Labor and Employment Law in Two Transitional Decades

Theodore J. St. Antoine

University of Michigan Law School, tstanton@umich.edu

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LABOR AND EMPLOYMENT LAW IN TWO TRANSITIONAL DECADES

Theodore J. St. Antoine

I. INTRODUCTION

Labor law became labor and employment law during the past several decades. The connotation of "labor law" is the regulation of union-management relations and that was the focus from the 1930s through the 1950s. In turn, voluntary collective bargaining was supposed to be the method best suited for setting the terms and conditions of employment for the nation's work force.\(^1\) Since the 1960s, however, the trend has been toward more governmental intervention to ensure nondiscrimination, safety and health, pensions and other fringe benefits, and so on.\(^2\) "Employment law" is now the term for the direct federal or state regulation of individual employees' relations with their employer. This paper will concentrate on the legal developments over the two decades of existence of the Carl A. Warns, Jr. Institute of Labor and Employment Law. But, I am going to indulge in the same kind of liberties with exact dating that seems accepted by reputable historians. A growing consensus among them is that the 19th century did not end until August 1914, when World War I broke out, and the 21st century did not begin until "9/11." So I can't resist going back to the watershed year of 1980 in my "two decades."

Part of the growth we have seen in employment law, as distinguished from labor law, is attributable to the decline of organized labor. Government has had

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\(^1\) The official policy of the United States, as declared in the original Wagner Act, 49 Stat. 449 (1935), and confirmed in the more conservative Taft-Hartley Act, 61 Stat. 136 (1947), has been one of "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151 (2000).

to step in to fill the vacuum. Indeed, the drop in union membership has been steep and dramatic. Since the early 1980s, it has gone down from about 19 million to 16 million while the nonagricultural work force has grown from some 90 million to over 120 million. The result is that the rate of organization has shrunk from 20.1% in 1983 to 13.2% in 2002. Since public sector membership has remained steady at around 37%, this has meant a devastating decline in the private sector, from approximately 16% in 1983 to 8.5% in 2002. That is a loss rate of almost 50% in a mere 20 years.

This is not the place for an extended discussion of the many reasons for the decline in the American labor movement. The shift from manufacturing to service industries, automation and technological advances, job relocations from the north to the south and southwest, more intense employer resistance, unimaginative union leadership, and employee apathy have undoubtedly all contributed. But, adverse decisions by an increasingly conservative federal judiciary have almost surely played a role, and these will be part of my overview of some major legal developments of the past two decades.

II. UNION EMPLOYER RELATIONS

A. Defining Protected “Employees”

A long, poignant history attends the definition of “employee” in the National Labor Relations Act (NLRA), which of course is the threshold question in determining whether an individual is entitled to the statute’s protections. Way back in 1944, the Supreme Court agreed with the National

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Labor Relations Board (NLRB) that “newsboys” selling papers at fixed street locations were “employees” under the Act, even though they might not have fit within the “narrow technical legal relation of ‘master and servant’” under the common law.\(^7\) The Taft-Hartley Congress excoriated this reliance on the “theoretic ‘expertness’ of the Board” and said that common-law standards were indeed intended to apply.\(^8\) The definition of “employee” was amended expressly to exclude “independent contractors” as well as “supervisors.” Thus abashed, the Supreme Court has subsequently been wary of covering persons who might appear subordinate to an employer in a hierarchical sense but who for one reason or another do not fit the accepted common-law agency concept of employees.

The plight of university faculty members dealing with supposedly heavy-handed administrators may not seem akin to that of newsboys battling William Randolph Hearst. Nonetheless, two different generations of the Labor Board were prepared to treat both groups as “employees” eligible for unionization under the NLRA. The 1980 Supreme Court disagreed in a decision that ushers in, and perhaps sets the tone for, my “two-decades” survey. In *NLRB v. Yeshiva University*,\(^9\) a five-to-four majority held that the faculty of a “mature” private university is more than a body of “professional” employees covered by the NLRA. Instead, faculty members are “managerial” employees because of their dominant role in formulating and implementing the institution’s academic policy. As managers, they are excluded from the Act. All that is very logical, but the dissenters in *Yeshiva* insisted that the operation of the modern university has been effectively transferred from the faculty to an autonomous administration, which often has competing priorities. However debatable these positions may be in theory, and even how sensible the majority decision might be from an institutional perspective, the reality is that *Yeshiva* denies a group of employees the collective representation they feel is necessary to promote their interests vis-à-vis their employer.\(^10\)

More important in numerical terms is the statutory exclusion of “supervisors.” The Supreme Court confronted the status of nurses as


\(^{8}\) H.R. REP. No. 80-245, at 18 (1947).

\(^{9}\) 444 U.S. 672 (1980).

supervisors in *NLRB v. Health Care & Retirement Corp. of Am.* 11 The Labor Board had held that four licensed practical nurses who had been disciplined were protected by the NLRA. Although the nurses had certain directive functions regarding nurses' aides, the Board concluded that these duties were not exercised "in the interest of the employer" when they were incidental to the treatment of patients. 12 Again a five-to-four majority of the Supreme Court rejected the Board's reasoning, declaring that patient care was, in fact, the business of the employer nursing home and thus was performed in the employer's interest. The dissenters argued that since the Act expressly covers "professional" employees, the term "supervisors" should not be extended so far as to exclude nearly all professionals who may use "independent judgment" in directing others' work. Once more, as in *Yeshiva*, there is strict logic in the Court's stance. Yet the end result here too is to override the Board's presumed expertise and to cut back on the number of employees who are able to assert NLRA protections.

**B. Union Access to Employees**

Employer property rights have traditionally trumped organizational rights under the NLRA, keeping unions from gaining access to employees in plants, shops, stores, and other work sites. 13 Exceptions have been recognized when a plant and the employees' living quarters were so isolated that there were no reasonable alternative means for the union to communicate. 14 In *Lechmere, Inc.*, 15 a unanimous panel of Reagan-appointed Board members found such an exception. The union had placed handbillers on a parking lot jointly owned by a retail store in a shopping plaza in a large metropolitan area. When ordered to leave, the organizers relocated to a grass strip of public property abutting a four-lane divided turnpike, and tried to pass out leaflets to cars entering the parking lot. The union also sent mailings to about forty of the store's 200

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12 Section 2(11) of the NLRA defines "supervisor" as "any individual having authority, in the interest of the employer, to . . . responsibly direct [other employees] . . . if . . . the exercise of such authority . . . requires the use of independent judgment." 29 U.S.C. § 152(11) (2000). Section 2(3) excludes supervisors from the category of "employee." Id. § 152(3) (2000).
14 *See, e.g., id.* at 112; *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26 (2d Cir. 1967) (involving a remote mountain resort hotel).
employees, whose addresses it had obtained by checking license plates in the employee parking area. There were also some attempts to contact employees by telephone or home visits. None of these efforts were fruitful. The Board concluded the employees were effectively inaccessible to the union by means other than on-site approaches, and held the employer in violation of the NLRA for barring organizers from its parking lot.

A six-to-three majority of the Supreme Court reversed. Speaking for the Court, Justice Thomas declared that the burden of establishing the "isolation" necessary to justify access to an employer's property was "a heavy one." It wasn't satisfied by "mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication." "[S]igns or advertising" were suggested as "reasonably effective." In light of the realities of the wide dispersal of employees throughout large metropolitan areas, and the difficulty of luring them from their television sets or backyard barbecues to gather at a union meeting hall, one might fairly ask whether the workplace is not the most natural forum for the exchange of views about the merits of unionization. At the same time, however, Justice Thomas may be entitled to more than "mere conjecture." A national union could be well advised to invest in some genuine socio-psychological studies to demonstrate empirically the futility of attempting to reach today's urban, suburban, and ambulatory workforce by the conventional methods that the majority of the Supreme Court apparently feels are still adequate.

C. Permanent Replacements

Ancient dictum has it that during an economic strike an employer may hire "permanent replacements," who need not be displaced to make way for striking employees who wish to return at the end of the strike. More recently, a further twist was added in Trans World Airlines v. Independent Federation of Flight Attendants. There the Supreme Court held, six to three, that the same principle applies to enable an employer to retain junior employees who worked during the strike rather than reinstate strikers with greater seniority. Justices

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17 Id. at 540.
18 Id.
19 Id.
Brennan, Marshall, and Blackmun dissented, primarily on the grounds this action was "inherently destructive" of the right to strike. They regarded such a preference for "crossover" employees as more detrimental to the bargaining unit than promising permanence to new hires from outside, since it amounts to a "divide and conquer" technique threatening the solidarity of the employee unit. In either instance, of course, permanent replacement is a powerful disincentive to strike, and an awesome weapon in the hands of any employer willing and able to use it.

Following the TWA decision, the AFL-CIO took an action that most disinterested observers would probably have labeled quixotic. It filed a complaint against the Government of the United States with the International Labor Organization, alleging that the permanent replacement of strikers violated freedom of association and the right to organize and bargain collectively. The AFL-CIO's task was not made easier because the United States has ratified neither ILO Convention No. 87 on Freedom of Association nor Convention No. 98 on the Right to Organize and Collective Bargaining. Sole reliance thus had to be placed on the more general language of the ILO Constitution, to which the United States is a party. Nonetheless, the ILO's Committee on Freedom of Association recommended that the United States Government "take into account that, if a strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights." Not surprisingly, the rest is silence. The United States did not deign to reply. It was neither the first nor the last time that American labor and employment law has been out of line with that of most of the industrial world.

D. Consumer Boycotts

Whether or not I agree with them, I find most of the Supreme Court decisions discussed so far well reasoned, with the conclusions flowing logically from the premises. I now come to a case where I don't feel this is true. In NLRB v. Retail Clerks Local 1001 [Safeco], the Supreme Court held, six to three, that picketing asking consumers not to buy a nonunion product being
distributed by a second party could be forbidden as an unlawful boycott under the NLRA where the distributor derived ninety % of its income from the sale of the picketed product. The constitutional question of free speech received short shrift, a single paragraph, in a four-member opinion by Justice Powell. Nowhere is there the slightest indication that the Supreme Court precedents relied on were distinguishable in that they dealt with appeals for concerted employee action or action by unionized workers presumably subject to group loyalties and discipline. Nowhere is it recognized that Safeco was the first time the Court had ever clearly upheld a ban on peaceful picketing addressed to, and calling for seemingly lawful responses by, individual consumers acting on their own.

Justices Blackmun and Stevens, concurring in part, did not join in Justice Powell’s “cursory discussion” of the free speech issue, thus leaving the Court without a majority opinion on the constitutional question. Unfortunately, their own efforts leave much to be desired. Justice Blackmun reasoned limply: “I am reluctant to hold unconstitutional Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.” Where was the evidence that consumers were coerced, either in this case or generally?

Justice Stevens had more interesting things to say, but I also find inadequate his distinction between picketing and handbilling: “[T]he principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.” Cannot the handbiller confront the approaching customer with the same pair of beady eyes as the picketer? Or is it the sign on the stick that bothered Justice Stevens? Unless we expect the stick to be wielded as a weapon, it would surely seem improper to forbid the picket sign but not the handbill merely because the placard may be more visible and thus more likely to catch a busy shopper’s eye. And what if the placards were not carried on sticks by burly laborers, but, as has been done, were draped over the shoulders

26 Id. at 616.
28 Safeco, 447 U.S. at 617-18.
29 Id.
30 Id. at 619 (emphasis added).
31 Cf. Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942) (Douglas, J., concurring) (posing the question of whether a state “can prohibit picketing when it is effective but may not prohibit it when it is ineffective?”).
of elderly men and women? Finally, suppose the pickets were not union organizers, but an African-American civil-rights group peacefully urging moviegoers not to attend "The Birth of a Nation?"

The three dissenters in Safeco, Justices Brennan, Marshall, and White, did not even attempt to grapple with the First Amendment issue. They contented themselves with the statutory question, concluding that the NLRA did not forbid peaceful consumer picketing aimed solely at a nonunion product rather than the neutral distributor's business as such, regardless of the %age of the neutral's sales represented by that product.32

Professor Archibald Cox, while recognizing the deficiencies of the Safeco opinions, believed the decision could "be fitted into the body of First Amendment law if picketing is classified with commercial advertising as economic speech." There is certainly logic in that position, especially if it were a question of first impression. But relegating picketing to the category of commercial advertising would be a major departure from the attitudes expressed toward union picketing appeals ever since the seminal case of Thornhill v. Alabama.34 Said the Court in Thornhill's companion decision, Carlson v. California,35 "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern."

Not all the Supreme Court decisions of the past two decades have been adverse to organized labor. Ironically, an even more conservative Court than the one that had decided Safeco, and sharply limited the constitutional status of picketing, later handed labor unions a major organizing weapon by maintaining the distinction between picketing and handbilling, and by sustaining the right to handbill customers with much the same sort of strained statutory construction

32 Safeco, 447 U.S. at 622-24 (Brennan, J., dissenting) (citing NLRB v. Fruit & Vegetable Packers Local 760 [Tree Fruits], 377 U.S. 58 (1964), to avoid difficult constitutional questions, picketing asking consumers not to buy one single nonunion product in a neutral supermarket was held not a forbidden secondary boycott).


34 310 U.S. 88 (1940).

35 310 U.S. 106 (1940)

36 Id. at 112-13 (emphasis added). Even the more conservative Justice Frankfurter was ready to concede, "Peaceful picketing is the workingman's means of communication." Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).
used by the Warren Court to exempt a limited form of consumer picketing. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, a union had a dispute with a building contractor over its allegedly substandard wages and fringe benefits. The contractor was hired to construct a department store in a shopping mall. The union peacefully distributed handbills at the entrances of the mall, urging customers not to patronize any of the shops in the mall until all construction was done by contractors paying “fair wages and fringe benefits.” The handbills made clear, however, that the union was not seeking a work stoppage by any store employees. The National Labor Relations Board ruled the consumer handbilling was “coercion” of the secondary employers in violation of Section 8(b)(4)(B) of the NLRA.

In an opinion by Justice White, six members of the Court observed that the Board’s construction of the statute would pose serious questions of its validity under the First Amendment. Here there was no picketing or patrolling. Picketing is “qualitatively different”; handbills “depend entirely on the persuasive force of the idea.” Justice White declared: “The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion.” Justice White went on to note for the Court that the NLRB’s reading would prohibit newspaper, radio, and television appeals to the same effect as the handbills. Nothing in the language or legislative history of Section 8(b)(4), the Court concluded, prevented interpreting it as not reaching peaceful handbilling, and thus the constitutional questions were avoided. *DeBartolo* has significantly expanded the publicity tactics available to labor organizations.

37 See *Fruit and Vegetable Packers Local 760, 377 U.S. at 58.*
39 *Id.* at 573 (The Eleventh Circuit denied enforcement in *Fla. Gulf Coast Bldg. & Constr. Trades Council v. NLRB*, 796 F.2d 1328 (11th Cir. 1986)).
40 *Id.* at 575. There were no dissents. Justices O’Connor and Scalia concurred in the judgment. Justice Kennedy did not participate. For Justice White the handbills did not appear “typical commercial speech” advertising the price or merits of a product since they “pressed the benefits of unionism to the community” and “the dangers of inadequate wages to the economy.” But even as commercial speech the handbills would present serious constitutional issues. *Id.* at 576.
41 *Id.* at 580 (quoting Babbitt v. Farm Workers, 442 U.S. 289, 311 n. 17 (1979) and Hughes v. Superior Court, 339 U.S. 460, 465 (1950)). The same language was also quoted in Justice Stevens’ concurrence in *NLRB v. Retail Clerks Local 1001 [Safeco]*, 447 U.S. 607, 619 (1980).
42 *DeBartolo*, 485 U.S. at 580.
43 *Id.* at 588.
and has led to so-called "corporate campaigns" against nonunion firms through widespread nonpicketing appeals to suppliers and customers.\footnote{\textsuperscript{44}}

E. Collective Bargaining

The National Labor Relations Act requires employers to bargain with the representative of their employees concerning "wages, hours, and other terms and conditions of employment."\footnote{\textsuperscript{45}} Perhaps the most persisting issue concerning the duty to bargain has been the extent to which employers must negotiate about decisions that result in the shrinkage of employees' job opportunities. Examples include subcontracting, automation, and plant relocations. The crucial question is whether a subject is classified as a "condition of employment" or as a management right.\footnote{\textsuperscript{46}} In the \textit{Fibreboard} case,\footnote{\textsuperscript{47}} the Supreme Court of the Warren era gave limited approval to the Labor Board's expansion of so-called mandatory subjects of bargaining to include a manufacturer's subcontracting out of maintenance work within a plant. The Court emphasized that this did not alter the company's basic operation or require any capital investment.\footnote{\textsuperscript{48}}

In the early 1980s, the Court appeared to cut back on employers' obligations. It held in \textit{First National Maintenance Corp. v. NLRB} \footnote{\textsuperscript{49}} that a custodial firm did not have to bargain about terminating an unprofitable contract to provide janitorial services to a nursing home. A balancing test was applied. Bargaining over management decisions that have a substantial impact on job opportunities would be required "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."\footnote{\textsuperscript{50}} The Court then stated broadly that an employer has no duty to bargain about a decision "to shut down part of


\footnotesize{\textsuperscript{45}} 29 U.S.C. §§ 158(a)(5), 158(d), 159(a) (2000).


\footnotesize{\textsuperscript{48}} \textit{Id.} at 216.

\footnotesize{\textsuperscript{49}} 452 U.S. 666 (1981) (Brennan and Marshall, JJ., dissenting).

\footnotesize{\textsuperscript{50}} \textit{Id.} at 679.
its business purely for economic reasons." But it backed away from that sweeping pronouncement by pointing out that the operation in this particular case was not being moved elsewhere and the laid-off employees were not going to be replaced, the employer's dispute with the nursing home concerned the size of a management fee over which the union had no control, and the union had only recently won recognition and thus there was no disruption of an ongoing relationship. That left unanswered many questions regarding the more typical situation of a partial closing or a plant relocation.

Imposing a duty to bargain over such employer decisions as subcontracting, plant removals, and technological change would delay transactions, reduce business flexibility, and perhaps interfere with the confidentiality of negotiations with third parties. In some instances bargaining would be doomed in advance as a futile exercise. Yet there is much evidence, including management testimony, of the practical contribution that the men and women on the shop floor can make to the competitive success of an enterprise through their first-hand knowledge of what really goes on. Moreover, the closer we move toward recognizing that employees may have something akin to a property interest in their jobs, the more apparent it may become that not even the employer's legitimate regard for profit making or the public's justified concern for a productive economy should totally override the workers' claim to a voice in the decisions of ongoing enterprises that will vitally affect their future employment opportunities. A moral value is arguably at stake in determining the role employees ought to play in management decision making. As labor economist Neil Chamberlain has put it: "[T]he workers' struggle for increasing participation in business decisions ... is highly charged with an ethical

51 Id. at 686.
content.... [L]egal and economic arguments, technological and political considerations must give way before widely held moral convictions."  

F. Arbitration

Of all the aspects of union-management relations considered by the Supreme Court during the past two decades, arbitration was the one in which there was the greatest unanimity. Arbitration was also the area in which unions and employees fared the best. Yet employers could find this a blessing in disguise, saving them the time and expense of extended court litigation. In *AT&T Technologies v. Communications Workers*, the Court reaffirmed and refined four principles set forth in the famed 1960 *Steelworkers Trilogy* concerning the judicial enforcement of an executory agreement to arbitrate:

- Arbitration is a matter of contract and a party need not arbitrate unless it has so agreed.  
- The court, not the arbitrator, is to decide whether a party has agreed to arbitrate, unless the parties clearly provide otherwise.  
- The arbitrator, not the court, is to decide the claim under the collective bargaining agreement, even if the claim appears frivolous to the court.  
- If the contract contains an arbitration clause, there is a presumption of arbitrability. Arbitration should not be denied unless the clause cannot be interpreted as covering the dispute. Doubts are resolved in favor of coverage.

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57 *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). (The first two cases dealt with the enforcement of an agreement to arbitrate; *Enterprise* dealt with the enforcement of an arbitral award once issued. Generally, *Enterprise* held that a court should not review the merits of an award and should confine itself to such questions as whether there was any fraud or corruption, denial of due process, or exceeding of the arbitrator's commission.)  
58 *AT&T Tech.*, 475 U.S. at 648.  
59 Id. at 649.  
60 Id. at 649-50.  
61 Id. at 650.  
62 Id.  
63 Id.
Some parties, most often employers, balk at the application of these standards in certain extreme cases. That is an understandable human reaction, but both logic and policy are on the side of the Court. A typical arbitration clause covers “all disputes arising under the contract,” with rare exclusions, and is not limited to “meritorious” or “nonfrivolous” claims. And as a practical matter, even the arbitration of frivolous claims may serve a therapeutic function, clearing the air and letting the parties get on with their business.

Probably the most controversial issue of recent years has been the authority of a court to set aside an arbitration award on the grounds it violates “public policy.” In *Paperworker's International Union v. Misco, Inc.*, the Fifth Circuit had refused to enforce an arbitrator’s reinstatement of an employee whose job was operating a dangerous paper-cutting machine, and whose car had been found to contain marijuana while in the company parking lot. The Supreme Court reversed, declaring that “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” The Court naturally recognized the general common law doctrine that a contract will not be enforced if it violates the law or public policy. But it cautioned that there must be “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.”

Not all the lower courts seemed willing to accept this message. The Supreme Court had to reinforce the lesson in *Eastern Associated Coal Corp. v. United Mine Workers District of America 17.* This time an arbitrator had ordered the reinstatement of a truck driver who had twice tested positive for marijuana. A three-months’ suspension was substituted for the discharge, however, and the employee had to undergo drug treatment and testing and to accept “last chance” terms in his reinstatement. The employer argued that the award was contrary to public policy but the Court disagreed. It first

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66 Id. at 38.
67 Id. at 43.
68 Id. at 43 (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)).
70 Id. at 60.
71 Id. at 61.
72 Id. at 61-67.
emphasized that the award should be treated as the equivalent of an agreement by the parties on the meaning of "just cause."\textsuperscript{73} It then applied \textit{Misco}, pointing out that the relevant federal statute and Department of Transportation regulations contained both antidrug and rehabilitation provisions for safety-sensitive positions and nothing that would specifically prohibit the grievant’s reemployment.\textsuperscript{74} Justices Scalia and Thomas, concurring, would have gone even further. They would refuse to enforce an agreement or award only on the grounds it violated some positive law, and not any other "public policy."\textsuperscript{75}

One should think that with a unanimous Supreme Court sustaining the award in \textit{Eastern Associated Coal}, and with two of the most conservative Justices its most ardent champions, the final stake would have been driven through the heart of nebulous public policy challenges to arbitration. But the objectors have shown remarkable resilience over the years, and there is still available the claim that an award does not “draw its essence” from the collective bargaining agreement or that the arbitrator has attempted to “dispense his own brand of industrial justice.”\textsuperscript{76}

\section*{III. Exceptions to Employment at Will}

The most important and dramatic development in employment law over the last couple of decades came at the state level, not the federal. State courts began to carve out exceptions, on one theory or another, to the long-standing and pernicious doctrine of "employment at will." As bluntly stated in a famous 19th century decision, this principle meant that employers may “discharge or retain employees at will for good cause or for no cause, or even for bad cause . . . .”\textsuperscript{77} That was the well-nigh universal rule in the United States, except for certain statutory protections against discrimination because of race, sex, union activity, and the like, until a California court encountered a situation it simply could not

\begin{quote}
\textsuperscript{73} \textit{Id.} at 62.
\textsuperscript{74} \textit{Id.} at 63-65.
\textsuperscript{75} \textit{Id.} at 68-69.
\end{quote}
stomach. In this case, an employer had fired an employee for refusing to perjure himself on behalf of the employer. That, the court declared, was actionable as contrary to public policy. Such a ruling was a rarity, however, and it was not until the watershed year of 1980 that one saw the beginning of a glacial movement in the state courts to temper the worst rigors of employment at will.

Three principal theories, with variants, came into use. Torts included discharges contrary to public policy and abusive or retaliatory discharges. Contract claims could be based on oral commitments to an employee at the time of hiring or statements of policy in personnel manuals. The third, and potentially most expansive theory of recovery for wrongful discharge, is based on the implied covenant of good faith and fair dealing, but only about a dozen states have accepted it. Eventually, only Louisiana and Rhode Island seem to have failed to embrace one or more of these various theories.

From an employee's perspective, there are serious deficiencies in these judicially developed doctrines. Contracts call for promises, and nothing compels employers to guarantee job security. In any event, properly drafted and

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79 Id. at 26.
80 Id. at 27.
conspicuous disclaimers can extinguish contractual claims.\textsuperscript{87} Employers may be able to revoke previous promises contained in personnel manuals through a reasonable notice to the work force.\textsuperscript{88} As a practical matter, binding oral commitments might largely be confined to higher-level jobs, since it has been held that general assurances of continuing employment are inadequate; some specific bargaining over job security may be required.\textsuperscript{89} Tort theories will ordinarily be useful only in egregious cases. Honorable, well-advised employers are rarely if ever going to engage in outlandish conduct that violates public policy or otherwise supports claims of abusive behavior. Finally, as indicated earlier, the most expandable concept, the covenant of good faith, is recognized in only a small number of states. Even there, the usual approach is to determine whether the employer acted honestly and reasonably in discharging an employee, not whether it was objectively correct in its judgment about the supposed misconduct or poor performance.\textsuperscript{90}

Nearly all employees covered by collective bargaining agreements can be discharged only if there is "good cause." If nonunion workers are ever to enjoy similar protections against arbitrary treatment, legislative will probably be necessary. To date Montana is the only state that has enacted a statutory "good cause" requirement for the dismissal of covered employees.\textsuperscript{91} In 1991, however, the National Conference of Commissioners on Uniform State Laws (ULC) — a mainstream body of lawyers, judges, and state legislators — adopted the Model Employment Termination Act (META)\textsuperscript{92} by a 39-11 vote of the state delegations. META would protect most full-time, non-probationary employees — those working twenty or more hours a week after one year of service — against


\textsuperscript{91} MONT. CODE. ANN. §§ 39-2-901 to 39-2-915 (2003); see also Marcy v. Delta Airlines, 166 F.3d 1279 (9th Cir. 1999) (under Montana statute, employer's good faith is no defense if employee was discharged under mistaken view of the facts; 2-1 decision); 29 P.R. LAWS ANN. § 185a (2001) (providing indemnity upon discharge).

discharge without good cause.93 "Good cause" may be based upon either employee conduct or business needs.94 Despite this endorsement by the prestigious ULC, a dozen years later no state has joined Montana in prohibiting wrongful discharge. That leaves the United States as the only major industrial democracy in the world that has not heeded the call of the International Labor Organization for laws preventing the termination of workers when there is no valid reason.95

Elsewhere I have discussed at some length the pros and cons of at-will employment.96 Without it, there might be a modest loss in employer flexibility in the operation of the business. That has not seemed an excessive burden in all the other industrial nations where the doctrine does not exist. On the other side is simple justice – and devastating psychic, social, and economic effects on dismissed employees and their families. Why, after all, should an employer wish to fire a worker when, by definition, there is no good reason? Yet any experienced labor arbitrator has seen it happen. I would even maintain that a good-cause regime would work to management's benefit as well. Much evidence shows, for example, that a work force which feels secure is more likely to have a record for high productivity and quality output.97

In 1984, I had the privilege to address the very first of these annual Labor and Employment Law Institutes, now named in honor of Carl A. Warns, Jr. My title was "The Twilight of Employment at Will? An Update."98 Socially, I could not have asked for a warmer or more generous reception. Intellectually, at least in terms of my impact on the legal order, it was as if I had never appeared. At any rate, the question I raised about the status of employment at will has been answered. It was not twilight for the doctrine back in 1984; indeed, we hadn't even reached high noon! Nonetheless, I remain hopeful. It took us some fifty

94 Id. § 1(4), 7A U.L.A. 429.
years longer than that hardly liberal statesman, Chancellor Bismarck of Germany, to see the need for Social Security. In the long run, this is a wise, fair, and caring society. Going by the Bismarck timetable, and counting from the ILO's adoption of its Employment Termination Convention of 1982, I have every confidence that by the year 2032 the vast majority of the states, or preferably the U.S. Congress, will have seen the light. No longer will American workers be subject to discharge "at will."  

IV. STATUS DISCRIMINATION – RACE, SEX RELIGION, AGE

A. Principal Theories of Discrimination

By the 1980s, the Supreme Court had already erected the conceptual framework for two theories of discrimination under Title VII of the 1964 Civil Rights Act, which forbids discrimination in employment because of race, color, sex, religion, and national origin. Discrimination could consist of disparate treatment, i.e., intentional distinctions based on prohibited grounds, or it could consist of disparate impact, i.e., unintended but prohibited distinctions resulting from seemingly neutral job standards or qualifications. The Age Discrimination in Employment Act of 1967 (ADEA) forbids discrimination on the basis of age against persons at least 40 years old. A 1993 Supreme Court decision left it uncertain, however, whether disparate impact analysis applies to the ADEA. The last two decades have focused on further refinements of these basic doctrines.

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99 See INT'L LABOUR ORGANIZATION, supra note 94.
102 E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (black applicant alleged he was denied employment because of his civil right activities and because of his race and color).
103 E.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employer required high school education or passing of standardized intelligence test for certain jobs even though these standards were not shown to be related to job performance and they disqualified blacks at a substantially higher rate than whites).
105 The Court avoided the issue in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), but suggested impact analysis might not be suitable for ADEA. The lower courts are now divided. Compare Mullin v. Raytheon, 164 F.3d 696 (1st Cir. 1999) (impact theory unavailable), with
B. Proving Discrimination

The Supreme Court has not always found it that easy to spell out or follow an appropriate methodology for proving discrimination. Even in dealing with the seemingly simpler issue of intentional discrimination, the Justices split sharply in *St. Mary's Honor Center v. Hicks.*\(^{106}\) Hicks, a black man, was hired as a correctional officer at a halfway house and was later promoted to a supervisory position. For some time he enjoyed a good service record but problems developed with a change in management. Hicks was demoted for failing to ensure that his subordinates complied with reporting rules and he was later fired for threatening his immediate superior. Hicks claimed racial discrimination. Under the accepted three-step rubric for disparate treatment cases, the plaintiff must first establish a prima facie case; the defendant then has the burden of producing evidence of the legitimate reasons for its actions; and finally the plaintiff has the opportunity to show the proffered reasons were a pretext and race the true motive.\(^ {107}\) At all times the plaintiff bears the ultimate burden of persuasion.\(^ {108}\)

In *Hicks*, the trial court found that the reasons presented by the employer—the plaintiff's supervisory failings and his threatening of a superior—were not the real reasons for his demotion and discharge. Yet the court still held that Hicks had not carried the burden of proving race was the determining factor rather than mere personal animosity. A five-to-four majority of the Supreme Court agreed. A stinging dissent by Justice Souter pointed out that had the employer remained silent, Hicks would have prevailed on the unrebutted presumption created by his prima facie case. Instead, the dissenters remonstrated, an employer can escape liability by "lying" about why it acted.\(^ {109}\) Despite the powerful logic of Justice Souter's dissent, Professor Deborah Malamud argues for the soundness of the majority's result.\(^ {110}\) The basic problem, she maintains, is the three-step proof process itself and the

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\(^{106}\) *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996).


nonuniformity it has generated because of "the extraordinary variability in the actual content of the prima facie case in the lower courts." She would abandon the artificial three-step proof structure and forthrightly declare that "the only relevant question at trial would be whether the plaintiff has proven intentional discrimination by a preponderance of the evidence."  

In two other cases, Supreme Court efforts to toughen the proof process in discrimination cases were shortly thereafter overturned or qualified by Congress. In *Price Waterhouse v. Hopkins*, the Court held that even though a female plaintiff proved that her gender was a motivating factor in denying her a position, the employer could escape liability and avoid any remedy by showing by a preponderance of the evidence that it would have taken the same action for nondiscriminatory reasons anyway. The 1991 Civil Rights Act provided instead that an unlawful employment practice would be established by showing that prohibited grounds were "a motivating factor." But the Act also provided that if a defendant can demonstrate it would have made the same decision in the absence of the impermissible factor, then there will be no damages or job placement for the individual claimant. The court may, however, grant injunctive relief, attorney fees, and costs.

Congress also rebuffed the Supreme Court's introduction of a new twist in proving disparate impact cases. Conventionally, the plaintiff employee establishes a prima facie case by demonstrating the differential effect of the challenged job qualification or practice. The defendant employer must then offer a legitimate business justification. But the Court in *Ward's Cove Packing Co. v. Atonio* held that the employer did not have to prove that the contested practice was job-related and that the test was not "business necessity" but only "legitimate employment goals." The response of the 1991 Civil Rights Act was to place the burden of persuasion on the defendant "that the challenged practice is job related ... and consistent with business necessity." Thus, as to both the applicable criterion and the burden of proving it, Congress shifted the responsibility in favor of the employee. At least in these contexts, the Congress of the early 1990s appeared significantly more liberal than the Supreme Court.

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111 *Id.* at 2318.
112 *Id.* at 2317-18.
113 490 U.S. 228 (1989).
116 *Id.* at 659.
C. BFOQ AND AFFIRMATIVE ACTION DEFENSES

Two major defenses that may be raised against charges of unlawful employment discrimination are that the otherwise impermissible classification is (1) a bona fide occupational qualification (BFOQ) or (2) a component of a legitimate affirmative action program. BFOQs are applicable to sex, religion, national origin, and age, but not to race. The BFOQ defense has always been narrowly construed. A good example of the strict construction of the BFOQ is Western Air Lines v. Criswell. The Federal Aviation Administration required pilots and first officers to retire upon reaching the age of sixty, but did not impose mandatory retirement on flight engineers. Flight engineers were the third person in the cockpits of large aircraft but they did not take over the controls unless both the pilot and first officer were incapacitated. Western’s pension plan required all members to retire at age sixty. Two pilots retiring under the mandatory provision of the FAA rule and wishing to become flight engineers, and a flight engineer retiring under the mandatory provision of the pension plan, sued on the grounds the mandatory provisions violated the Age Discrimination in Employment Act.

The Court agreed, concluding that the BFOQ standard was one of “reasonable necessity,” not reasonableness. The Court expressly rejected the notion that the employer’s requirement should be upheld on a “rational basis” test. Nevertheless, the Court recognized that Congress had allowed a BFOQ to be asserted if the employer could show that (1) substantially all employees above a specified age were unable to perform their jobs safely and efficiently and (2) it was impractical to determine through objective tests which individuals were able to perform safely and efficiently.

Just prior to the period covered by this survey, the Supreme Court held that a union and an employer could enter into an affirmative action plan, allowing racial preferences in a job training program, without violating Title VII’s ban on discrimination because of race. The objective was to eliminate manifest

\[118\]
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racial imbalances in long-segregated craft jobs. The Court emphasized, however, that the program did not involve state action and thus did not implicate the equal protection clause of the Federal Constitution. In succeeding years the Court struck down or closely questioned several affirmative action plans established by governmental units.

In *Wygant v. Jackson Board of Education*, the Court concluded that neither generalized “societal discrimination,” mere racial imbalance, nor the desire of a public school system to provide black students with minority teacher “role models” constituted a sufficiently compelling governmental interest under the equal protection clause to justify taking race into account in determining layoffs. In *City of Richmond v. J.A. Croson Co.*, the Court held that “strict scrutiny” applied even to supposedly “benign” racial classifications by a local government. But a majority seemed willing to say that a “prima facie” showing of discrimination by private parties in a contracting program for which a public entity is ultimately responsible could warrant affirmative remedial steps by the public body. The strict scrutiny standard was extended to the federal level in *Adarand Constructors v. Pena*. The Court remanded the case to the court of appeals for further consideration, under that standard, of the Federal Government’s program providing for extra compensation for general contractors hiring subcontractors controlled by “socially and economically disadvantaged individuals,” presumptively including racial minorities.

An exception to this series of anti-affirmative action decisions was *Johnson v. Transportation Agency, Santa Clara County*. In an area where women constituted 36.4% of the labor market, the employer agency had only 22.4% women. There were no women among the 248 skilled craft positions. In the eyes of the Court at the time, this “manifest imbalance” was sufficient to sustain a temporary program taking gender into account in filling craft openings, with the goal of eventually having 36% women in the craft jobs. *Johnson* would seem superseded by *Croson*’s adoption of a “prima facie” rather than “manifest imbalance” standard, unless different criteria apply to affirmative action

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124 Id. at 494-95 (explaining that “strict scrutiny” calls for both a “compelling governmental interest” and a “narrowly tailored” solution to justify a racial classification).
125 Id. at 492, 509.
programs for racial minorities and for women. Requiring a prima facie showing of past or present discrimination before there could be affirmative action, at least by a public agency, would of course be much more restrictive than simply having to show a manifest imbalance in the number of minorities or women.

In two cases decided since this lecture was delivered, the Supreme Court dealt with affirmative action in the different context of public higher education. In *Grutter v. Bollinger,* the Court sustained the admissions program of the University of Michigan’s Law School, which seeks a “critical mass” of minorities in its student body, against a challenge that this racial and ethnic preference violates the equal protection clause of the Fourteenth Amendment. Justice O’Connor spoke for the majority in declaring the law school had a “compelling governmental interest” in securing a diverse student body for the educational benefit of all students, and the program was “narrowly tailored” to accomplish this end. Although *Grutter* was decided only five-to-four, dissenting Justice Kennedy made for a total of six Justices who were expressly prepared to accept the principle of “racial diversity” in university admissions approved by Justice Powell in his deciding opinion in the *Bakke* case. At the same time, the Court struck down the admissions program of the University’s undergraduate college, which automatically awarded 20 admission points out of a possible 150 to “underrepresented minority” applicants and did not provide the same “highly individualized, holistic review” of applicants’ total range of qualifications that was found in the law school.

The positive decision on affirmative action in public higher education will not automatically be transferable to public (or private) employment. The theory of diversity in university enrollment is based on enhancing the educational

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128 In constitutional challenges, gender classifications are subject to an intermediate standard of scrutiny falling somewhere between “strict scrutiny” and “rational basis.” Craig v. Boren, 429 U.S. 190 (1976).


experience of everyone through the particular insights and opinions brought by minority students. Justice O'Connor's majority opinion in *Grutter* also relied on the “special niche” occupied by a university's freedom of expression and academic judgments, including student selection, in our constitutional tradition.\(^{132}\) It could be somewhat harder to find analogous compelling interests, not to mention free-speech claims, in diversifying the work force of a public agency (or private employer).\(^{133}\) Yet the heavy emphasis in *Grutter* on the vital need to prepare a diverse group of students for future service in the corporate and military worlds would seem encouraging for affirmative action in employment as well.\(^{134}\)

**D. SEXUAL HARASSMENT**

One of the significant developments of the 1980s was the Supreme Court's acceptance of sexual harassment as a form of sex discrimination prohibited by Title VII. That was not self-evident; it was earlier argued there is no discrimination in the absence of some tangible economic loss. But in *Meritor Savings Bank v. Vinson*,\(^{135}\) the Court dismissed that contention and concluded there could be actionable harassment through “unwelcome” sexual advances or other actions creating a “hostile environment.” The *Meritor* opinion also noted the existence of a second type of sexual harassment. In addition to a hostile environment, there can be quid pro quo harassment, when sexual favors are sought in return for preferential job treatment. The Court elaborated on the elements of a hostile environment harassment claim in *Harris v. Forklift Systems*, pointing out that the conduct must be “severe or pervasive enough to create an objectively hostile or abusive work environment – an environment

\(^{132}\) *Grutter*, 123 S.Ct. at 2338-39.


\(^{134}\) 123 S.Ct. at 2340-41.

\(^{135}\) 477 U.S. 57 (1986). *See generally* CATHERINE MACKINNON, SEXUAL HARRASSMENT OF WORKING WOMEN (1979) (explaining that there can, of course, be racial as well as sexual harassment on the job).
that a reasonable person would find hostile or abusive – [and] the victim does subjectively perceive the environment to be abusive."  

A highly important question for the victim of harassment on the job is whether she (it’s almost always a woman) can reach the deeper pockets of the corporate employer. Harassment may be caused either by supervisors or by co-workers. The liability of the employer will vary accordingly. The Supreme Court attempted to lay down some definitive rules for vicarious liability in *Burlington Industries, Inc. v. Ellerth.* When a supervisor takes “tangible employment action,” such as a discharge or an undesirable assignment, it becomes the action of the employer for Title VII purposes and no affirmative defense is available. But when there is no tangible action, and only a hostile environment, the employer may raise an affirmative defense. The defense would require proof that (1) the employer took reasonable care to prevent and correct any sexual harassment and (2) the employee victim unreasonably failed to avoid harm. Since nonsupervisory co-workers engaging in harassment would ordinarily be acting outside the scope of their employment, the employer will be liable for their conduct only if it is negligent or otherwise at fault. Justices Thomas and Scalia, dissenting in *Ellerth,* would not hold an employer liable even for supervisors’ creation of a hostile work environment unless the victim could prove the employer was negligent in not preventing the supervisor’s conduct.

V. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act of 1990 (ADA) is the only totally new piece of antidiscrimination legislation passed during the time period of this survey. Very generally it prohibits employment discrimination against a “qualified individual with a disability because of the disability.” A “disability” includes a “physical or mental impairment that substantially limits one or more of the major life activities.” A “qualified” individual is someone

137 524 U.S. 742 (1998). The Court noted that “the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability.” *Id.* at 765; *see also* Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
138 *Burlington,* 524 U.S. at 762-63.
139 *Id.* at 765.
141 *Id.* § 12112(a).
142 *Id.* § 12102(2).
who can perform the "essential functions" of the job in question with or without "reasonable accommodation." 143 "Reasonable accommodation" refers to adjustments in the facilities or the job that do not impose "undue hardship" in terms of cost or difficulty. 144

The Supreme Court started out with a fairly broad notion of the sweep of the ADA. In more recent years it has appeared to retrench. Thus the Court held, under the ADA's predecessor, the Rehabilitation Act of 1973, 145 that a person afflicted with tuberculosis was "handicapped" within the meaning of the statute and "otherwise qualified" to teach elementary school. 146 Similarly, in Bragdon v. Abbott, 147 the Court ruled that the human immunodeficiency virus (HIV) is a disability under the ADA even when the infection has not yet progressed to the symptomatic phase, since it is a physical impairment that substantially limits the major life activity of reproduction.

Retrenchment was under way in Sutton v. United Air Lines. 148 Two twin sisters both had severe myopia, 20/200 or worse in one eye and 20/400 or worse in the other. With corrective lenses, however, their vision was 20/20 or better. 149 When they applied for employment as commercial airline pilots, they were rejected because they did not meet the employer's requirement of uncorrected visual acuity of 20/100 or better. 150 The majority of the Supreme Court determined that the sisters were not "disabled" under the ADA because when a person is taking steps to mitigate an impairment, the effects of those efforts must be considered in deciding whether the individual is "substantially limited in a major life activity." 151 Even on the assumption that working is a major life activity, the Court further concluded that the sisters had not shown they were "regarded" as having a disability limiting a major life activity simply because they were precluded from holding the one job of airline pilot. The dissenting Justices labeled this a "miserly" and "narrow" reading of the term "disability," regardless of the ultimate merits of the sisters' claim.

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143 Id. § 12111(8).
144 Id. § 12111(9) and (10).
149 Id. at 475.
150 Id. at 476.
151 Id. at 482.
What constitutes a "major life activity" under the ADA was again to the fore in *Toyota Motor Manufacturing of Kentucky v. Williams.* An employee claimed she was disabled from performing her automobile assembly line job by carpal tunnel syndrome and other problems. This time a unanimous Supreme Court held that in "addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." Even though the employee’s medical conditions made her avoid sweeping, quit dancing, occasionally seek help dressing, and reduce the frequency of playing with her children, gardening, and driving long distances, the Court found these were not such severe restrictions as to establish a manual-task disability as a matter of law. The court of appeals’ grant of partial summary judgment in her favor was thus reversed and the case remanded.

In an unusual five-to-four division of the Justices, the Supreme Court held in *US Airways, Inc. v. Barnett* that ordinarily the ADA does not require an employer to accommodate a disabled employee by assigning him to a position to which another employee is entitled under the employer’s established seniority system. But the Court added that the plaintiff may be able to prevent summary judgment for the employer by showing the job assignment is a reasonable accommodation because of special circumstances. The Court considered it irrelevant that the seniority system in this instance was installed by the employer unilaterally and was not the product of collective bargaining. In both situations seniority fulfills employee expectations of job security and steady, predictable advancement.

*Barnett* may also be notable for a split of the Justices that found dissenters from both ends of the conservative-liberal spectrum. Justice Breyer spoke for the Court. Justices Scalia and Thomas dissented, criticizing the Court for the uncertain state in which it left *bona fide* seniority systems and insisting that the accommodation provision of the ADA requires only "the suspension (within reason) of those employment rules and practices that the employee’s disability prevents him from observing." Justices Souter and Ginsburg dissented on the grounds that nothing in the ADA, unlike Title VII and ADEA, insulated

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152 534 U.S. 184 (2002).
153 Id. at 187.
154 Id. at 200-01.
156 Id. at 412 (emphasis in the original).
seniority provisions, and especially a unilaterally imposed system, from the accommodation requirement, and that the plaintiff here had shown his proposed accommodation was reasonable.\textsuperscript{157}

VI. ARBITRATION AS AN ALTERNATIVE ENFORCEMENT DEVICE

A great debate has developed over the past couple of decades about the capacity of employers – or employers and unions through collective bargaining – to substitute arbitration for an employee’s right to seek judicial relief for claims against an employer. Suppose Mary Jones applies for a job and is presented with a form to sign. It obligates employees to submit all workplace disputes to an arbitration system devised by the employer rather than to take them to court. If Mary has the foresight and temerity to ask whether this arrangement covers statutory claims and whether she must sign if she wants the job, she is told the answer is “Yes” to both questions. Later, Mary is dismissed and alleges sex and age discrimination. Despite having signed the employer’s required form, she files a federal court action after having gone through the necessary EEOC procedure. The employer, needless to say, interposes the arbitration agreement as a bar to the suit.

Almost thirty years ago the Supreme Court appeared to lay to rest any idea that private arbitration could displace an employee’s resort to statutory procedures. In \textit{Alexander v. Gardner-Denver Co.},\textsuperscript{158} the Court held an arbitrator’s adverse decision under a collective bargaining agreement did not prevent a black employee from pursuing in court a claim his discharge was based on racial discrimination in violation of Title VII of the 1964 Civil Rights Act. The Supreme Court reasoned that the arbitrator was only authorized to decide the contractual issue of discrimination, and not the statutory issue. Maybe the real reason for the result in \textit{Gardner-Denver} was skepticism about union zeal, at least as of the early 1970s, in pressing Title VII discrimination cases in contrast to cases of antiunion discrimination.

\textsuperscript{157} \textit{Id.} at 420, 423.

\textsuperscript{158} 415 U.S. 36 (1974); \textit{see also} Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) (holding that employees not barred by arbitration award on wage claim under union contract from suing under Fair Labor Standards Act). In \textit{Gardner-Denver}, the Court noted that the arbitrator’s award could be admitted in evidence in subsequent court proceedings, and that if certain procedural safeguards were observed, the award could be accorded “great weight.” 415 U.S. at 60 n. 21.
In 1991 the Supreme Court seemed to take an abrupt turn away from the *Gardner-Denver* approach. In *Gilmer v. Interstate/Johnson Lane Corp.*,\(^{159}\) it held that an individual stockbroker employee was bound by a contract with the New York Stock Exchange to arbitrate a claim of age discrimination against his employer. The Court distinguished *Gardner-Denver* on the grounds that in *Gilmer* the arbitrator was authorized to handle statutory as well as contractual disputes.\(^{160}\) The earlier case was also said to involve a "tension" between union representation and individual statutory rights. Furthermore, the Court stressed that no loss of statutory rights occurred in *Gilmer*. It was only a change of forum. Nevertheless, the Court noted that the stockbroker was not precluded from filing a charge with the EEOC; only his court action was barred.\(^{161}\)

*Gardner-Denver* and *Gilmer* can be distinguished in several ways. The Court's own emphasis on the authority of the arbitrator will make little difference, if unions and employers can simply empower arbitrators in the labor contract to deal with statutory issues. But in *Wright v. Universal Maritime Serv. Corp.*,\(^{162}\) the Court held that any union-negotiated waiver of employees' statutory right to a judicial forum would have to be "clear and unmistakable." On the existence of a real distinction between *Gardner-Denver* and *Gilmer*, the explanation of Judge Harry Edwards in *Cole v. Burns International Security Services*\(^{163}\) is more convincing than the Court's. Speaking for the District of Columbia Circuit, he emphasized that in individual contracts of employment, the employee manages the arbitration presentation, while the union is in control in the collective bargaining setting.\(^{164}\)

On the other hand, in terms of bargaining power, one can argue that a union's agreement to arbitrate and waive the judicial forum should be more acceptable – less of a contract of adhesion – than an isolated individual employee's agreement. Moreover, any concern that a labor organization might treat an employee's civil rights cavalierly should be tempered by the existence

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\(^{160}\) *Id.* at 33-34.

\(^{161}\) *Id.* at 28. The Court has since held that an individual's agreement to arbitrate employment disputes does not preclude the EEOC from seeking victim-specific relief in court, including reinstatement, back pay, and damages. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

\(^{162}\) 525 U.S. 70, 80-81 (1998).

\(^{163}\) 105 F.3d 1465 (D.C. Cir. 1997).

\(^{164}\) In *Wright*, Justice Scalia for the Court distinguished between "an individual's waiver of his own rights [in *Gilmer*], rather than a union's waiver of the rights of represented employees." 525 U.S. at 80.
of the well-established union duty of fair representation. Significantly, the Supreme Court in *Wright* recognized, but did not resolve, the question of whether "*Gardner-Denver* 's seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*."

The theoretical arguments against so-called mandatory arbitration agreements are very powerful. Congress, or some other legislative body, has prohibited various types of employment discrimination and has prescribed certain procedures for the vindication of those statutory rights. The specified procedures, sometimes including the right to a jury trial, may be almost as important as the substantive rights themselves. No employer, acting either alone or in conjunction with a union, should be able to force an employee to waive the statutorily provided forum and procedures as the price of getting or keeping a job. Conditioning employment on the surrender of statutory entitlements would seem a blatant affront to public policy. Numerous scholars, two federal agencies, and two prestigious private bodies have gone on record as opposed to mandatory arbitration of statutory employment claims.

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166 *Wright*, 525 U.S. at 80.

Yet facts often trump theory. Highly pragmatic considerations indicate that the ordinary rank-and-file worker may be better off with the actuality of arbitration, even of the mandatory variety, than with the beguiling, but often illusory, possibility of a court suit. Experienced plaintiffs’ attorneys have estimated that only about 5% of the individuals with an employment claim who seek help from the private bar are able to obtain counsel.\textsuperscript{168} Of course, some of those who are rejected will not have meritorious claims. But others will be workers whose potential dollar recovery will simply not justify the investment of the time and money of an experienced lawyer in preparing a court action. For those individuals, the cheaper, simpler process of arbitration is the most feasible recourse. It will cost a lawyer far less time and effort to take a case to arbitration; at worst, claimants can represent themselves or be represented by laypersons in this much less formal and intimidating forum.

Several studies show that employees actually prevail more often in arbitration than in court. The American Arbitration Association in one study found a winning rate of 63% for arbitral claimants.\textsuperscript{169} In a much-criticized system operated by the securities industry, employees still prevailed 55% of the time, according to the U.S. General Accounting Office.\textsuperscript{170} By contrast, claimants’ success rates in separate surveys of federal court and EEOC cases were only 14.9% and 16.8%, respectively.\textsuperscript{171} Even if the latter figures are somewhat skewed because they may omit pretrial settlements, the relative attractiveness of arbitration for claimants cannot be denied.\textsuperscript{172} As might be expected, successful plaintiffs obtain larger awards from judges or juries. But claimants as a group recover more in arbitration.\textsuperscript{173} All these statistics reflect the situation before the American Bar Association’s Due Process Protocol\textsuperscript{174}

\textsuperscript{169} \textit{Id.} at 46.
\textsuperscript{170} \textit{Id.} at 50.
\textsuperscript{171} \textit{Id.} at 46, 48.
\textsuperscript{173} Maltby, \textit{supra} note 166, at 54.
was adopted, when many flawed systems were in existence. Arbitration procedures should be even more favorable for employees now. In short, for me the key is not the mandatory nature of the agreement but the accessibility and fairness of the arbitration system in actual operation.

Arbitration received a further boost from the Supreme Court in *Circuit City Stores v. Adams*. The only issue directly before the Court was whether the Federal Arbitration Act (FAA), which mandates the judicial enforcement of a wide range of arbitration agreements, exempts contracts of employment generally, or only the contracts of transportation workers. The Court opted, five to four, for the narrower exclusion, thus covering everyone except transportation workers. In my view that promotes the salutary notion of broad, more uniform federal standards of arbitrability in employment. Still, a vast number of worker-rights supporters were convinced that what was at stake was the spread of the perfidious *Gilmer* doctrine of mandatory arbitration, and that this had to be stopped. Yet it strikes me that lifetime federal judges may well be readier than many state judges to protect employees from abuse by overreaching employers.

VII. CONCLUSION

The last two decades have continued the shift of emphasis from labor law to employment law - from governmental regulation of union-management relations, with collective bargaining expected to set most of the substantive terms of employment, to the direct governmental regulation of more and more union, and plaintiffs' attorneys from the ABA and the National Employment Lawyers Association, and representatives of the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution

177 The minority is probably supported by the legislative history, but I believe both the statutory text and sound policy are on the side of the majority. Of course, the FAA only applies to employees covered by the interstate commerce clause.
178 Twenty-eight governmental units or private groups filed briefs as *amicus curiae*, urging that the FAA not apply to contracts of employment. *Circuit City*, 532 U.S. at 108-09.
179 See, e.g., Ingle v. Circuit City Stores, 328 F.3d 1165 (9th Cir. 2003) (numerous "unconscionable" provisions; applying California law); Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002) (on remand) ("unconscionable" contract of adhesion; applying California law), *cert. denied*, 535 U.S. 1112 (2002); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) (striking down employer's unilaterally established "one-sided" arbitration procedures).
aspects of the employer-employee relationship. Insofar as that fills in gaps in the protection of workers which would otherwise never be covered, it is all to the good. Insofar as it diminishes private initiative and the voluntary arrangements that have made collective bargaining such a uniquely valuable American institution, it must be deemed a cause for regret. One likes to think that in such gatherings as the Carl Warns Labor and Employment Law Institute, we can help each other better understand the processes at work and thus try to achieve a more ideal balance between public and private governance. If I may use a racetrack analogy, in this of all places: the best laws are like the best jockeys; they know when to tighten the reins, and they know when to let the horses run.