recognized the FAA as embodying the federal policy of encouraging the use of arbitration to resolve contractual disputes in lieu of litigating the disputes in court[47]—that when the parties have a valid agreement to arbitrate, it is incumbent upon the courts to honor their wishes.[48] The Supreme Court has stated that "[the FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"[49] and that "the Federal Arbitration Act … requires courts liberally to construe the scope of arbitration agreements covered by that Act."[50] These are core

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[42] *Circuit City*, 532 U.S. at 111.
[43] 9 U.S.C. §2.
[44] 9 U.S.C. §§3 and 4.
[45] 9 U.S.C. §1.
[46] *Id.*
[47] *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, No. 09-893, 2011 LEXIS 3367 at *21 (Sup. Ct. Apr. 27, 2011); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625–26 (1985).
[48] *Mitsubishi*, 473 U.S. at 626; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).
[49] *Mitsubishi*, 473 U.S. at 626 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24–25 (1983)).
[50] *Id.* at 627.

principles shared by the FAA and §301. However, when it comes to the question of how broadly to interpret the scope of arbitration agreements, the Supreme Court may have sent a message that §301 clauses are to be read more broadly than FAA clauses. In *Warrior & Gulf*, the Court established a super-presumption in favor of finding CBA disputes arbitrable. It ruled that courts should compel arbitration "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."[51] The Court has not attributed the same "positive assurance" standard to FAA cases. This difference of presumptions is consistent with the different purposes served by commercial and labor arbitration. Because §301 arbitration avoids the harm of industrial work stoppages, the broader "positive assurance" presumption of substantive arbitrability in CBA cases may ensue from the national labor policy of avoiding strikes and lockouts. In comparison, the Supreme Court has repeatedly said that FAA arbitration is an institutional alternative to courts for litigating disputes. The fact that commercial arbitration serves that sole purpose may explain why, in the Court's view, it does not warrant the more expansive presumption of substantive arbitrability: the parties should not be compelled to arbitrate a dispute that they have not agreed to arbitrate.

Another distinction that the Supreme Court has drawn between labor arbitration and commercial arbitration is its view that labor arbitrators are superior to judges in deciding labor disputes, but that commercial arbitrators are equivalently competent to judges in deciding commercial disputes. In a 1985 case, *Mitsubishi Motors v. Soler-Chrysler Plymouth, Inc.* (a dispute involving alleged violations of the Sherman Antitrust Act), the Court concluded that commercial arbitrators could furnish the parties with the same measure of justice as could a judge.[52] The Court compelled enforcement of the arbitration clause in a commercial contract, observing that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it submits to their resolution in only an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition

[51] *Warrior & Gulf*, 363 U.S. at 582–83.
[52] 473 U.S. 614, 632–38 (1985).

of arbitration."[53] This reasoning was echoed in *Gilmer*, when the Supreme Court held that an agreement to arbitrate employment disputes covered a financial consultant's statutory Age Discrimination in Employment Act claim.[54] The Court rejected Mr. Gilmer's arguments that arbitration was an inadequate forum for such claims. The Court noted:

> [I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration 'rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'[55]

The Court's endorsement of arbitration under the FAA is consistent with the labor arbitration principle favoring arbitration as an alternative dispute resolution forum, but the endorsement of commercial arbitrators as adjudicators has not carried with it the attribution of superior competence that was the hallmark of the Court's ruling in *United Steelworkers*: "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

As with §301 labor cases, the judicial review of FAA arbitration decisions is limited. However, unlike §301, the FAA furnishes specific statutory criteria for vacating arbitration awards. They are the following:

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators…;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to

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[53] *Id.* at 628.

[54] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Mr. Gilmer's agreement to arbitrate employment disputes was *not* made with his employer, but rather, with the New York Stock Exchange as a condition of his registration as a securities broker. Therefore, the contract was not considered an employment contract, 500 U.S. at 25 n.2, and the Court applied the FAA without having to wrestle with the question it decided in *Circuit City* concerning FAA coverage of employment contracts.

[55] 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[56]

In 2008, in *Hall Street Associates, L.L.C. v. Mattel*,[57] the Supreme Court ruled that parties could not contract to expand the grounds for judicial review beyond those set forth in the FAA.[58] In *Hall*, the Court balanced the core principle common to both labor and commercial arbitration—that arbitration agreements should be enforced—against the explicit bases for vacatur enumerated in the FAA, and found that the statutory criteria should be deemed exclusive.

Recap

The FAA encourages the use of arbitration to resolve disputes in the commercial world. Its core principles are:

(1) Arbitration is a good substitute for litigation in court;
(2) Courts must honor the parties' agreement to arbitrate;
(3) Arbitrators are as good as judges in resolving contractual disputes; and
(4) The bases for judicial review are limited, pursuant to specific statutory terms.

Part II—Comparing §301 and FAA Core Principles

FAA and §301 jurisprudence share some core principles: (1) encouraging arbitration is federal policy, (2) courts should defer to the parties' decision to arbitrate disputes arising under a contract and should enforce valid arbitration agreements,[59] and (3) the bases for judicial review of arbitration awards are limited. However, FAA and §301 jurisprudence diverges on the core principles regarding the role of arbitrators and the policy objectives of arbitration. The Court has viewed labor arbitrators as possessing

[56]9 U.S.C. §10 (2011).
[57]552 U.S. 576 (2008).
[58]*Id.* at 584, 588–89.
[59]But keep in mind that §301 goes a bit further and requires courts to read labor arbitration clauses broadly.

greater competence than judges in the adjudication of §301 contract disputes and considers them to be part of the collective bargaining process, but confines their jurisdiction to the four corners of the CBA. In contrast, the Court has opined that FAA arbitrators are as competent as (but not more competent than) judges in interpreting commercial contracts and those statutory provisions that those contracts may incorporate by reference. FAA arbitrators are not presumed to have any special expertise, and are not charged with developing the commercial equivalent of the "industrial common law."[60] And, whereas labor arbitrators are viewed as being necessary actors in the collective bargaining relationship and process, commercial arbitrators do not play a comparable role in the parties' contractual relationship or process.

Part III—Crossing the Border Between the FAA and §301

A. The Historical Separation Between the FAA and §301

The differences in the policy and legal foundations of the FAA and §301 are not surprising. During the 62 years following the passage of the FAA, the federal law of arbitration appeared to proceed along two separate paths: the CBA route and the FAA route.[61] As late as 1987, when the Supreme Court decided the *Misco* case[62] discussed in Part I, judges and litigants interpreted the FAA as inapplicable to employment and labor arbitration agreements. In *Misco*, which involved a §301 challenge to an arbitration award under a CBA, the Supreme Court noted that although the FAA "does not apply to 'contracts of employment,'" federal courts had "often looked to the [FAA] for guidance in labor arbitration cases, especially in the wake of the holding that §301 of the Labor Management Relations Act of 1947 … empowers the federal courts to fashion rules of federal common law to govern" disputes about CBA violations.[63] The Court appeared to assume that the FAA did not apply to CBAs.

In his 1947 *Lincoln Mills* case dissent, Justice Felix Frankfurter criticized the majority for failing to clearly state that the FAA was inapplicable to CBAs. (Again, the *Lincoln Mills* case grounded

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[60] *Warrior & Gulf*, 363 U.S. at 581–82.

[61] Of course, there is also state law on the enforcement and vacating of arbitration awards, but it has been circumscribed through the preemptive effect of §301 or the FAA for those agreements covered by those laws.

[62] *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

[63] *Id.* at 41 n.9 (citing *Lincoln Mills*, 353 U.S. 448).

the enforceability of labor arbitration agreements in §301 of the LMRA.) Justice Frankfurter noted that Congress had passed the FAA to remedy the judicial rejection of petitions to enforce arbitration agreements. The FAA accomplished Congress's goal, he stated, by "making executory agreements to arbitrate specifically enforceable in the federal courts, but explicitly excluding 'contracts of employment' of workers engaged in interstate commerce from its scope."[64] He continued:

> Naturally enough, I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for 'contracts of employment,' were available, the Court would hardly spin such power out of the empty darkness of §301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts.[65]

In its landmark 2001 decision in *Circuit City Stores v. Adams*,[66] the Supreme Court defined the limitation of the FAA's exclusion of "contracts of employment." It held that the exemption from arbitration[67] applied to only (1) the employment contracts of seamen, railroad employees, and other "transportation workers,"[68] and (2) those employees directly employed in interstate commerce,[69] but that the Act did not exempt from arbitration other non-CBA employees. In *Circuit City*, the arbitration clause in question was part of a non-CBA employment agreement between an individual, Saint Clair Adams, whom the Court found not to be employed in interstate commerce, and *Circuit City*.[70] The Court ruled that Mr. Adams' statutory claim of racial discrimination under Title VII of the Civil Rights Act of 1964 had to be resolved by an arbitrator because the arbitration clause of his employment agreement

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[64] *Lincoln Mills*, 353 U.S. at 466 (Frankfurter, J. dissenting).
[65] *Id.*
[66] 532 U.S. 105.
[67] The FAA does *not* cover "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1.
[68] 532 U.S. at 119.
[69] "The plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce.' See, e.g., *Gulf Oil, supra,* at 195 (phrase 'engaged in commerce' 'appears to denote only persons or activities within the flow of interstate commerce')."
[70] *Id.* at 109–110, 119.

covered all disputes arising out of his employment, including "any and all" statutory claims.[71]

B. The Twenty-First-Century Convergence of the FAA and §301

The Supreme Court has not yet directly ruled that the FAA applies to CBAs, but courts have sometimes used legal precedents from FAA and §301 cases interchangeably, implying applicability.[72] In *Pyett*, the Supreme Court appeared to tacitly accept this cross-application of the statutes. In *Pyett*, the employer invoked the FAA, not §301, to compel arbitration pursuant to an arbitration clause in a CBA that prohibited statutorily defined discrimination. The clause stated the following:

> NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, … or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.[73]

The Supreme Court held that this arbitration clause was enforceable: that the union could legitimately agree to CBA language waiving its members' rights to litigate individual statutory discrimination claims and requiring that they instead arbitrate the claims. The Court stated that, if such a litigation waiver has been expressed "clearly and unmistakably," the statutory claim must be arbitrated.[74]

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[71] *Id.* at 109–110. The arbitration clause stated:

"I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort." App. 13 (emphasis in original).

[72] David L. Gregory, Michael K. Zitelli, Christina Papadopoulos, *The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions—Will Gold Turn to Rust?*, 60 Cath. U. L. Rev. 47, 71 (2010).

[73] *Pyett*, 129 S. Ct. at 1461.

[74] *Id.* at 1466.

While the Court stated that the National Labor Relations Act governed the parties' bargaining relationship,[75] neither the majority nor the dissenting justices acknowledged that another federal labor law—§301—governed the judicial enforcement of the arbitration agreement. Their only reference to §301 concerned a different case: a duty of fair representation "hybrid" suit that the employees had previously filed and then withdrawn.[76] The Court may have been silent about the application of the FAA to the CBA because the parties had not asked it to decide that question, or because differences between the two acts—statutes of limitations, appellate procedures, and judicial review doctrines—were not at issue. The union may have decided not to challenge the employer's invocation of the FAA, believing that the validity of the waiver could have been addressed under either statute. The Court accepted, without comment, the use of the FAA's procedural provisions for the enforcement of the CBA,[77] and the Court's silence left unanswered the question of FAA applicability to CBAs.

The Court's silence notwithstanding, there are several reasons why the FAA should be deemed to not apply to CBAs. First, it's not clear that Congress considered the FAA's coverage of "contracts of employment" to include CBAs. In a prescient article on the interaction of the FAA and §301, Professor William Gould pointed out that in a 1944 NLRA case, *J. I. Case v. N.L.R.B.*, the Supreme Court had stated that a CBA "is not … a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment."[78] Because *J. I. Case* contrasted individual contracts of employment with CBAs under the NLRA and did not construe the FAA, the effect of that dictum is not clear. A reasonable person could assume that the term "contract of employment" means

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[75] *Id.* at 1463–64.

[76] *Id.* at 1462 n.2. Through much of *Pyett*, there was a great deal of discussion of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a §301 case, but there was no direct discussion of the propriety of moving to compel arbitration under the FAA.

[77] 9 U.S.C. §§3, 4, 9, 10–13. See Seth Galanter & Jeremy M. McLaughlin, *Does the Supreme Court Decision in* 14 Penn Plaza *Augur the Unification of the FAA and Labor Arbitration Law?*, 64 Disp. Res. J. 56, 58 (2009), at 58–59; Barry Winograd, *The* Pyett *Decision: A Major Shift in Doctrine, but Limited Impact*, 23 Cal. Labor & Emp. L. Rev. 3, 16 (2009). It should be noted, however, that the result in *Pyett* would have been the same if the union had raised the issue that the employer's claim should have been brought pursuant to §301.

[78] *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335 (1944); William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 610 (2006), at 640.

the same thing under the NLRA and the FAA and that, therefore, CBAs are not "contracts of employment" under either statute. Second, because the FAA and §301 serve different purposes, full application of the FAA to CBAs would undercut Congress's establishment of a federal labor policy. Third, there is a substantial body of lower court law that holds that, although the FAA can be used as a guide to fill in doctrinal gaps in §301 common law, the FAA does not apply to CBAs.[79] Finally, it would not make much

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[79]See Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in* 14 Penn Plaza v. Pyett, 14 Lewis & Clark L. Rev. 825, 852 n.151 (2010), citing to *International Ass'n of Machinists & Aerospace Workers Local 2121 v. Goodrich*, 410 F.3d 204, 207 n.2 (5th Cir. 2005) ("Most courts, both before and after *Circuit City*, adhere to the traditional view that suits arising under Section 301 and concerning collective bargaining agreements are outside the scope of the FAA."); *IBEW, Local 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1097 (8th Cir. 2004) (§301 of the LMRA "provides an independent basis for federal jurisdiction to enforce labor arbitration"); *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 53 (2d Cir. 2001) ("We hold that in cases brought under section 301 … the FAA does not apply."); *International Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 494 (5th Cir. 2003).

Professor Moses does point out that the Seventh Circuit is an outlier: *Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Indus. Workers of Am.*, 36 F.3d 712, 715 (7th Cir. 1994) ("As it happens, however, our circuit is among the minority that has limited §1 [of the FAA] to the transportation industries and therefore applies the Arbitration Act to most collective bargaining agreements."). Nonetheless in *Teamsters Nat'l Automotive Transporters Industry Negotiating Committee v. Troha*, 328 F.3d 325, 329–30 (7th Cir. 2003), the Seventh Circuit found that the FAA did not apply in a collective bargaining case in which a party was seeking to enforce an arbitration subpoena and that *Lincoln Mills* contemplated that courts would fashion a federal common law to allow them to be enforced. The Court looked to the FAA's provisions on subpoena enforcement because they are "instructive in fashioning federal common law." 328 F.3d at 330.

In *Teamsters Local 331 v. Philadelphia Coca-Cola Bottling Co.*, 183 L.R.R.M 2428, 2007 U.S. Dist. LEXIS 93578 at *9–11 (D.N.J. 2007), the Hon. Joseph H. Rodriguez noted that the Third Circuit appeared to hold in 1953 that the FAA applies to CBAs, *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, Local 437*, 207 F.2d 450, 454 (3d Cir. 1953), and that the Third Circuit appeared to reaffirm the *Tenney* case in *Great Western Mortgage Co. v. Peacock*, 110 F.3d 222 (3d Cir. 1997). However, the judge held, where the employees involved are transportation workers excluded from the FAA's coverage, §301 is an independent source of federal court jurisdiction; the employer cannot use the FAA exemption to "sabotage federal jurisdiction statutorily conferred by the Taft-Hartley Act." 183 L.R.R.M at 2431, 2007 U.S. Dist. LEXIS 93578 at *13.

Post-*Pyett*: *1199 SEIU United Healthcare Workers East v. Civista Medical Center, Inc.*, 2011 U.S. Dist. LEXIS 8268 at *4 (Civ. Action No. DKC 10-0479) (D. Md. 2011) ("The Federal Arbitration Act does not apply directly to labor contracts under §301 of the Labor-Management Relations Act."); *Walt Disney Co. v. Nat'l Ass'n of Broadcast Employees & Technicians*, 189 L.R.R.M 2323, 2325, 2010 WL 3563110 at *3 (S.D.N.Y. 2010) (noting that the Second Circuit has held that the FAA does not apply to §301 cases, but finding that the FAA could serve as a useful guide, quoting *Troha*); *Globe Newspaper Co. v. International Ass'n of Machinists*, 648 F. Supp. 2d 193, 197 n.5 (D. Mass. 2009) (the FAA may be consulted for guidance in CBA cases, but "it does not apply of its own force to actions arising from arbitral decisions issued pursuant to collective bargaining agreements"). But see *NFL Players Ass'n v. NFL Mgmt. Council*, 2011 U.S. Dist. LEXIS 865 at *6 (Case No. 10CV1671 JLS (WMC)) (S.D. Cal. Jan. 5, 2011) ("the Ninth Circuit has not resolved the issue whether the Federal Arbitration Act (FAA) speaks to suits brought under §301"); *Breckenridge O'Fallon, Inc. v. Teamsters Union Local No. 682*, 2011 U.S. Dist. LEXIS 623 at *9 n.1 (Case No. 4:09CV2005 CDP) (E.D. Mo. 2011) ("it is unclear whether collective bargaining agreements are subject to the FAA").

sense to apply the FAA to CBAs when the FAA exempts contracts in the transportation sector, whereas §301 covers them[80] (except for CBAs covered by the Railway Labor Act,[81] a labor relations statute analogous to the LMRA for the airline and railroad industries). There would be no justification for having arbitration rules that are different for only some §301 CBAs.

C. So What?

Pyett has endorsed the arbitration of employment discrimination and other statutory claims under the auspices of CBA arbitration. If at least some parts of the FAA apply to CBAs, what new problems or concerns does that raise for labor arbitration?

As arbitrator Barry Winograd has pointed out, even if there are not many CBAs that presently exist or likely will exist that "clearly and unmistakably" delegate statutory dispute resolution to an arbitrator, the doctrinal shift in *Pyett* is still important.[82] Arbitrator Winograd noted that *Pyett* raises "concerns [about] the dividing line between FAA proceedings and §301, the traditional basis for enforcing CBAs"[83] that, should the FAA supplant §301, "could portend a weakening of our national body of law dealing with labor relations, and a return to traditional state-based contract doctrines."[84]

Those cases that treat the FAA and §301 interchangeably seem to ignore the core principles that distinguish the two: (1) the labor arbitrator is an actor in an ongoing collective bargaining process; (2) the labor arbitrator is better than a judge at deciding labor contract disputes, but has no role in other kinds of disputes; (3) labor arbitration is a substitute for industrial strife, not for court litigation; and (4) FAA arbitration is a substitute for court litigation, nothing more. Section 301 jurisprudence rests on the assumption that unnecessary work stoppages are anathema. Honoring an arbitration agreement by reading it broadly is crucial when the arbitrator is the last line of defense against a work stoppage. That is not the case when the arbitrator is filling in for a judge who could decide the case as competently as an arbitrator.

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[80] See *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers*, 242 F.3d at 55.
[81] 45 U.S.C. §§151–161, 181–185, 187 (2011).
[82] Barry Winograd, *The* Pyett *Decision: A Major Shift in Doctrine, but Limited Impact*, 23 Cal. Labor & Emp. L. Rev. 3, 3 (2009).
[83] *Id.* at 16.
[84] *Id.*

Professor Alan Hyde has expressed concern that an FAA and §301 convergence may erode *Warrior & Gulf*'s mandate to read CBA arbitration clauses broadly. He points out that judges may believe *Pyett* means that courts will have to look more closely and therefore more narrowly at CBA arbitration clauses to determine whether they "clearly and unmistakably" waive the right to litigate statutory claims in court. He argues that "*Pyett* will have mischievous results if it upends this established practice of broadly interpreting CBA arbitration clauses."[85]

The FAA does not require an especially broad reading of arbitration clauses because, in commercial arbitration, there is no assumed threat of commerce coming to a halt if the parties choose not to exercise their freedom to arbitrate. FAA jurisprudence rests on the libertarian assumption that parties' freedom to contract to arbitrate should be as unfettered as possible. One would expect judges in FAA cases to read arbitration clauses closely in order to allow the arbitration of only those issues that the parties have agreed to arbitrate and, then, pursuant to the procedures that they envisioned.[86] This is consistent with the views that parties should not be forced to arbitrate more than they wish to and that they should gain no substantive advantage by choosing arbitration over court litigation.

In non-labor arbitration cases, arbitration is not an inherent part of the parties' relationship; there is no history or future of a collective bargaining relationship. The non-labor arbitration agreement is often a one-time transaction that is not subject to re-negotiation at regular intervals, and that may involve parties with disparate bargaining power and sophistication. Where arbitration is simply an alternative to litigation, a court would reasonably expect more specificity from the parties as to the kinds of disputes that are arbitrable and the powers that are invested in the arbitrator.

Even if the FAA did not supplant §301, its parallel applicability to CBA cases poses practical problems. Professor Gould described three:

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[85]Alan Hyde, *Labor Arbitration of Discrimination Claims After* 14 Penn Plaza v. Pyett: *Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 Ohio St. J. Disp. Res. 975, 982 (2010).

[86]E.g., *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775–76 (2010) (where arbitration agreement is silent on class actions, arbitration panel cannot permit class action arbitrations).

(1) The FAA "bars appeals from some orders compelling arbitration until there is a final order,"[87] whereas §301 does not. This means that arbitrations under the FAA may proceed more quickly than under §301 in some circumstances.

(2) Unlike §301, the FAA provides for discovery during the arbitration process. Although failure to provide necessary discovery under a CBA's grievance process is considered an unfair labor practice under the NLRA, injunctions compelling compliance are the only judicial enforcement "tool" and are rarely used, whereas the FAA allows for judicial enforcement of discovery orders.[88]

(3) Section 301 is silent on judicial review of CBA arbitration awards, although a federal common law doctrine has been developed. In contrast, the FAA provides four specific grounds for vacating awards.[89]

Applying concepts developed for commercial arbitration to the §301 context ignores the significant doctrinal gaps between labor and non-labor arbitration, and can lead to unexpected or unclear results. *Pyett* illustrates the problem. In *Pyett*, the employer moved to compel arbitration under the FAA, not §301. As noted, the Court did not address whether its doing so was appropriate under the FAA.

Pyett appears to selectively acknowledge and disregard core labor arbitration principles. It attributes to labor arbitrators an expertise in resolving statutory disputes comparable to their presumptive expertise in resolving workplace disputes. It loses sight of the role that labor arbitrators serve as a part of the collective bargaining process: the arbitrator as an alternative to work

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[87]9 U.S.C. §16(b).

[88]9 U.S.C. §7; *Security Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865, 870–71 (8th Cir. Minn. 2000) ("implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing"). But see *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008). In that case, the Second Circuit noted a split among the circuit courts about discovery from third parties under FAA §7:

> Does section 7 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §7, authorize arbitrators to compel pre-hearing document discovery from entities not parties to the arbitration proceeding? The Eighth Circuit has held that it does, see *In re Arbitration Between Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870–71 (8th Cir. 2000); the Third Circuit has determined that it does not, see *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004); and the Fourth Circuit has concluded that it may—where there is a special need for the documents, see *Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999). Like the Third Circuit, we hold that section 7 does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding.

Life Receivables, 549 F.3d at 212.

[89]William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 644–45 (2006).

stoppages. (The arbitration of individuals' statutory disputes will not likely abate industrial strife because it does not involve collective interests.) Rather, individual statutory dispute arbitration is a substitute for litigation, as is true in any commercial arbitration.

Although *Pyett* blurred the FAA and §301 boundary, the Court majority required that a union's waiver of the right to litigate a statutory claim must be "clear and unmistakable." This is a requirement that the Court has applied to only CBAs. The "clear and unmistakable" standard was first applied by Justice Scalia in *Wright v. Universal Maritime Service Corp.*[90] Justice Scalia opined that the standard was necessary in *Wright*, which dealt with collective rights under a CBA, but not in *Gilmer*, which had pertained to a single employee: "*Gilmer* involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees—and hence [in *Gilmer*] the 'clear and unmistakable' standard was not applicable."[91] Writing for the Court in the *Pyett* decision, Justice Thomas referenced[92] Justice Scalia's rationale in *Wright.*[93]

The dissent in *Pyett* characterized *Alexander v. Gardner-Denver Co.*[94] as having recognized a "seemingly absolute prohibition of union waiver of employees' federal forum rights."[95] But Justice Thomas, writing for the majority, distinguished *Gardner-Denver* as being limited to cases in which the arbitration clause did not clearly cover statutory disputes.[96]

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[90] 525 U.S. 70 (1998).

[91] *Id.* at 80–81. One court easily rejected a litigant's argument that *Pyett*'s "clear and unmistakable" language requirement was applicable to individuals' contracts. In *Campbell v. Pilot Catastrophe Services*, 2010 U.S. Dist. LEXIS 85173 at *14 (Civil Action No. 10-0095-WS-B) (S.D. Ala. 2010), the plaintiff asserted that *Pyett* required the same "clear and unmistakable" standard for individual employment contracts as pertained to CBAs. The court disagreed:

> [P]laintiff's argument that statutory anti-discrimination claims must be explicitly identified in an *individual* employee's arbitration in order to be subject to arbitration is contrary to extensive precedent in this Circuit [Eleventh] and elsewhere, and proceeds from an out-of-context misreading of a single sentence in *14 Penn Plaza*. This objection to enforcement of the arbitration agreement is, therefore, meritless.

Id. at *16 (emphasis added).

[92] *Pyett*, 129 S. Ct. at 1465.

[93] *Wright*, 525 U.S. 70.

[94] 415 U.S. 36 (1974).

[95] *Pyett*, 129 S. Ct. at 1480 (quoting *Wright v. Universal Maritime*, 525 U.S. at 80 (Souter, J. dissenting)).

[96] *Id.* at 1468–69. Justice Thomas appeared to be contemplating overturning *Gardner-Denver* when he stated "*Gardner-Denver* would appear to be a strong candidate for overruling if the dissents' broad view of its holding … were correct." *Id.* at 1469 n.8. Even so, the Court need not further eviscerate *Gardner-Denver.*

Part IV—Continuing the Separate Paths of Labor and Commercial Arbitration

As noted, the dual application of the FAA and §301 to CBAs is problematic because it ignores the substantive differences between CBAs and other contracts and between collective and individual bargaining. An FAA/§301 convergence appears to contemplate a new kind of hybrid arbitrator: one who is expert in both resolving collective bargaining disputes and in resolving employment-related statutory disputes. Nonetheless, the Supreme Court still recognizes the institutional differences between commercial and labor arbitration, between the FAA and §301, and may be circumspect about taking further steps toward the commingling of their purposes. Moreover, the parties to collective bargaining contracts do not have to use the power the Court has given them; they can just say no to negotiating CBAs that waive court adjudication of statutory disputes. Parties to the CBA have the discretion to decide whether it's a good idea to create hybrid arbitration opportunities and can, if they want, limit the effect of *Pyett*.

It is possible that recent Court decisions are indicia of its vigilance over the limits of arbitrators' powers, and those of the courts' exclusive jurisdiction. That vigilance may yet be a constraint on any inclination of the Court to further pursue the *Pyett* line of reasoning.

A. The Courts' Continued Distinction Between the FAA and §301

Notwithstanding that *Pyett*, which dealt with a CBA, came to the Court under the auspices of the FAA, and notwithstanding that the Court's decision has opened an expanded role to labor arbitrators, the *Pyett* decision largely preserved the distinction between labor and non-labor contracts, as well as some of the core principles of the former. *Pyett* was consistent with the traditional labor arbitration doctrine of broadly reading arbitration clauses. By holding that the union possessed the power to waive individuals' rights to court litigation on statutory disputes,[97] the Court

[97] *Pyett*, 129 S. Ct. at 1468–69.

read the arbitration clause even more broadly than some parties had urged.[98]

The Court's "clear and unmistakable" criterion conformed to its 1986 decision in *AT&T Technologies v. Communications Workers of America*,[99] a §301 case in which the Court reiterated that "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator,"[100] unless "the parties *clearly and unmistakably* provide otherwise."[101] In *Pyett*, the Court opined that the "clear and unmistakable" standard applied to the question of the authority of a CBA arbitrator to decide whether an individual employee's federal statutory right had been violated, a decision that would previously have been made by a judge. That arbitrability standard is unique to CBAs; it does not pertain to commercial agreements. In that respect, the Court still differentiated between the two. Future litigants can emphasize and, thereby, reinforce that differentiation. Arbitrators should remain mindful that CBAs are agreements affecting collective rights.

In 2010, several court cases dealt with the question of whether arbitrability was to be determined by a judge or the arbitrator: in *Rent-a-Center, West, Inc. v. Jackson*[102] (decided June 21, 2010) and *Granite Rock Co. v. International Brotherhood of Teamsters*[103] (decided June 24, 2010), the Court distinguished between labor and nonlabor contracts. In *Rent-a-Center*, an FAA case, an unrepresented employee, Antonio Jackson, brought a suit in federal court alleging that his employer had unlawfully discriminated against him. When Rent-a-Center moved to stay the litigation and compel arbitration under an employment agreement, Jackson argued that the agreement's arbitration provision was unenforceable by reason of unconscionability.[104]

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[98]See, e.g., *14 Penn Plaza, L.L.C. v. Pyett* (No. 07-581), Brief for the Respondents, 2007 U.S. Briefs 581, 2008 U.S. S. Ct. Briefs LEXIS 603; Brief for the United States as Amicus Curiae Supporting Respondents, 2007 U.S. Briefs 581, 2008 U.S. S. Ct. Briefs LEXIS 618; Brief for the AFL-CIO as Amicus Curiae Supporting Respondents, 2007 U.S. Briefs 581, 2008 U.S. S. Ct. Briefs LEXIS 621; Brief for the National Academy of Arbitrators as Amicus Curiae Supporting Respondents, 2007 U.S. Briefs 581, 2008 U.S. S. Ct. Briefs LEXIS 587.

[99]475 U.S. 643 (1986).

[100]*Id.* at 649.

[101]*Id.* (emphasis added).

[102]130 S. Ct. 2772 (2010).

[103]130 S. Ct. 2847 (2010).

[104]*Rent-a-Center*, 130 S. Ct. at 2775. The arbitration agreement "provided for arbitration of all 'past, present or future' disputes arising out of Jackson's employment with Rent-a-Center, including 'claims for discrimination' and 'claims for violation of any federal … law.'" *Id.* The "delegation provision" provided "'[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relat-

The Supreme Court applied the FAA and what has come to be known as the "*Prima Paint*[105] rule" to the *Rent-a-Center* facts. In *Prima Paint*, the Court distinguished between two types of challenges to the contractual validity of arbitration clauses in commercial contracts. The first is a challenge to the validity of the arbitration agreement itself, severed from the validity of the contract as a whole. The second is a challenge to the validity of the arbitration agreement indirectly, as a part of a larger claim that the entire contract (of which the arbitration agreement is a part) is invalid. The *Prima Paint* rule states that a challenge of the first type goes to the court; a challenge of the second type can go to the arbitrator.

In *Rent-a-Center*, the Court held that, since Mr. Jackson had not pled that the delegation provision itself was unconscionable, he was attacking the enforceability of the agreement as a whole. Citing the *Prima Paint* rule, the Court stated that disputes about the enforceability of a whole contract with a severable arbitration provision were within an arbitrator's jurisdiction, not the court's. Mr. Jackson was constrained to arbitrate his unconscionability challenges because the delegation provision was a severable part of the larger agreement.[106] Relying on its decision in *First Options of*

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ing to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.'" *Id.*

[105] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–404 (1967). The parties in *Prima Paint* entered into a commercial agreement that contained a broadly inclusive arbitration clause: "[a]ny controversy … arising out of this agreement, or the breach thereof, shall be settled by arbitration." When Prima accused Flood of having fraudulently induced it to enter into the agreement (by concealing Flood's insolvency), Flood invoked the arbitration provision. Prima sued in federal court for rescission of the agreement and contemporaneously sought to enjoin Flood from proceeding with arbitration. The case went to the Supreme Court, where the issue was whether an arbitrator, rather than a court, should resolve the claim of fraud in the inducement, inasmuch as there was no evidence that the parties had *intended to exclude* that issue from the scope of the subjects that would be subject to arbitration. The Court ruled that a claim of fraud in the inducement *of the contract generally*—as opposed to fraud in the inducement *of the arbitration clause specifically*—was for the arbitrator and not for the courts to resolve. It reasoned that FAA Section 4 does not permit the federal courts to consider claims of fraud in the inducement of a whole contract (which, the Court stated, was the province of the arbitrator) but of fraud only in the inducement of the arbitration clause itself: "[A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate." This holding became known as the *Prima Paint* rule.

[106] *Rent-a-Center*, 130 S. Ct. at 2779–80. If this sounds a bit circular, consider Justice Stevens' dissenting explanation of the majority's 5–4 holding: "Today the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitrability disputes to an arbitrator. … I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity. But even assuming otherwise, I certainly would not hold that the *Prima Paint* rule extends this far." 130 S. Ct. at 2786 (Stevens, J. dissenting).

Chicago v. Kaplan,[107] the Court reaffirmed that the parties to an FAA contract have the power to agree to arbitrate the question of arbitrability, allowing the arbitrator to make the determination as to his or her own jurisdiction. (See *First Options of Chicago Inc. v. Kaplan*: A party pleading unconscionability must present specific facts addressing the unconscionability of the severable arbitration provision of the agreement.)

In *Granite Rock*, a §301 case, the employer sought to enforce a CBA no-strike clause and to obtain money damages for an employee strike. The union claimed that, at the time of the strike, the CBA had not existed and that the no-strike provision was thus inoperable. The issue was whether a court or an arbitrator had the jurisdiction to decide when the contract with the no-strike provision had been formed. The Ninth Circuit Court of Appeals ruled, *inter alia*, that "a party generally may not sue in federal court under a contract that, by its terms, requires arbitration. … In such cases, the matter must be sent to arbitration 'unless there is a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract.'" The Ninth Circuit concluded that the district court had lacked the authority to decide whether the CBA had existed, and should have referred the question to arbitration.[108] Notwithstanding that this was a CBA case, the Ninth Circuit applied the FAA *Prima Paint* rule. The court reasoned that, because the employer, Granite Rock, was attacking the contract as a whole and not the arbitration clause specifically, an arbitrator, and not a court, should decide the question of whether the CBA had been ratified before the strike occurred. The Ninth Circuit's decision thus turned on the severability of the arbitration

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[107]514 U.S. 938, 943–44 (1995).

[108]The Appellate Court stated, in relevant part, the following:

> The United States Supreme Court has drawn a distinction between challenges to an arbitration clause and challenges to an entire contract. The Court has stated this general rule: '[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.' *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). The Ninth Circuit recognized this dichotomy recently in *Nagrampa* [Nagrampa v. MailCoups, Inc., 469 F.3d 1257], where we held that federal courts must refer to arbitration those claims seeking to 'invalidate or otherwise directly affect the entire contract,' 469 F.3d at 1271, but may hear 'challenges specifically to [an] arbitration agreement.' *Id.* at 1269 (quoting 546 F.3d 1169 (9th Cir. 2011)).

provision, an issue that would have been pertinent to an FAA case but should not have been relevant to the §301 case before it.[109]

Granite Rock appealed the Ninth Circuit's decision to the Supreme Court. The union argued that the Ninth Circuit had correctly applied the severability doctrine of *Prima Paint* to the §301 case.[110] An amicus brief for the Center on National Labor Policy (CNLP) argued that the Ninth Circuit's *Prima Paint* reasoning was wrong because it incorrectly applied FAA law (*Prima Paint*) to a §301 case.[111] CNLP observed that there was "a conflict among the federal circuit courts on the … important matter regarding whether the FAA applies to §301 cases" and argued that the Court "should, but it does not appear that it has yet settled this important question of federal law."[112]

The Supreme Court overturned the Ninth Circuit's decision without addressing the latter's invocation of FAA law for what was, in substance, a §301 case. The Court noted that, before a case could get to an arbitrator, a court had to first "'determine whether the parties intended to arbitrate grievances concerning' a particular matter";[113] that based on long-standing arbitration doctrine, courts decide "gateway" issues of arbitrability, including issues of the validity and formation of the contract, unless the parties have "clearly and unmistakably provid[ed] otherwise."[114] And the Court cited the Trilogy cases: "Indeed, the rule that arbitration is strictly a matter of consent—and thus that courts must typically decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it—is the cor-

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[109]"Consistent with this framework, a party generally may not sue in federal court under a contract that, by its terms, requires arbitration." *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989). "In such cases, the matter must be sent to arbitration 'unless there is a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract.'" *Id.* at 1410 (citing *Prima Paint,* 388 U.S. at 402–04).

[110]Brief of Respondent Local 287, *Granite Rock Co. v. International Bhd. of Teamsters, Local 287*, 130 S. Ct. 2847 (No. 08-1214), 2008 U.S. Briefs 1214 at 18–22, 2009 U.S. S. Ct. Briefs LEXIS 1108.

[111]Brief of the Center on National Labor Policy, Inc. as Amicus Curiae in Support of Petitioner, *Granite Rock Co. v. International Bhd. of Teamsters, Local 287*, 130 S. Ct. 2847 (No. 08-1214), 2008 U.S. Briefs 1214 at 15–17, 2009 U.S. S. Ct. Briefs LEXIS 1644.

[112]*Id.* 2008 U.S. Briefs 1214 at 15.

[113]*Id.* 130 S. Ct. 2847 at 2858 (quoting *AT&T Technologies*, 475 U.S. at 651).

[114]*Id.* (citing to *AT&T Technologies*, 475 U.S. at 649). The Court had noted earlier in the decision that "[i]t is well settled in both commercial and labor cases that whether parties have agreed to 'submi[t] a particular dispute to arbitration' is typically an 'issue for judicial determination.'" *Granite Rock*, 130 S. Ct. at 2855 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (an FAA case) (quoting *AT&T Technologies*, 475 U.S. at 649) (a §301 case)).

nerstone of the framework the Court announced in the Steelworkers Trilogy for deciding arbitrability disputes in LMRA cases."[115] The Court reiterated that both its FAA and §301 decisions have supported a federal policy of encouraging arbitration.[116] It opined that "[w]e, like the Court of Appeals, discuss precedents applying the FAA because they employ the same rules of arbitrability that govern labor cases."[117] But the Court also recognized that FAA and §301 cases were distinct and that they diverged in significant ways, one being the severability of the arbitration provision of FAA agreements. *"[A]t least in cases governed by the Federal Arbitration Act*… courts must treat the arbitration clause as severable from the contract in which it appears."[118] The Supreme Court did not explicitly address the appropriateness of the Ninth Circuit's invocation of the FAA to decide a CBA case, but its reversal of the decision was an implicit rejection of the applicability of the FAA-based *Prima Paint* severability rationale to what was essentially a §301 case.

The Supreme Court thus has continued to treat commercial and labor contracts as different animals. This reflects the practice of many lower court judges who, before and after *Pyett*, *Rent-a-Center*, and *Granite Rock*, have recognized that the separately developed doctrines under the FAA and §301 do not all bleed together.

B. "Big Picture" Explanations for Otherwise Confusing Cases

There are some basic "big picture" tenets that the Supreme Court has applied to both commercial and labor arbitration that should be kept in mind when trying to make sense of the legal landscape for arbitration. These tenets are based on the common principles of the FAA and §301 and also on principles that are independent of either law.

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[115] *Id.*

[116] "Our cases invoking the federal 'policy favoring arbitration' of commercial and labor disputes apply the same framework. They recognize that, except where 'the parties clearly and unmistakably provide otherwise,' *AT&T Technologies* , 475 U.S. at 649, it is 'the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning' a particular matter, *id.*, at 651. They then discharge this duty by: (1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption and ordering arbitration only where the presumption is not rebutted." *Granite Rock*, 130 S. Ct. at 2858–59.

[117] *Granite Rock*, 130 S. Ct. at 2857 n.6.

[118] *Id.* at 2857 (emphasis added). The Ninth Circuit had relied, in part, on *Prima Paint*'s severability doctrine when it found that the dispute was arbitrable. *Granite Rock Co. v. International Bhd. of Teamsters, Local 287*, 546 F.3d 1169, 1176–78 (9th Cir. 2008).

First, the Supreme Court's recent decisions on arbitration have continued its long-standing support of the freedom of parties to contract to arbitrate what they want—up to a point. This freedom to contract is based on the Court's view that the FAA and the LMRA embody separate but parallel federal policies to protect contractual freedom by removing barriers to the enforcement of arbitration agreements.[119] *Gilmer* and *Mitsubishi* made clear how broad the freedom to arbitrate is by opening the door to the arbitration of statutory disputes pursuant to the FAA. *Circuit City* confirmed that the scope of the FAA included most individual employment contracts.[120] *Pyett* held that the freedom to arbitrate under CBAs encompassed statutory disputes, notwithstanding the tension between the interests of unions and individual bargaining unit members.

Second, the Court has nonetheless limited the scope of arbitration where it has encroached upon judges' exclusive powers or has given too much discretion to arbitrators. These limits are not dependent on the special nature of either type of arbitration. Rather, they are based on the legal boundaries of the applicable statutes: the FAA and §301 enforce arbitration agreements but they do not provide that arbitrators can invade judicial space other than in the context of arbitration agreements. For example, except in the context of a challenge to the validity of an FAA contract that incorporates a severable arbitration agreement, only judges, and never arbitrators, may decide the legal question of whether a valid contract to arbitrate a dispute exists.[121] Furthermore, unless the parties use "clear and unmistakable" language to assign to an arbitrator the "gateway" question of whether an arbitration clause covers a particular dispute, only a judge may decide that question.[122] In 2010, the Court held that arbitrators in a commercial setting did not have the discretion to infer that the parties meant to permit class action arbitrations when the contract was

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[119] *Mitsubishi*, *supra* note 53, 473 U.S. at 625 (the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements"); *Warrior & Gulf*, 363 U.S. 574, 582–83 (1960) ("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.").

[120] Except for transportation workers, who are exempt, along with "seamen" and "railroad employees" from the FAA. 9 U.S.C. §1; see text accompanying note 10, *supra*; *Circuit City*, 532 U.S. at 120–21.

[121] *Granite Rock*, 130 S. Ct. at 2857–58, 2861.

[122] *Id.* at 2858–59 (citing *Howsam*, 537 U.S. at 83–84 (FAA); *AT&T Technologies*, 475 U.S. at 649–50 (§301)).

silent on the issue.[123] And, in *Hall Street Associates, L.L.C. v. Mattel*, the Court held that parties to a commercial contract could not agree to expand the scope of judicial review of arbitration awards beyond what the FAA permits.[124]

The messages of the Court's recent decisions may appear somewhat contradictory: (1) the Court will step in to limit the excesses of parties or arbitrators when they encroach upon exclusively judicial functions, but (2) the Court will allow arbitrators free rein to adjudicate whichever disputes the parties agree they should, including statutory disputes over which judges usually preside. These messages can be reconciled by recognizing an underlying rationale: parties can agree to arbitrate disputes that are directly between them, but arbitrators may not take the place of judges in any other circumstance. Thus, parties can agree to allow an arbitrator to hear statutory disputes between them but, under the FAA, an arbitrator cannot decide a question that is not specifically included in a contract, such as the availability of class actions. Again, gateway arbitrability issues, normally reserved for judges, can be heard by an arbitrator only if the parties have "clearly and unmistakably" expressed that intention.

The tension between the Court's support of freedom to contract for the arbitration of disputes, and the preservation of the boundaries of exclusive judicial terrain was present in the *Granite Rock* and *Rent-a-Center* cases. Why did the Court insist on a judge's deciding a contract's formation in *Granite Rock*, but not in *Rent-a-Center*? *Granite Rock* concerned a CBA for which the issue was whether a no-strike contract clause was in effect at the time of a union strike. That was not a dispute that the parties agreed to arbitrate. Rather, it was a legal issue, the resolution of which would determine whether a §301 agreement to arbitrate existed.

In contrast, *Rent-a-Center* concerned an individual's employment contract. In that case, the majority deemed there to have been an existing agreement to arbitrate both statutory disputes and disputes pertaining to the validity of the arbitration agreement. The parties were operating within the regulations of the FAA and were not infringing on judicial authority.

It was the majority's characterization of the parties' disputes, and not its legal conclusions, that was the determining factor in *Granite Rock* and *Rent-a-Center*. In *Rent-a-Center*, an FAA case, Mr.

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[123] *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775–76 (2010).
[124] 552 U.S. at 584–86.

Jackson attacked the enforceability of the agreement as a whole, not its delegation provision specifically. The Court ruled that his contract claim was arbitrable. In *Granite Rock*, a §301 case, the question was whether the contract, including its arbitration clause, existed. The Court ruled that a judge, not an arbitrator, would decide the case.

This does not explain why the majority did not see *Rent-a-Center* as presenting the same type of contract formation issue as it had in *Granite Rock*. The four *Rent-a-Center* dissenters certainly considered Mr. Jackson's unconscionability challenge to question whether a contract had been formed.[125] A cynical explanation would be that a majority of the Court had a bias against unions or collective bargaining that led them to look more closely at formation issues for CBAs than for individuals. The more likely explanation is that the *Granite Rock* and *Rent-a-Center* decisions reflected the Court's policing the boundaries of what was properly the judiciary function.

In *Granite Rock*, if a labor arbitrator had been allowed to resolve the dispute, he or she would have had to decide first when and whether the no-strike clause was in effect, and only then decide whether the union violated it. Although the two dissenters in *Granite Rock* thought it was clear that the contract had been in force at the time of the strike, had the dissenters prevailed, the arbitrator still would have had to deal with the issue of when the no-strike clause took effect in relation to the effective date of the arbitration clause. The legal question of the effective or formation date of a contract has always remained on the judicial side of the adjudication boundary between arbitrators and judges. The notion that labor arbitrators were the best arbiters of contract disputes but were not intended to step into an ordinary judge's shoes to decide the existence of the underlying contract coincides with the Court's view in *Granite Rock*.

In comparison, *Rent-a-Center* concerned arbitrability questions that did not necessarily encroach upon exclusive judicial territory. The Court had already decided in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and *AT&T Technologies* that parties could delegate to an arbitrator questions concerning the validity or enforcement of an agreement. An arbitrator could thus be asked

[125] 130 S. Ct. at 2785 (Stevens, J. dissenting) ("If respondent's unconscionability claim is correct … it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate. Accordingly, it is necessary for the court to resolve the merits of respondent's unconscionability claim in order to decide whether the parties have a valid arbitration agreement.").

to decide whether a contract had unconscionable terms. The possibility that Mr. Jackson's unconscionability claims could have involved contract substance and formation issues like the ones in *Granite Rock* did not raise a jurisdictional issue in *Rent-a-Center* because courts had already ceded to arbitrators the power to deal with other unconscionability issues. The core principle that commercial arbitrators are as good as judges in deciding disputes supports the conclusion that there was no danger in erring on the side of arbitration.

In labor and commercial arbitration contexts, the Court's protection of exclusive judicial turf is a counter-balance to the general policy of allowing parties to agree to arbitrate almost anything they wish. But when parties ask courts to permit arbitrators to decide something other than what the contract has defined as an arbitrable dispute, the judicial obligation to support arbitration evaporates. The Court has determined that only judges may decide such extra-contractual disputes.

C. How to Deal with Hybrid Arbitration After *Pyett*

Even though the Court recognizes that labor and non-labor arbitrations are different types of alternative dispute resolution processes, the *Pyett* decision permitted the creation of a new type of hybrid arbitrator that combined some of the attributes of both arbitration systems. If parties to CBAs adopt "clear and unmistakable" language that delegates statutory disputes to arbitrators, it would behoove them to manage the new hybrid cases correctly.

1. At the Arbitration Hearing

The recent arbitration jurisprudence poses a problem for the institution of labor arbitration because it seems to join §301 doctrine with what had been, at least theoretically, a solely non-labor arbitration function—arbitrators acting in lieu of judges[126]

[126]Adjudicating individuals' statutory claims is a new role for labor arbitrators although they have been interpreting and applying statutes that are incorporated by reference into CBAs for decades. The difference is that, when labor arbitrators interpret a law that is referenced in a CBA, they are not acting as substitutes for judges. Rather, they are still acting as part of the collective bargaining process, hearing grievances that the union has brought to vindicate collective, not individual, rights. Although a grievance may directly affect only one employee, the grievance is brought to enforce collective rights. Moreover, some labor arbitrators consider the application of a law that has been incorporated by reference into a CBA to be an interpretation of the contract, not a judicial determination about the law. See, e.g., *Chicago Tribune Co.*, 119 Lab. Arb. 1007, 1013 n.15 (Nathan 2003) ("[E]ven if the arbitrator misconstrues the law, the parties have bargained for his

in deciding individuals' statutory disputes with their employers. As discussed above, in the world of commercial arbitration, this scenario flowed naturally from the core FAA principles that arbitration is a substitute for litigation and arbitrators are just as good as judges in deciding these disputes. But it does not ensue easily from §301 doctrine, where the core principles have been that arbitration prevents work stoppages, and that labor arbitrators are superior to judges in deciding contractual labor disputes but have no role in resolving extra-contractual disputes.

Although potential conflicts between the FAA and §301 can be minimized by adhering to clear rules concerning which law takes precedence, it is more difficult to resolve what labor arbitrators should do when acting in a hybrid capacity, governed by two different policy regimes. Labor arbitrators have struggled over the years with the propriety of making "judicial" pronouncements about statutes, and there has been a philosophical division within the National Academy of Arbitrators (NAA) about how to deal with the statutory issues that arise within the context of contract disputes.[127] Taking the next step and deciding statutory disputes that are not connected to contract disputes creates even more of a quandary.[128]

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interpretation of the statute when that law was incorporated by reference in the collective bargaining agreement. In a sense, the arbitrator is not defining the law. He is interpreting the contract.").

[127] *See* Laura J. Cooper, Dennis R. Nolan & Richard A. Bales, ADR in the Workplace (2d ed. 2005) at 170–83, excerpting the following articles: Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 30 Proceedings of the National Academy of Arbitrators 29 (1977) ("NAA Proceedings"); Michael I. Sovern, *When Should Arbitrators Follow Federal Law*, 23 NAA Proceedings 29, 38–45 (1970); Richard Mittenthal, *The Role of Law in Arbitration*, 21 NAA Proceedings 42 (1968); Bernard Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 20 NAA Proceedings 1, 14–17 (1967).

[128] The placement of statutory disputes into the arbitration process creates a variety of policy problems for both labor and commercial arbitration, but this paper focuses on solely the legal and institutional effects on the labor arbitration process.

Canada's longer experience with having labor arbitrators decide statutory issues may prove instructive to arbitrators in the United States. In an article analyzing the changes in Canadian labor arbitration over the years, Claire Mumme traced the Supreme Court of Canada's (SCC) steady addition of external law into the mix of issues that labor arbitrators must consider. *Labour Arbitration as Translation: The Transformation of Canadian Labour Arbitration in the Twentieth Century from a Semi-Autonomous Institution of the Shop to an Institution of the State* (Jan. 1, 2008). Available at Social Science Research Network: http://ssrn.com/abstract=1485682. She explains that in 1975, in *McLeod v. Egan*, [1975] 1 S.C.R. 517, the SCC held that arbitrators had to consider employment-related statutes when interpreting CBA provisions because CBAs could not contravene the statutes. In 1995, the SCC held that labor arbitrators had exclusive jurisdiction over any disputes that arose out of collective bargaining agreements, including disputes involving questions of constitutional and tort law. *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929. Eight years later, the SCC held that CBAs were to be read to include the provisions of employment-related laws. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* [2003] 2 S.C.R. 157, 2003 SCC 42.

Although the frequency with which labor arbitrators will have to become "hybrids" is unclear, arbitrators should be prepared for the possibility. If a labor arbitrator is confronted with a CBA and a dispute that clearly and unmistakably requires the arbitrator to decide an individual's statutory claim against an employer, then the arbitrator should realize, first, that she or he has been thrust into the role of a substitute judge in what is essentially an individual employment dispute. The arbitrator should look to the due process protocols that the NAA has developed in conjunction with the American Arbitration Association and others[129] to determine how to conduct a fair employment arbitration hearing, including the processes necessary to ensure a fair evaluation of the statutory claim.

However, the hybrid labor arbitrator's role will not be identical to that of an employment arbitrator, because the dispute still arises out of a CBA. There is an overlay of collective action, collective rights, and union control that is not present in the employment arbitration context. A CBA may grant the individual bargaining unit member the right to self-represent or to be represented by his or her own attorney or other professional but, because of the CBA, there is a union involved. This means that the arbitrator still has to view him- or herself as part of the collective bargaining process. For example, the arbitrator will have to award remedies and impose penalties that are consistent with the collective bargaining relationship. As Professor Gould points out, in the ordinary breach of contract case, "civil remedies [i.e., monetary remedies] are generally available." In cases involving a breach of a CBA, "the same is not true … where, for instance, there is a violation of a work rule relating to misconduct or time and attendance. … Reinstatement is provided for employees unjustly dismissed under the collective bargaining agreement, but courts would be reluctant to impose such remedies in what the law has traditionally regarded as a personal relationship. Instead, courts are more apt to provide damages."[130] Unless the parties make specific requests for monetary remedies, the labor arbitrator should default to the types of remedies normally made under CBAs because they are still working within the confines of a collective bargaining relationship.

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[129] *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, http://naarb.org/protocol.asp (last visited 2/28/11).

[130] William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 610 (2006), at 639.

The labor arbitrator may have to decide if the contract "clearly and unmistakably" delegates the hearing of the statutory dispute to the arbitrator, even if the parties do not raise the issue. Although this would appear to be a "gateway" arbitrability issue that a judge should hear, the reality is that, if neither party goes to a court, the arbitrator will have to confront the issue. If one party claims that the language is not sufficiently "clear and unmistakable" to bestow jurisdiction over the statutory claim in the arbitrator, that party could still agree to have the arbitrator decide that jurisdictional question. Labor arbitrators should determine what their jurisdiction is under the arbitration clause, including what powers they possess to grant appropriate relief. But they must do so with a new set of presumptions. In contrast to the traditionally broad reading of arbitration clauses to cover disputes that "arise under" a contract, labor arbitrators should presume that statutory disputes do not arise under a contract unless it can be clearly shown to be otherwise. This is consistent with labor arbitration principles as well as with the current state of the law.

Labor arbitrators will be called upon to undertake new considerations: (1) deciding whether a contract has created a hybrid role for the arbitrator; (2) acting as a hybrid of a labor and non-labor arbitrator in some cases; and (3) helping the parties cope with the hybrid nature of the arbitrator and the case itself. Court decisions have not addressed the consequences that will ensue from the hybrid role that *Pyett* created. It will be up to the arbitrators and the parties to confront the new reality. The potential hybrid arbitrator should be guided by the core principles of each type of arbitration in deciding close questions.

2. Legal Conflicts

The dual applicability of the FAA and §301 in CBA arbitrations may prove problematic in court. There are actual and potential conflicts between the two statutes, such as the statute of limitations for moving to confirm an arbitration award[131] and the availability

[131]The FAA provides for a one-year statute of limitations to confirm an award. 9 U.S.C. §9. Under §301, the statute of limitations "is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *United Automobile Workers of America v. Hossier Cardinal Corp.*, 383 U.S. 696, 703–05 (1966). Some courts have already decided that the FAA statute of limitations does not apply in §301 cases. See, e.g., *UNITE HERE Local 26 v. The Taj Hotel Boston*, 731 F. Supp. 2d 95, 101 (D. Mass. 2010) ("The First Circuit has expressly rejected the argument … that the FAA's one year statute of limitations should apply to an action to confirm the arbitration award.").

of monetary versus injunctive remedies. Judges will have to determine which law will apply.

Some litigants and judges are invoking the FAA and §301 interchangeably in CBA disputes. Judges often look to the FAA for guidance in §301 cases, and vice versa. The Supreme Court has not furnished much guidance as to which will pertain in hybrid cases, and has not shut the door on the dual law enforcement of CBAs. The Supreme Court has accepted, without deciding, that some FAA procedural provisions (as opposed to doctrinal conclusions or substantive provisions) may apply to CBAs. Yet, on nonprocedural issues, §301 is the only statute that the Supreme Court has consistently applied to CBAs.[132] The lower courts should follow this lead. Where a procedural issue is raised and there is a conflict between the statutes, the courts should examine the kind of question addressed in the underlying arbitration.[133] Under well-accepted canons of statutory interpretation, the more specifically applicable law should prevail.[134] If a dispute involves the interpretation of a CBA, §301 law should take precedence over conflicting FAA law because §301 applies specifically to CBAs and the FAA does not. Additionally, in such cases, §301 should supersede conflicting FAA precedent under the canon of statutory interpretation that the more recent law should prevail.[135] Section 301 was enacted in 1947, the FAA in 1925. Finally, steady application of §301 to CBA disputes will serve the policy goals that are unique to collective bargaining and national labor policy.

When the arbitration issue deals with contractual and statutory issues, and §301 and the FAA conflict, §301 should still apply because the essential nature of the conflict—a dispute about a CBA—is governed by §301. But where the arbitrated issue involves solely a statutory interpretation unrelated to the interpretation

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[132]Deciding what is "procedural" will, of course, not be clear in some cases.

[133]See *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997), in which the court determined that §301 is a source of substantive law for §301, but that the procedural provisions of the FAA can apply. *Id.* at 357–59.

[134]See *Busic v. United States*, 446 U.S. 398, 406 (1980) ("a more specific statute will be given precedence over a more general one, regardless of their temporal sequence") (holding on other issues repealed by statute, *Abbott v. United States*, 131 S. Ct. 18, 28 (2010)); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment,'" quoting *Morton v. Mancari*, 417 U.S. 535, 550–551 (1974)).

[135]See *Nguyen v. United States*, 556 F.3d 1244, 1253 (11th Cir. 2009) ("[T]he canon is that a later enacted provision controls to the extent of any conflict with an earlier one."). See *ConArt v. Hellmuth, Obata & Kassabaum, Inc.*, 504 F.3d 1208, 1210 (11th Cir. 2007) ("[W]here two statutory provisions would otherwise conflict, the earlier enacted one yields to the later one to the extent necessary to prevent the conflict.").

of the CBA, the FAA rules and doctrine should apply, under the theory that the arbitrator is acting, in substance, as a non-labor arbitrator. Maintaining this dichotomy will protect the institution of labor arbitration by keeping statutory disputes out of §301 jurisprudence. It may also help the courts, arbitrators, and parties recognize that the arbitrator's institutional role is different when dealing with statutory disputes.

3. Judicial Review

The standards for vacating arbitration awards under the FAA and §301 appear similar, but are articulated differently under each of the laws. In §301 awards, judicial intervention is limited to those cases where arbitrators fail to draw their decision from the "essence of the contract." That is equivalent to FAA vacatur when arbitrators "exceeded their powers."[136] Awards can be vacated under both Acts if there is fraud, corruption, bias, or arbitrator misconduct prejudicing a party's rights. In addition, the public policy judicial review doctrine described in *Misco*[137] arose from contract common law and would seem to apply equally to CBAs and other arbitration contracts.

The idea of arbitrators rendering decisions on the application and interpretation of statutes dealing with public rights raises the question of whether the judicial review standard for statutory decisions should be as narrow as that for contractual decisions. The *Gilmer* Court noted that "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue."[138]

But Professor Gould has argued that "the courts cannot give the arbitrators [in statutory cases] as much scope and flexibility as is the case on contract issues."[139] He points out that in *Gilmer*, the Court seemed to acknowledge that there could be a difference between court review of arbitrators' contractual versus statutory decisions.

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[136]9 U.S.C. §10(a)(1)–(4).
[137]484 U.S. 29 (1987).
[138]500 U.S. 20, 32 n.4 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987)).
[139]William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 610 (2006), at 639.

Although some courts have applied the "manifest disregard of the law"[140] standard to police arbitrators' statutory interpretations,[141] there is now a circuit split about whether the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[142] has eliminated the "manifest disregard" standard.[143] Professor Gould has urged a more stringent judicial review standard for statutory decisions.[144] His pre-*Hall Street* advocacy of a separate standard for awards applying statutes is compelling and is also consistent with the Court's reasoning in *Gilmer*.

Without questioning *Hall Street*'s holding—that parties cannot contract to expand the scope of judicial review authorized by FAA §10—the Court could alternatively rule that "manifest disregard" is a relevant basis for vacating an arbitrator's award pertaining to statutory rights. The Second and Ninth Circuits have opined that "manifest disregard" is an FAA standard that permits a court to vacate an award "[w]here the arbitrators exceeded their powers."[145] As the Sixth Circuit did, the Court could find that "manifest disregard" is a relevant judicially created review stan-

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[140]"For some circuits, the standard [of manifest disregard of the law] is a refusal to pay any attention to a standard of law which the arbitrator appreciates and yet ignores." Gould, *supra* note 139, at 647.

[141]*Id.*

[142]552 U.S. 576 (2008). In *Hall Street*, the Court held that the judicial review standards for vacating arbitration awards listed in FAA §10 were the exclusive review standards available. Further, parties could not contract for additional judicial review grounds. The Court invalidated the parties' agreement to permit a court to vacate an award "(i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." 552 U.S. at 579.

[143]Some courts have held that "manifest disregard" is subsumed within FAA §10's grounds for review or vacating an award. *Johnson v. Wells Fargo Home Mortgage*, 2011 U.S. App. LEXIS 2908 at *31 (No. 09-15937, No. 09-16815) (9th Cir. 2011); *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94–96 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010). The Sixth Circuit did not view the *Hall Street* decision as precluding courts, as opposed to private parties, from relying on the "judicially invoked" review standard, *Coffee Beanery Ltd. v. WW LLC*, 300 Fed. Appx. 415, 418–19, 2008 U.S. App. LEXIS 23645 (6th Cir. 2008) (unpublished), *cert. denied*, 130 S. Ct. 81 (2009).

Others circuits have held that the Supreme Court's invalidation of an agreement to have a court review an arbitration award for errors of law meant that the "manifest disregard" standard is no longer viable in FAA cases. *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. Citifinancial Corp., L.L.C.*, 604 F.3d 1313, 1322 n.8 (11th Cir. 2010); *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (dicta), questioned in *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010) ("We have referred to the issue [of the vitality of the "manifest disregard" doctrine] in dicta, see *Ramos-Santiago v. United Parcel Serv.*…, but have not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*."); *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

The Supreme Court had a chance to rule on this issue in *Stolt-Nielsen, S.A. v. AnimalFeeds Int' l Corp.*, but did not. "We do not decide whether 'manifest disregard' survives our decision in *Hall Street*." *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3.

[144]William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 610 (2006), at 648–49.

[145]9 U.S.C. §10(a)(4).

dard (as opposed to a standard created by the contracting parties in *Hall Street*), derived from the same common law from which the "public policy" review standard was created. Because it has been applied in both the FAA and §301 realms, the concept of "manifest disregard" can serve the public policy objective of ensuring that laws are consistently enforced, while avoiding the anomaly of vacating a CBA arbitration award for "manifest disregard" while not doing so for a commercial contract arbitration award.

Different standards of judicial review may apply to a hybrid award dealing with both contractual and statutory issues. And the line of demarcation might not always be clear. Section 301 is the statute specifically designed for and applicable to CBAs. To reduce uncertainty, courts should "default" to §301 jurisprudence for CBA cases in which the issues are too intermingled to parse out the statutory elements. This will make a bright-line rule to follow in cases with overlapping issues. Section 301 should also be the default standard for judicial scrutiny of labor arbitrators' statutory decisions.

Conclusion: Where Does This Leave Labor Arbitration, Arbitrators, and Federal Labor Law?

Several conclusions can be drawn from the Supreme Court's evolving arbitration jurisprudence. First, the Court still recognizes differences between CBAs and other contracts, even in CBA cases brought pursuant to the procedures of the FAA. Second, because Congress has not changed the federal labor policy of the LMRA, the courts cannot ignore it. Despite some changes in the Court's view on the kinds of disputes that labor arbitrators may decide, its recent decisions have not weakened the traditional role of labor arbitration in resolving disputes. Granted, some commentators think that the *Pyett* decision applied FAA law to the detriment of §301 and the LMRA by neutering *Alexander v. Gardner-Denver*'s distinction between collective and individual rights and actions.[146] Further departure by the judiciary from its LMRA precedent might undermine the federal labor policy that Congress created. Or the Supreme Court and lower federal courts could continue to recognize, or could emphasize, the legal, doctrinal, and institutional differences between labor and non-labor arbitration.

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

Although the Supreme Court accepted without deciding in *Pyett* that the FAA's procedural provisions for enforcing arbitration clauses was applicable to CBAs, it did not go so far as to say that CBAs were "contracts of employment" over which the FAA exercised substantive dominion. The Supreme Court can maintain its ruling in *Pyett* while still preserving that distinction.

When a labor arbitrator, acting under the auspices of a CBA, hears a hybrid contract-statutory dispute or a purely statutory dispute, and a conflict arises as to the application of §301 or FAA law or processes, the arbitrator should default to §301 and not to the FAA. The only exception should be where the dispute involves a purely statutory claim for an individual, which claim is unrelated to any CBA dispute. In that event, the FAA should apply. Similarly, to the extent that the grounds for judicial review under the FAA are changed, those changes should comport with the purposes of §301 if they pertain to the arbitration of statutory disputes arising under CBAs.

The Supreme Court requires litigants to be precise in their pleadings in FAA cases challenging the existence or validity of an arbitration clause.[147] If the Court's *Rent-a-Center* reasoning were transplanted to CBAs, it should have little impact. Parties don't typically attack the validity of CBA arbitration clauses that have been collectively negotiated; CBA cases furnish little room for an argument about unconscionability.

The ground has shifted a bit for labor arbitration. The Supreme Court, lower courts, and the collective bargaining world are now confronted with some of the legal and policy problems that this shift has created or will create. If courts stay true to the still robust legal precedents that recognize the different core principles and policies of labor and non-labor arbitration, the nature of labor arbitration will not change. The parties to collective bargaining agreements should realize that "pushing the envelope" presented by *Pyett* may yield unintended consequences. If they choose to, the parties can exercise their bargaining power to promulgate an arbitration model that will serve employers, unions, and employees well.

[147] *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2779–80 (2010).