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LABOR AND COMMERCIAL ARBITRATION: THE COURT'S MISGUIDED MERGER

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Abstract: In the 2011 case, in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempts state contract laws that interfere with the goals of the Act, including the defense that an arbitration agreement is unconscionable. This decision was hardly surprising despite its significant effect on consumers and employees. Since the 1980s the Court has continually expanded the FAA, the statute governing commercial arbitration. The Court has justified this expansion by comparing the FAA to section 301 of the Labor Management Relations Act, a comparable statute requiring courts to defer to labor arbitration where parties agree to arbitrate their disputes. Yet, labor arbitration is distinctly different from commercial arbitration. Labor arbitration supports the collective bargaining process, whereas commercial arbitration is simply a substitute for litigation. Despite the differences, the Court in the last two decades has conflated labor arbitration and commercial arbitration. This conflation is troubling because labor arbitration may become a substitute for litigation, rather than a tool to support the collective bargaining process. This shift reflects a sharp departure from the original purposes of labor arbitration.

Introduction

In April 2011, the U.S. Supreme Court held, in *AT&T Mobility LLC v. Concepcion*, that the Federal Arbitration Act (FAA) preempts state contract laws that interfere with the goals of the Act.[1] In that case, the Court held that the FAA preempted an unconscionability defense because it stood as an obstacle to accomplishing expeditious arbitration.[2] By restricting the use of an unconscionability defense, the *Concepcion* decision effectively limited parties' capacity to defend against unfair arbitration agreements.[3] Although hugely consequential for consumers and employees, the holding in *Concepcion* does not come as a surprise.[4]

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[1] 131 S. Ct. 1740, 1753 (2011); *see* 9 U.S.C. §§ 1–16 (2006).

[2] *See Concepcion*, 131 S. Ct. at 1747–50.

[3] *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1436–37 (2008) (addressing how

Since the 1980s, the Supreme Court has continually broadened the reach of the FAA, the statute governing commercial arbitration.[5] Initially, the Act only applied to merchants' disputes.[6] Over time, the FAA grew to cover employment, consumer, and business disputes as well.[7] The Court has justified the expanding authority of the FAA by comparing it to section 301 of the Labor Management Relations Act ("LMRA"), a comparable statute requiring courts to defer to labor arbitration when parties agree to arbitrate their disputes.[8]

Yet, labor arbitration is distinctly different from commercial arbitration.[9] The historical underpinnings, the sources of law, and the policy justifications vary between the two.[10] Despite the differences, the Court has conflated labor and commercial arbitration principles by resolving a labor arbitration case using commercial arbitration law.[11] The effect, this Note argues, distorts the unique policies supporting labor arbitration.[12]

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courts, critical of arbitration, relied on the unconscionability doctrine to invalidate arbitration clauses).

[4] *See* David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239, 265 (2012) (arguing that the Supreme Court's growing deferential position toward the FAA, established between the 1980s and 2011, foreshadowed the *Concepcion* decision).

[5] *See Concepcion*, 131 S. Ct. at 1753 (holding that contract defenses that limit the purposes of the FAA cannot be used to challenge an arbitration agreement); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010) (limiting the unconscionability defense so that it applies only to the delegation clause within an arbitration agreement); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (holding that the FAA applies to contracts of employment); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (holding that individual employees can be compelled to arbitrate statutory claims); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 628 (1985) (permitting arbitration of statutory claims unless Congress expressly prohibits waivers of judicial remedies); *see also* David Horton, *Unconscionability Wars*, 106 Nw. U. L. Rev. Colloquy 13, 13 (2011), http://www.law.northwestern.edu/lawreview/v106/n1/387/LR106n1Horton.pdf (recognizing the expansion of the FAA).

[6] *See* Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. Miami L. Rev. 949, 949–50 (2002).

[7] *See id.*

[8] *See* 29 U.S.C. § 185(a) (2006); Katherine V.W. Stone, *The* Steelworkers' Trilogy: *The Evolution of Labor Arbitration*, *in* Labor Law Stories 149, 188 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

[9] Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 Baylor L. Rev. 781, 783 (2000).

[10] *See id.*

[11] *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 266 (2009); Michael H. LeRoy, *Irreconcilable Differences? The Troubled Marriage of Judicial Review Standards Under the* Steelworkers Trilogy *and the Federal Arbitration Act*, 2010 J. Disp. Resol. 89, 109 (arguing that the Court married labor and commercial arbitration when it analyzed a labor dispute according to the FAA).

[12] *See infra* notes 321–365 and accompanying text.

This Note traces the evolution of labor and commercial arbitration from their distinct beginnings to their eventual convergence.[13] Part I explores the early development of labor and commercial arbitration.[14] Part II addresses how the FAA and section 301 derive from distinct policies.[15] Part III discusses case law leading up to and the eventual collision of the FAA and section 301.[16] Finally, Part IV reflects upon the consequences of an arbitration law merger, arguing that these changes distort the purposes and objectives of labor arbitration that supported its initial growth.[17]

I. The Evolution of Labor and Commercial Arbitration

Arbitration dates back centuries as a form of privately resolving disputes between parties.[18] The parties agree in contract, prior to any dispute, to bring their future claims to a neutral arbitrator rather than file suit in court.[19] The arbitrator is ordinarily authorized to issue binding decisions.[20] Because arbitration is flexible, it has attracted different types of parties and disputes.[21] This Note compares two areas in particular: labor and commercial arbitration.[22] Labor arbitration refers only to arbitration in unionized workplaces, meaning the process serves unionized employees and their management.[23] Section 301 of the LMRA constitutes the primary source of the law regulating labor arbitration.[24] By comparison, commercial arbitration law covers agreements between merchants, consumers, management, and nonunionized employees.[25] The FAA controls in these types of disputes.[26]

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[13] *See infra* notes 18–320 and accompanying text.

[14] *See infra* notes 18–162 and accompanying text.

[15] *See infra* notes 163–241 and accompanying text.

[16] *See infra* notes 242–320 and accompanying text.

[17] *See infra* notes 321–365 and accompanying text.

[18] James P. Buchele & Larry R. Rute, *The Changing Face of Arbitration: What Once Was Old Is New Again*, J. Kan. B. Ass'n, Aug. 2003, at 36, 37.

[19] *See* Thomas E. Carbonneau, *Freedom and Governance in U.S. Arbitration Law*, 2 Global Bus. L. Rev. 59, 80–82 (2011).

[20] *See id.*

[21] Menkel-Meadow, *supra* note 6, at 949–50.

[22] *See infra* notes 32–162 and accompanying text.

[23] Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 Chi.-Kent L. Rev. 753, 759 (1990).

[24] *See* 29 U.S.C. § 185(a) (2006); Stephen L. Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 Berkeley J. Emp. & Lab. L. 521, 523 (2000).

[25] *See* Menkel-Meadow, *supra* note 6, at 950 (recognizing that arbitration serves "consumers and banks, hospitals, schools, employers, airlines, securities sellers, and merchants of all sizes and shapes").

Initially, the FAA and section 301 developed on parallel tracks; over time, the two laws have intersected.[27] To explain this convergence, this Part introduces the distinct histories separating labor and commercial arbitration law.[28] Section A traces the growth of labor arbitration within the unique context of collective bargaining.[29] Section B similarly explores the development of commercial arbitration, from its founding to its modern application.[30] After explaining the historical differences, this Note moves on to discuss the implications of the FAA and section 301 merger.[31]

A. *History of Labor Arbitration*

Today, disputes between labor unions and employers that arise out of their collective bargaining agreements are usually resolved in arbitration.[32] Parties elect to resolve disputes privately for several reasons.[33] First, given that parties operate within technical enterprises, an arbitrator with expertise in the field can more effectively understand the nature of disputes as compared to a judge or jury.[34] Second, arbitration represents a form of self-ordering, where parties, sophisticated in their trades, can efficiently resolve contractual questions on their terms without having to satisfy the more complex and slower requirements of litigation.[35] Third, business operations remain mostly undisturbed because arbitration expeditiously resolves disagreements.[36] Like commer-

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[26] 9 U.S.C. §§ 1–16 (2006); *see* Hayford, *supra* note 9, at 827.

[27] Lise Gelernter, *How Much Power Does a Labor Arbitrator Have? What the Latest Court Decisions Mean for Arbitrators, Employers, Unions, and National Labor Policy* 15 (Buffalo Legal Studies Research Paper Series, Paper No. 2012–005, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889273; *see, e.g.*, *Concepcion*, 131 S. Ct. at 1749; *Pyett*, 556 U.S. at 248, 265–66 (holding that an agreement to arbitrate within a collective bargaining agreement was enforceable under the FAA).

[28] *See infra* notes 32–162 and accompanying text.

[29] *See infra* notes 32–95 and accompanying text.

[30] *See infra* notes 96–162 and accompanying text.

[31] *See infra* notes 163–365 and accompanying text.

[32] *See* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 Hastings L.J. 1187, 1187 (1993).

[33] *See infra* notes 34–37 and accompanying text.

[34] *See* Julius H. Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L.J. 147, 150 (1921) ("Presumably men of commercial experience today need no guardianship for determining, at the time of making a contract, whether they prefer the opinion of their own trade upon technical questions, or the hazardous judgment of a jury of the vicinage.").

[35] *See id.*

[36] *See* Buchele & Rute, *supra* note 18, at 37.

cial arbitration, this modern tradition took decades to develop, beginning in the twentieth century.[37]

Labor arbitration began with the emergence of collective bargaining between unions and management.[38] In the early 1900s, parties primarily created trade agreements (minimal writings with minimal commitments) as opposed to formal collective bargaining agreements.[39] In part, unions relied on trade agreements because they lacked legal standing, as unincorporated entities, to bring breach of contract claims in court.[40] As such, if a party violated a trade agreement provision, either a strike or a lockout would ensue.[41] Union leaders further relied on trade agreements because they feared that courts would not enforce written collective bargaining agreements.[42]

Distrust of courts flowed from two sources: judicial hostility toward arbitration generally, and courts' unfavorable responses to peaceful union strikes in the early twentieth century.[43] First, judges questioned the legitimacy of arbitration and whether its adoption would undermine the integrity of the judicial system because arbitrators were untrained in the law.[44] Further, judicial opposition reflected concerns that arbitration would diminish caseloads, and, subsequently, judges' salaries.[45] In addition, unions distrusted legal recourse because courts in the early 1900s issued several injunctions against unions, based on antitrust laws, holding that union strikers were illegally conspiring against their employers.[46] In its early history, court review of collective bargaining agreements was unpredictable at best.[47]

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[37] Stone, *supra* note 8, at 154.

[38] *See id.* at 150–56.

[39] *See id.* at 151.

[40] *See* William G. Rice, Jr., *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572, 604 (1931) ("[T]he American law, as it now stands, tends to develop these collective agreements into something more than a custom and yet something different from a contract, for the breach of which damages is the normal remedy.").

[41] *See* Stone, *supra* note 8, at 151 (explaining that agreements were renegotiated constantly and that a union needed to "mobilize its supporters to apply economic pressure both to enforce past agreements and to secure new ones").

[42] *See id.* at 152.

[43] *See id.* (unfavorable union treatment); Buchele & Rute, *supra* note 18, at 37 (hostility toward arbitration generally).

[44] *See* Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 Me. L. Rev. 263, 266 & n.15, 268 (1988) (explaining that courts questioned whether arbitrators were equipped to provide redress and whether their decisions could bind reluctant parties).

[45] Buchele & Rute, *supra* note 18, at 37.

[46] *See* Loewe v. Lawlor, 208 U.S. 274, 275 (1908) (holding that the Sherman Antitrust Act prohibited secondary boycotts); Vegelahn v. Guntner, 44 N.E. 1077, 1078 (Mass. 1896)

Eventually, Congress realized that employees needed more protections to counteract their employers' extensive control over the terms and conditions of employment.[48] In 1935, Congress passed the National Labor Relations Act ("NLRA").[49] The Act created a framework in which employees could organize, form a union, and bargain with their employers.[50] In order for such a scheme to work, the Act included a set of restrictions, known as unfair labor practices, that employers were prohibited from committing.[51] As such, the NLRA primarily created obligations for management by requiring them to negotiate with unions through a collective bargaining process.[52]

Although the NLRA legitimized collective bargaining agreements, it did not address how to enforce these agreements.[53] Without an enforcement regime, parties selected arbitration as a means of self-enforcing the terms of their collective bargaining agreements.[54] If there was a dispute over the agreement to arbitrate, state common law controlled.[55] Because opposition toward arbitration ran rampant in the courts, judges often allowed parties to revoke their agreement to arbitrate.[56] At this time, courts also contemplated to what degree, if any, the FAA would apply to arbitration agreements.[57] In the midst of the uncertainty surrounding the FAA's scope, Congress passed the LMRA.[58]

(holding that employees, whether or not under the employ of the employer, were enjoined from picketing in front of an employer's shop); *see also* Stone, *supra* note 8, at 152 (noting that courts issued injunctions against unions in the early 1900s).

[47] *See* Stone, *supra* note 8, at 153.

[48] H. David Kelly, Jr., *An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 U. Det. Mercy L. Rev. 1, 16–17 (1997).

[49] National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

[50] Steven L. Willborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 B.C. L. Rev. 725, 725–26 (1984) (explaining that proponents of the Act described it as creating a shell for "industrial democracy," which empowers employees by allowing them to "share in industrial government").

[51] 29 U.S.C. § 158; *see* Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. Rev. 1579, 1619 (2005).

[52] Kelly, *supra* note 48, at 17.

[53] Stone, *supra* note 8, at 156.

[54] *Id.*

[55] *See* Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 591 (1954).

[56] *Id.*

[57] *See id.* at 592–95. Courts disagreed as to whether section 1 of the FAA, which exempts "contracts of employment" from the definition of commerce, applied throughout the Act and whether a collective bargaining agreement constituted a "contract[] of employment." *See* 9 U.S.C. § 1 (2006); Cox, *supra* note 55, at 592–95. The U.S. Supreme Court

Section 301 of the LMRA provides that "suits for violation of contracts" between unions and management may be brought in federal district court.[59] Interestingly, the text of section 301 does not explicitly mention arbitration or how to enforce arbitration agreements; rather, the law impliedly captures this issue.[60] At common law, unions were unincorporated entities that could not sue or be sued.[61] Now, under section 301, unions have a "legal personality."[62] Thus, the law serves a procedural function by establishing federal jurisdiction over disputes between unions and management that arise out of collective bargaining agreements.[63]

Ten years later, the U.S. Supreme Court held that section 301 was more than a procedural grant of authority—it permitted a federal common law as well.[64] The federal common law refers to substantive rules applicable in federal courts that determine the enforceability of arbitration clauses in collective bargaining agreements.[65] These substantive laws generally require parties to arbitrate all disputes arising out of collective bargaining agreements and limit courts' review of arbi-

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responded to this concern in 1944, in *J.I. Case v. NLRB*, where it held that collective bargaining agreements differ from contracts of employment because individuals do not secure jobs based on the terms of such an agreement. *See* 321 U.S. 332, 334–35 (1944).

[58] 29 U.S.C. § 185(a) (2006); *see* Cox, *supra* note 55, at 591.

[59] *See* 29 U.S.C. § 185(a). Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, 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.

Id.

[60] *See id.*; Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 449–52 (1957) (interpreting the vague language of section 301).

[61] Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 304 (1948).

[62] Stone, *supra* note 8, at 157 ("[The LMRA] was drafted by Senator Taft in order to give unions collective legal personality, to promote uniformity in enforcement, and to reject the individual employment contract theories that existed in the state courts."); *see* Cox, *supra* note 61, at 305.

[63] Mitchell H. Rubenstein, *Altering Judicial Review of Labor Arbitration Awards*, 2006 Mich. St. L. Rev. 235, 256–57; *see* Cox, *supra* note 61, at 305.

[64] *Lincoln Mills*, 353 U.S. at 455 ("[T]he legislation does more than confer jurisdiction in the federal courts over labor organizations . . . ."); *see also* Rubenstein, *supra* note 63, at 256–57 (noting that until 1957, courts were unsure as to whether section 301 constituted substantive law on arbitrability).

[65] Estreicher, *supra* note 23, at 757.

tration decisions.[66] The default rules derived from section 301 represent a federal policy in favor of arbitration.[67]

The U.S. Supreme Court first declared this policy in 1957 in *Textile Workers Union v. Lincoln Mills of Alabama*, holding that federal courts have authority to enforce agreements to arbitrate under section 301.[68] In this case, a union and an employer agreed to arbitrate disputes over the terms of their collective bargaining agreement, but when the union requested arbitration, the employer refused.[69] For the first time, the Court used section 301 to order specific performance, compelling the employer to arbitrate.[70]

The Court reasoned that Congress intended federal courts to fashion a federal substantive law, including the authority to grant injunctive relief.[71] The underlying policy was that parties, without enforceable contract terms, would engage in economic warfare when terms were breached.[72] Alternatively, if both parties could be compelled by court order to honor their agreement, then parties would arbitrate instead of engaging in (or forcing) a work stoppage.[73] Therefore, the Court held that the agreement to arbitrate was the quid pro quo for the no-strike promise.[74]

The federal common law promoted in *Lincoln Mills* firmly inserted courts into the collective bargaining process.[75] Courts were not resolving contract disputes, but they had the authority to stay litigation and

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[66] *See infra* notes 78–90 and accompanying text.

[67] *Lincoln Mills*, 353 U.S. at 455.

[68] *Id.*; *see* Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 171–72 (2008). Nowhere in the case does the Court consider whether this dispute should have been resolved under the FAA. *See* Hayford, *supra* note 24, at 522.

[69] *Lincoln Mills*, 353 U.S. at 449.

[70] *See id.* at 455.

[71] *See id.* at 457; Stone, *supra* note 8, at 163.

[72] *See Lincoln Mills*, 353 U.S. at 454. As the Court inferred, interrupting operations with strikes, boycotts, or lockouts amounts to economic warfare in the workplace. *See id.*

[73] *See id.*

[74] *Id.* at 455. Ordinarily, collective bargaining agreements require unions to sign no-strike provisions, which prohibit unions from striking throughout the term of the agreement. *See* 20 Richard A. Lord, Williston on Contracts § 56:2 (4th ed. 2012). Without the power to strike, unions lack recourse if the employers breach the agreements' terms. *See id.* In exchange for unions' no-strike promises, employers generally agree to resolve disputes in arbitration. Estreicher, *supra* note 23, at 757. Thus, the arbitration clause is the quid pro quo for the agreement not to strike. *Id.*

[75] *See* Stone, *supra* note 8, at 163 (explaining that after *Lincoln Mills*, labor scholars and practitioners expressed fear that increased judicial involvement would disrupt labor relations).

compel arbitration in its place.[76] In June 1960, in what is known today as the *Steelworkers Trilogy*, the U.S. Supreme Court cemented its new role in three notable cases; the Court abandoned its former hostility toward arbitration and instead pronounced arbitration as the favored approach to resolving labor disputes.[77]

In the first *Trilogy* case, *United Steelworkers v. American Manufacturing Co.*, the U.S. Supreme Court held that the agreement to arbitrate applies to all types of grievances—meritorious or not.[78] The Court reasoned that collective bargaining agreements are not "ordinary" contracts.[79] Even if a court would dismiss a contract claim as frivolous, an arbitrator should resolve all claims, frivolous or not, because the parties bargained for this result.[80] The Court also explained that the agreement to arbitrate serves a function beyond dispute resolution; it functions as a "stabilizing influence" in maintaining industrial peace.[81]

In the second *Trilogy* case, *United Steelworkers v. Warrior & Gulf Navigation, Co.*, the Court held that parties should be compelled to arbitrate unless their agreement expressly excludes the dispute at issue.[82] The Court reasoned that questions of arbitrability should be directed to an arbitrator, not to a court, because evaluating these questions requires interpretation of the collective bargaining agreement.[83] Courts' narrow role, under section 301, is to ask whether the refusing party agreed to arbitrate the grievance.[84] Finally, Justice William Douglas, writing for the majority, reaffirmed the federal policy favoring arbitration when stating, "Doubts should be resolved in favor of coverage."[85]

Rounding out the *Trilogy*, in *United Steelworkers v. Enterprise Wheel & Car Corp.*, the U.S. Supreme Court held that courts should not review the merits of an arbitration award.[86] The Court established a deferential principle for judicial review of arbitration awards.[87] So long as the arbitration award "draws its essence from the collective bargaining

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[76] *See Lincoln Mills*, 353 U.S. at 455; LeRoy & Feuille, *supra* note 68, at 177.

[77] *See infra* notes 78–90 and accompanying text.

[78] 363 U.S. 564, 567 (1960).

[79] *See id.*

[80] *Id.* at 568.

[81] *Id.* at 567.

[82] 363 U.S. 574, 582–83 (1960).

[83] *See id.* at 584–85.

[84] *Id.* at 582.

[85] *Id.* at 583.

[86] 363 U.S. 593, 596 (1960). Here, the parties did not expressly exempt their dispute from arbitration, and, therefore, the federal policy favoring arbitration demanded that this ambiguity be resolved in favor of arbitration. *Id.* at 599.

[87] Rubenstein, *supra* note 63, at 259; *see Enterprise Wheel*, 363 U.S. at 596.

agreement," courts should not refuse to enforce it.[88] Further, a court cannot refuse to enforce an award because it finds ambiguities in the rationale underpinning the award.[89] Ultimately, the parties bargained for arbitration, and judges cannot and should not interfere with this agreement because they disagree with an arbitrator's findings.[90]

The *Steelworkers Trilogy* recognized that industrial peace is best accomplished when unions and employers engage in self-governance.[91] In particular, within a collective bargaining agreement, parties can agree to a no-strike clause in exchange for the right to arbitrate disputes.[92] The *Trilogy* stands for three propositions: (1) an agreement to arbitrate is binding irrespective of the validity of the claim; (2) ambiguities in a collective bargaining agreement should be resolved in favor of arbitration; and (3) once the arbitrator makes an award, judges cannot refuse to enforce it because they disagree with the terms.[93] The ultimate justification for such deference flows from the notion that a collective bargaining agreement is different than other types of contracts.[94] Courts defer to labor arbitration because the purpose of collective bargaining is to stabilize the workplace by preventing work stoppages; the other form of arbitration, commercial arbitration, serves an entirely different purpose—arbitration in place of litigation.[95]

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[88] *Enterprise Wheel*, 363 U.S. at 597.

[89] *Id.* at 598.

[90] *Id.* at 599.

[91] *See id.* at 596; *Warrior & Gulf*, 363 U.S. at 582–83; *Am. Mfg.*, 363 U.S. at 567–58 (describing arbitration's therapeutic value, which contributes to stability in the workplace).

[92] *See Lincoln Mills*, 363 U.S. at 455.

[93] *See Enterprise Wheel*, 363 U.S. at 596 (holding that courts should enforce arbitrators' awards); *Warrior & Gulf*, 363 U.S. at 582–83 (holding that ambiguities should be resolved in favor of arbitration); *Am. Mfg.*, 363 U.S. at 567 (holding that if the parties agreed to arbitration as part of the grievance process, then applicable disputes should be arbitrable regardless of merit).

[94] *See* Malin & Ladenson, *supra* note 32, at 1192. As Professors Martin Malin and Robert Ladenson have explained:

> [T]he relative roles of court and arbitrator articulated in *The Trilogy* result from the recognition that grievance arbitration is not comparable to litigation of traditional contract rights, but is a part of the collective bargaining process that governs the workplace. . . . Although the collective bargaining agreement is judicially enforceable, labor arbitration does not function primarily as a litigation alternative. Instead, arbitration is an alternative to the strike.

Id.

[95] *See id.*

B. *History of Commercial Arbitration*

Commercial arbitration refers to private dispute resolution for consumers, companies, employers, and nonunionized employees.[96] Traditionally, commercial arbitration served businesspeople (mostly merchants) who voluntarily agreed by contract to arbitrate future disagreements as opposed to seeking review through the courts.[97] Businesspeople preferred arbitration for similar reasons as unions and management.[98] Parties tailored proceedings by selecting the arbitrator, avoided rigid court processes, and managed the speed and privacy of dispute resolution.[99]

Through the 1800s, courts responded to commercial arbitration agreements with hostility, similar to that seen in the labor context.[100] Accordingly, courts often permitted parties to revoke their contractual agreements and bring their disputes to court.[101] By the early 1900s, the business community pushed back on judicial hostility by supporting legislation that recognized arbitration agreements as binding, legitimate contracts.[102] In 1920, New York passed America's first arbitration statute, titled the Arbitration Law of the State of New York, which mandated that New York state courts honor arbitration clauses.[103] After the Supreme Court upheld the New York Act as constitutional, businesspeople in interstate commerce followed suit, urging federal legislators to pass a comparable national statute.[104] As a result of these efforts, Congress enacted the FAA in 1925.[105]

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[96] *See* Menkel-Meadow, *supra* note 6, at 950.

[97] *Id.*

[98] *See supra* notes 32–37 and accompanying text.

[99] Buchele & Rute, *supra* note 18, at 37.

[100] *Id.*; *see* Ins. Co. v. Morse, 87 U.S. 445, 450 (1874) (holding that a person cannot contract away his rights and the adjudication of those rights in court).

[101] *See* Malin & Ladenson, *supra* note 32, at 1191 (explaining that state courts would find agreements to arbitrate unenforceable, review arbitration award findings, and make determinations on the merits of cases). Malin and Ladenson further state, "The initial judicial reaction to grievance arbitration was hostile because the courts regarded it as substituting a private adjudicator for a court in the determination of contract rights." *Id.*

[102] *See* Cohen, *supra* note 34, at 147–49. In 1914, the New York Bar Association formalized a committee with the intention of dispensing of "unnecessary litigation." *See id.* at 147–48.

[103] Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803 (codified as amended at N.Y. C.P.L.R. 7501–7514 (McKinney 2011)); *see* Cohen, *supra* note 34, at 148.

[104] *See* Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 124 (1924) (holding that New York State had the authority to compel specific performance of an agreement to arbitrate); Buchele & Rute, *supra* note 18, at 37.

[105] *See* 9 U.S.C. §§ 1–16 (2006).

The FAA represented a departure from common law—no longer could courts oust an arbitrator's jurisdiction when parties voluntarily selected to arbitrate their disputes.[106] Section 2 of the FAA prominently reflects this shift, stating that maritime and commercial contracts that refer controversies to arbitration shall be "valid, irrevocable, and enforceable."[107] Accordingly, such a contract was deemed lawful and not against public policy.[108] To enforce the Act, section 4 grants courts jurisdiction to compel arbitration where parties have refused, neglected, or failed to honor their valid contracts to arbitrate.[109] Essentially, the judge or jury's function is to determine whether the parties made the agreement to arbitrate; if they did, the court must order the controversy to its intended venue—arbitration.[110] Despite the FAA's succinct language, since its passage, courts have struggled to define the relationship between private arbitration and public adjudication.[111]

Arguably, the 1925 Congress enacted the FAA for the narrow purpose of making arbitration agreements enforceable in federal courts.[112] The Act established simple procedural guidelines for enforcement so that court involvement would not interfere with expeditious resolution.[113] The limited Act would not preempt state contract laws and it would only apply to agreements between similarly situated commercial parties over factual or simple legal disputes.[114] Questions of enforceability in federal court would turn on whether the individual parties

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[106] *See* Carbonneau, *supra* note 44, at 268–69 & n.23 (describing a 1924 congressional debate in which U.S. Representative George Graham of Pennsylvania portrayed the FAA as simply requiring courts to enforce valid agreements to arbitrate). *See generally* Cohen, *supra* note 34 (discussing U.S. courts' attempt to depart from the influences of English arbitration law in order to accommodate changing business needs).

[107] 9 U.S.C. § 2; *see* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 Clev. St. L. Rev. 233, 247 (2008).

[108] *See* Carbonneau, *supra* note 107, at 247.

[109] *See* 9 U.S.C. § 4.

[110] *See* Carbonneau, *supra* note 107, at 249.

[111] *See* Margaret M. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 111–12 (2006) (providing an overview of the procedural history of the FAA's enactment).

[112] *Id.* at 112. Moses argued, based on an analysis of the legislative history of the FAA, that, "The FAA was a bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength to questions arising out of their daily relations. The bill was not the result of trade-offs or strategic compromises because it was essentially unopposed." *Id.* at 111–12.

[113] *Id.* at 111.

[114] *Id.* at 112 (arguing that the principal drafter of the FAA, Julius Cohen, believed that arbitration was an improper forum for resolving statutory and constitutional questions).

consented to the agreement to arbitrate.[115] The underlying policy of a limited FAA was to offer parties a swift alternative to litigation.[116] For the first forty years of FAA jurisprudence, courts adopted this narrow view of the Act.[117]

Early FAA case law suggests that courts distrusted arbitration as a fair alternative to judicial review.[118] In 1953, in *Wilko v. Swan*, the U.S. Supreme Court held that a buyer's suit under the Securities Act of 1933 against a seller for misrepresentation could be adjudicated in court despite an arbitration agreement.[119] The Court reasoned that Congress passed the Securities Act to protect buyers in securities exchanges, granting them the unwaivable right to judicial review.[120] Interpreting the rights afforded under the Securities Act required legal training that arbitrators lacked.[121] Therefore, the Court held that only judges were equipped to adjudicate this type of consumer dispute fairly.[122]

Three years later, in the 1956 case, *Bernhardt v. Polygraphic Co. of America*, the U.S. Supreme Court again limited the application of the FAA, holding that the Act did not cover employment contracts where performance involved purely intrastate commercial activity, as was the case here.[123] Even though the parties were in federal court based on diversity jurisdiction, state law controlled in this case because the dispute was exempt from the FAA.[124] Yet, in dicta, the Court reasoned that in other diversity cases not exempt from the FAA, state arbitration laws should control.[125] Following the directives of the *Erie* doctrine, the

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[115] *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 653 (1996).

[116] *See* Moses, *supra* note 111, at 111–12.

[117] *See* Sternlight, *supra* note 115, at 649–50. Sternlight argues that from 1925 to 1959, courts overwhelming assumed that the FAA was a federal procedural source of law that governed only in federal courts. *See id.* at 650.

[118] *See, e.g.*, Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956); Wilko v. Swan, 346 U.S. 427, 434–35 (1953); *see also* Carbonneau, *supra* note 107, at 244 (arguing that courts presumed that arbitration was a "bastardized form of adjudication").

[119] 346 U.S. at 434–35.

[120] *Id.* at 435.

[121] *Id.* at 436.

[122] *Id.* at 437.

[123] *See* 350 U.S. at 200–01; *see also* 9 U.S.C. § 2 (2006) (limiting the Act to contracts for transactions in interstate commerce).

[124] *See Bernhardt*, 350 U.S. at 200–01.

[125] *See id.* at 203–04. In *Bernhardt*, the plaintiff was a citizen of Vermont and was to perform the contract in Vermont, whereas the defendant was a corporate citizen of New York. *Id.* at 199. Under Vermont law, the arbitration agreement was revocable, whereas under the FAA, the parties would have been bound by the agreement. *Id.* at 203–04 ("If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the court-house where suit is brought.").

Court explained that the outcome of litigation should be uniform between state and federal courts.[126] Because the decision to compel arbitration is outcome determinative, state law should control.[127]

Controversy surrounding the FAA remained mostly dormant from 1956 until 1967.[128] During this period, courts presumed that the FAA was a procedural statute governing only federal courts.[129] State statutes enacted before and after the passage of the FAA governed disputes over the enforceability of arbitration agreements, regardless of whether the parties appeared in state or federal court.[130]

In 1967, however, the Supreme Court radically departed from this doctrine, issuing its first of several opinions that broadened the scope of the FAA.[131] In a split decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court held that federal courts could compel arbitration under the FAA, even in cases of diversity jurisdiction.[132] Here, parties from different states entered into a contract, and within a month a dispute arose.[133] Prima Paint refused to arbitrate, and instead filed a court claim seeking rescission of the entire agreement.[134] The Court declined to review the case on its merits, holding that the FAA directed that this dispute be resolved in arbitration.[135] The Court reasoned that Congress exercised its legitimate legislative authority when compelling federal courts to order arbitration in cases involving transactions in interstate commerce.[136] Accordingly, this decision represented a stark departure from the *Bernhardt* Court's position that compelling arbitration under the FAA would produce different outcomes than if state laws con-

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[126] *Id.* at 202–04 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)); s*ee Erie*, 304 U.S. at 78–79 (holding that federal courts can only prescribe procedural rules in federal courts, but they cannot intrude on states' substantive laws because outcomes should not vary depending on venue).

[127] *See Bernhardt*, 350 U.S. at 203; *id.* at 208 (Frankfurter, J., concurring); Moses, *supra* note 111, at 115–16.

[128] *See* Sternlight, *supra* note 115, at 650, 656.

[129] *See id.* at 649–50 & nn.61–62.

[130] *See id.*

[131] *See id.* at 656–57.

[132] 388 U.S. 395, 405 (1967). Justice Abe Fortas stated that the question in this case was not whether Congress could trump state substantive laws, but rather whether, "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative." *Id.*

[133] *Id.* at 398.

[134] *Id.*

[135] *See id.* at 401, 405.

[136] *Id.* at 405.

trolled.[137] In effect, the *Prima Paint* decision suggested that the FAA was not simply a procedural law, but a substantive law as well.[138]

As Justice Hugo Black feared in his *Prima Paint* dissent, the Court would eventually fashion a federal substantive law that removed states' traditional power to interpret contracts made in their territories.[139] In three notable cases, known today as the "commercial arbitration trilogy," Justice Black's fears were fully realized.[140] Here, the Court reproduced the policy favoring arbitration originally announced in the labor arbitration cases.[141]

In 1983, in the first trilogy case, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the U.S. Supreme Court redefined decades-old perceptions of arbitrability.[142] Justice William Brennan in an oft-cited remark, declared, "Section 2 is a congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[143] Section 2 effectively established a body of federal substantive law of arbitrability governing all arbitration agreements covered under the Act.[144] Thus, the Court announced a public policy favoring arbitration, regardless of the intentions of a contract's signatories.[145]

A year later, in the 1984 case, *Southland Corp. v. Keating*, the U.S. Supreme Court formally declared the supremacy of the FAA over state arbitration laws.[146] Any state provision which required court review in conflict with the FAA was preempted, regardless of whether the claim

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[137] Moses, *supra* note 111, at 116–22 (explaining, in detail, the consequences of applying the FAA in diversity matters); *see Bernhardt*, 350 U.S. at 203–04. Had *Prima Paint* been resolved under New York law, it likely would have resulted in a different outcome because claims of fraud were usually resolved in court, not arbitration. Moses, *supra* note 111, at 116.

[138] *See* Moses, *supra* note 111, at 120–21.

[139] *See Prima Paint*, 388 U.S. at 422 (Black, J., dissenting).

[140] *See Mitsubishi*, 473 U.S. at 626 (holding that the FAA preempts states' arbitration laws); Southland Corp. v. Keating, 465 U.S. 1, 14–15 (1984) (holding that statutory rights are arbitrable); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (holding that doubts concerning arbitrability should be resolved in favor of coverage).

[141] *See* Stone, *supra* note 8, at 188.

[142] *See Moses H. Cone*, 460 U.S. at 24 (holding that section 2 of the FAA created a federal substantive law that governs all contracts covered under the Act).

[143] *Id.*

[144] *Id.* Justice Brennan further explained that questions concerning the scope of arbitration agreements should be resolved in favor of arbitration. *Id.* at 24–25. Arbitrators, not judges, should decide questions of contract construction and defenses against arbitrability, such as waiver. *Id.*

[145] *See id.* at 24–25; Sternlight, *supra* note 115, at 660.

[146] *See Southland*, 465 U.S. at 14.

was brought in state or federal court.[147] As long as the contract referred to interstate commerce, the Court reasoned that Congress had intended the FAA to uniformly cover the contract's arbitration agreement.[148] According to the Court, this most effectively served the intent of the FAA's framers.[149]

In 1985, the U.S. Supreme Court rounded out the trilogy in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.*[150] Here, the Court extended the federal policy favoring arbitration beyond the context of purely contractual disputes.[151] Now, disputes over statutory rights would be sent to arbitration upon a finding of a valid agreement to arbitrate.[152] Justice Harold Blackmun stated that this favorable policy, in part, derived from a comparable labor arbitration policy.[153] The policy was fair because parties compelled to arbitrate did not surrender their rights; instead, they only surrendered a judicial forum for resolution.[154] Thus, the commercial arbitration trilogy is known for formalizing the federal policy favoring arbitration.[155]

In sum, the history of labor and commercial arbitration shows that labor arbitration significantly influenced the development of commercial arbitration.[156] And for years each evolved along parallel tracks.[157] First, courts equally distrusted labor and commercial arbitration as an

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[147] *See id.* 14–15; Hayford, *supra* note 24, at 534. Professor Stephen Hayford posited that the FAA construction broadened because:

> The Court identified two problems enactment of the FAA was intended to resolve: (i) the old common law hostility toward arbitration; and (ii) the failure of state arbitration acts to require the enforcement of contractual agreements to arbitrate. It then opined that confining the reach of the substantive law created by the FAA to the federal courts would frustrate the intent of Congress to fashion a statutory scheme that would ameliorate those two significant problems.

Hayford, *supra* note 24, at 534.

[148] *See Southland*, 465 U.S. at 12–14; Moses, *supra* note 111, at 125–26.

[149] *See Southland*, 465 U.S. at 14.

[150] *See Mitsubishi*, 473 U.S. at 626.

[151] *See id.* (holding that the FAA permits courts to compel arbitration for statutory claims, and demonstrating the Court's preference for arbitral resolution of statutory rights disputes where the parties signed valid arbitration agreements).

[152] *See id.*

[153] *See id.* (citing *Warrior & Gulf*, a case resolving a question of arbitrability from a collective bargaining agreement in favor of arbitration).

[154] *See id.* at 628.

[155] *See* Hayford, *supra* note 24, at 540 (recognizing that in each of the trilogy cases, the Court began its analysis by citing the "liberal, pro-arbitration policy set out in the FAA").

[156] *See* Stone, *supra* note 8, at 188.

[157] *See supra* notes 32–155 and accompanying text.

adequate substitution for court proceedings.[158] Then, the 1967 *Steelworkers Trilogy* legitimized labor arbitration by giving unions and management legal recourse to enforce the terms of their collective bargaining agreements.[159] Seeing this success, parties to other types of contracts sought comparable relief from courts under the FAA.[160] The success of labor arbitration led courts to treat commercial arbitration more favorably.[161] Although treated similarly, labor and commercial arbitration serve different purposes.[162]

II. The Distinct Policies Supporting Labor and Commercial Arbitration

Certainly, a strong federal policy favoring arbitration exists in both the labor and commercial contexts.[163] Yet, the policies supporting labor and commercial arbitration differ dramatically.[164] The effect of these differences is especially evident when comparing arbitration for unionized workers (subject to labor arbitration) to that of nonunionized workers (subject to commercial arbitration).[165] Three policies underscore labor arbitration: (1) arbitration agreements support industrial peace; (2) the NLRA supports self-governance, leaving a limited role for judicial review; and (3) the unique characteristics of labor arbitration protect workers' rights.[166] In comparison, only one policy justification supports commercial arbitration: encouraging swifter resolution to

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[158] *See* Carbonneau, *supra* note 44, at 266 & n.15.

[159] Malin & Ladenson, *supra* note 32, at 1191.

[160] *See* Stone, *supra* note 8, at 188 (describing the Court's application of labor arbitration standards to the commercial arbitration context).

[161] *Id.*

[162] *See infra* notes 163–241 and accompanying text.

[163] *See* Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in* 14 Penn Plaza v. Pyett, 14 Lewis & Clark L. Rev. 825, 842–45 (2010). The Court's policy toward arbitration of statutory claims has shifted from caution to unwavering receptivity. *See id.* at 842–43.

[164] *See* Malin & Ladenson, *supra* note 32, at 1192 (identifying the unique features of labor arbitration).

[165] *See infra* notes 169–241 and accompanying text.

[166] *See* Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 Cath. U. L. Rev. 919, 924–25 (1998) (commenting on the policy supporting self-governance); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 916 (1979) (listing finality, obedience, guidance, efficiency, availability, neutrality, conflict redaction, and fairness as the key tenets of labor arbitration); Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal and Labor Arbitration Laws*, 63 S.C. L. Rev. 43, 95 (2011) (recognizing the goal of industrial peace).

contractual disputes in place of litigation.[167] These policies are not interchangeable.[168]

First, labor arbitration agreements support industrial peace because such agreements force parties to privately grieve work disputes instead of engaging in work stoppages.[169] To justify this conclusion, the U.S. Supreme Court in 1957 in *Textile Workers Union v. Lincoln Mills of Alabama*, interpreted section 301 of the LMRA generously since the law makes no reference to arbitration.[170] Justice William Douglas, in *Lincoln Mills*, justified the creation of a federal common law as necessary because, "The legislative history of § 301 is somewhat cloudy and confusing," and therefore, "judicial inventiveness" is warranted in fashioning a national labor policy.[171] The Court reasoned that labor law generally was meant to support workplace stability.[172] In practice, if a union strikes instead of arbitrating a dispute, it can be enjoined from continuing under section 301, which effectively diminishes the power of the strike as an economic weapon.[173] Therefore, with the threat of injunction, parties to a collective bargaining agreement are encouraged to honor the terms of their agreement.[174]

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[167] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (1983); Gelernter, *supra* note 27, at 15.

[168] Getman, *supra* note 166, at 917. To assume that the policies supporting labor arbitration translate to the commercial arbitration context "overlooks the idiosyncratic nature of labor arbitration and its crucial interrelationship with unionization and collective bargaining." *Id.* In 1997, Judge Harry Edwards, a prominent labor scholar, writing for the U.S. Court of Appeals for the D.C. Circuit in *Cole v. Burns International Security Services*, passionately argued that commercial and labor arbitration serve different goals and that the distinct areas of law should not merge. *See* 105 F.3d 1465, 1473–78. (D.C. Cir. 1997).

[169] Corrada, *supra* note 166, at 923.

[170] 353 U.S. 448, 449–50 (1957); *see* Hayford, *supra* note 9, at 791.

[171] *Lincoln Mills*, 353 U.S. at 452–54, 457.

[172] *See id.* at 453–54. Justice Douglas stated in reviewing the legislative history:

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Id. at 454.

[173] *See* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 248 (1970) (holding that courts can issue an "immediate halt" to a strike if it is in violation of an agreement to arbitrate).

[174] *See id.* at 248–49.

Second, the NLRA created a mechanism of self-governance in labor relations, whereby unions and management create legal obligations absent court oversight.[175] The parties require limited judicial review, in part, because the collective bargaining agreement differs from an ordinary contract.[176] A collective bargaining agreement reflects collective compromises by workers' union representatives and by management over terms and conditions for a period of time.[177] The document serves as a "generalized code" rather than an outline of specific provisions for potential conflicts, meaning that it is a "common law of a particular industry or of a particular plant."[178]

Under the mandates of the NLRA, unions and employers must bargain to impasse over the terms and conditions of employment.[179] Because the two parties have opposing objectives, it is difficult to draft specific provisions to capture all of the possible conflicts that could arise in the workplace.[180] Instead, the parties create general legal rights within the collective bargaining agreement and usually reserve for the arbitrator the authority to resolve what the language means, in context, as disputes arise.[181] For example, where there is a dispute as to whether an employee was discharged for "just cause," the union can refer the case to arbitration and the arbitrator will interpret the collective bargaining agreement, as well as facts about the history of the union-management relationship, to determine if the discharge was based on "just cause."[182]

Finally, courts recognize labor arbitration as fair to unionized workers because several safeguards protect their interests.[183] The safeguards include the following: (1) unions and management repeatedly

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[175] *See* Corrada, *supra* note 166, at 924.

[176] *See* David L. Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in* NLRB v. Bildisco, 25 B.C. L. Rev. 539, 546 & n.37 (1984) (referencing Supreme Court cases that refer to the collective bargaining agreement as a contract that uniquely governs workplace relations).

[177] Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1000 (1955).

[178] Gregory, *supra* note 176, at 547.

[179] *See* NLRB v. Katz, 369 U.S. 736, 742–43 (1962) (holding that an employer cannot make a unilateral change on a mandatory subject of bargaining without bargaining to impasse with the union).

[180] *See* Getman, *supra* note 166, at 919.

[181] *See id.*

[182] *See* Malin & Ladensen, *supra* note 32, at 1199. The arbitrator can, but is not limited to, consider prior awards between the parties, including past definitions of disputed terms. *See id.*

[183] *See* LeRoy & Feuille, *supra* note 68, at 171–72 (explaining the features of labor arbitration that make it distinct from commercial arbitration).

arbitrate and jointly select the arbitrator; (2) the parties have a duty to share information; and (3) the union owes a duty of fair representation to its workers.[184] These protections are unique to labor arbitration.[185]

First, unions and management are similarly situated when participating in labor arbitration because both parties repeatedly arbitrate workplace disputes.[186] For example, the parties exercise control by jointly selecting the arbitrator who they believe can most fairly meet their expectations.[187] Since the parties repeatedly arbitrate, the arbitrator has an incentive—future employment—to perform consistently without favoring one party over the other.[188] Even though the parties collectively determine the scope of the arbitrator's discretion, the arbitrator may issue an award disliked by both parties.[189] The parties can agree to nullify the award and bargain for a different resolution.[190] In this regard, arbitration represents a more flexible alternative to litigation.[191]

If, however, the parties do not nullify the award, courts tend to refrain from adjusting the award, even where arbitrators interpret the law in error.[192] Limited judicial review is justified because the parties bargained for an arbitrator's resolution of the law.[193] The arbitrator's interpretation of the law, in effect, represents the interpretation of the collective bargaining agreement terms.[194] If the parties want an alternate outcome, they must renegotiate the terms of their agreement.[195] This ongoing capacity to renegotiate expectations by both parties distinguishes labor arbitration from commercial arbitration, which usually allows for a one-time negotiation.[196]

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[184] *See infra* notes 186–211 and accompanying text.

[185] *See* Getman, *supra* note 166, at 916 (providing a list of advantages that apply specifically to labor arbitration).

[186] *See* Ann C. Hodges, *Fallout from* 14 Penn Plaza v. Pyett: *Fractured Arbitration Systems in the Unionized Workplace*, 2010 J. Disp. Resol. 19, 41.

[187] *See* Albert Y. Kim, Comment, *Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations*, 65 U. Chi. L. Rev. 225, 243–44 (1998).

[188] *See* Malin & Ladensen, *supra* note 32, at 1198–99.

[189] *See id.* at 1198.

[190] *See id.*

[191] *See id.*

[192] *See* Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 789 F.2d 1, 6–7 (2d Cir. 1986); Malin & Ladensen, *supra* note 32, at 1196.

[193] *See Am. Postal Workers Union*, 789 F.2d at 6.

[194] *See id.*

[195] *See id.* at 6–7.

[196] *See* Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 Comp. Lab. L. & Pol'y J. 313, 330 (2007) ("It

Second, the NLRA imposes upon employers the duty to share information throughout the arbitration process.[197] For example, a union may need to see a company's accounting figures to determine if a discharge was based on financial need or some other impermissible reason.[198] Only when the company furnishes the union with relevant information to handle disputes can the union fulfill its duty of fair representation on behalf of its members.[199] By comparison, nonunionized workers do not possess the same right to information, meaning that an employer owes its nonunion employees no access to evidence in the arbitration process.[200] Proving wrongdoing, then, can be nearly impossible, particularly in an arbitration setting in which limited discovery occurs.[201] In sum, the worker fairs better in labor arbitration compared to commercial arbitration because the parties share information in labor arbitration proceedings.[202]

Third and finally, unionized workers possess a unique defense mechanism against their union, known as the duty of fair representation.[203] Under the duty of fair representation, workers can hold their union accountable throughout the arbitration process, ensuring that their dispute is handled fairly.[204] A union may violate its duty by acting in an arbitrary, discriminatory, or bad-faith manner.[205] If a breach occurs, a union member can assert a claim, under section 301, against the

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has long been known in the legal literature that, when one side to a controversy is a repeat player and the other side is a 'one-shot player,' the law evolves to inefficient rules that favor the repeat player.").

[197] *See* 29 U.S.C. § 158(a)(5) (2006); NLRB v. Acme Indus. Co., 385 U.S. 432, 435–36 (1967).

[198] *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152–53 (1956) (holding that the collective bargaining process requires employers to substantiate economic positions with proof).

[199] *See Acme Indus. Co.*, 385 U.S. at 435–36.

[200] *See* Martin H. Malin, *Privatizing Justice—But by How Much? Questions* Gilmer *Did Not Answer*, 16 Ohio St. J. on Disp. Resol. 589, 594 (2001) (commenting on the limitations of inadequate discovery).

[201] *See* Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 Seton Hall L. Rev. 147, 182–83 (2010) ("[A] party making a complex statutory claim is likely to have greater difficulty proving its case in arbitration and therefore will be less able to vindicate the rights Congress intended the law to provide.").

[202] *Compare* Malin, *supra* note 200, at 594 (highlighting the disadvantages inflicted on nonunionized employees in mandatory arbitration), *with Acme Indus. Co.*, 385 U.S. at 435–36 (compelling an employer to share information in arbitration so that the union could effectively meet its duties).

[203] *See* Stone, *supra* note 8, at 186.

[204] *See* Daniel Roy, Note, *Mandatory Arbitration of Statutory Claims in the Union Workplace After* Wright v. Universal Maritime Service Corp., 74 Ind. L.J. 1347, 1350–51 (1999).

[205] *See* Vaca v. Sipes, 386 U.S. 171, 190 (1967).

union.[206] The threat of costly litigation means that a union is likely to pursue arbitration when an employee insists on it.[207] Unionized employees subject to mandatory arbitration benefit in two regards: first, the employee is represented in arbitration by a repeat player with significant bargaining power, and second, if his union refuses to pursue a meritorious claim, the employee can seek relief in court.[208]

The three policies described above suggest that courts historically consider labor arbitration to be a fair and effective alternative to litigation.[209] Labor arbitration is fair to workers because their representative, the union, bargains on their behalf when forming the arbitration agreement and throughout arbitration proceedings.[210] The deference courts afford to labor arbitration, however, should not be duplicated in the nonunion, commercial arbitration setting.[211]

Arbitration for nonunionized workers, known as employment arbitration, is a sub-category of commercial arbitration governed by the FAA.[212] Even though nonunionized employees can be compelled to arbitrate disputes, they lack many of the protections held by unionized workers.[213] Most nonunionized employees possess minimal bargaining power when drafting pre-dispute agreements to arbitrate.[214] Critics of nonunion arbitration suggest that employees, either longstanding or prospective, usually sign arbitration agreements within adhesion contracts as a condition of employment.[215] The employee has little capacity to bargain for an alternative forum for dispute resolution when the employment contract is presented in a take-it-or-leave-it fashion.[216] Instead, the nonunion employee is encouraged to remain quiet or face

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[206] *See id.* at 191, 193.

[207] *See* Roy, *supra* note 204, at 1368.

[208] *See* Hodges, *supra* note 186, at 41 (repeat representation); Roy, *supra* note 204, at 1368 (court relief).

[209] *See* Corrada, *supra* note 166, at 924–25; *supra* notes 169–208 and accompanying text.

[210] *See* Roy, *supra* note 204, at 1350–51.

[211] *See* Getman, *supra* note 166, at 937–38 (arguing that the principles of labor arbitration are unique to the collective bargaining process).

[212] *Cf.* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 35 (1991) (holding that the FAA directed a nonunionized employee to arbitrate his age discrimination claim).

[213] *Cole*, 105 F.3d at 1473.

[214] *See* Dau-Schmidt & Haley, *supra* note 196, at 329. There is a distinct difference between pre-dispute and post-dispute agreements to arbitrate. *See* Malin, *supra* note 200, at 595. In a post-dispute setting, the terms are usually fairer because the parties together determined that arbitration represented a more effective alternative to litigation. *See id.*

[215] *See* Malin, *supra* note 200, at 596.

[216] *See id.*; Roy, *supra* note 204, at 1359–60.

discharge for refusing to participate in the agreement.[217] This threat is meaningful in the nonunion, at-will system—a system that permits discharge for any reason at any time.[218]

Once the commercial arbitration process commences, the employer has significant advantages over the nonunionized employee.[219] For example, the employer, as a repeat player in arbitration, usually pays for and selects the arbitrator handling the dispute.[220] Arbitrators may, consciously or not, be biased toward the employer with the intention of securing ongoing work.[221] This effect would be particularly pronounced when working for a large employer.[222]

Finally, both labor and commercial arbitrators have the authority to resolve the disputes before them without adhering to formal litigation procedures.[223] Parties to a labor arbitration benefit from this authority because the arbitrator is uniquely familiar with their workplace, whereas parties to a commercial arbitration benefit from this authority merely because arbitration is more expeditious than litigation.[224] In 1960, the U.S. Supreme Court in *United Steelworkers v. Warrior & Gulf Navigation, Co.* indicated that an arbitrator's interpretation in the labor setting is unique because the arbitrator is eschewing a common law of the shop.[225] The parties bargained for the specialized knowledge of an arbitrator familiar with the unique features of that particular workplace.[226] Importantly, Justice Douglas emphasized that the labor arbi-

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[217] *See* Malin, *supra* note 200, at 596 n.40 (referring to court-enforced agreements to arbitrate against longstanding employees regardless of whether the employee wanted the agreement or had the capacity to bargain for an alternate outcome).

[218] *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 Cornell L. Rev. 105, 106–07 (1997) (defining at-will employment as a system in which an employee can be discharged without notice and without good cause).

[219] *See* Malin, *supra* note 200, at 595.

[220] *See id.*

[221] *See id.*

[222] *See* Katherine V.W. Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017, 1040 (1996)(explaining that there is little data available on arbitration outcomes because of its private nature, but that anecdotally it has been confirmed that employers fair better than nonunionized employees in arbitration).

[223] *See* Dau-Schmidt & Haley, *supra* note 196, at 329.

[224] Gelernter, *supra* note 27, at 17 ("Whereas the Court considers commercial arbitrators to be equivalent to judges for contractual disputes, it considers labor arbitrators to be superior to judges in deciding labor disputes." (emphasis omitted)).

[225] *See* 363 U.S. 574, 579 (1960).

[226] *See id.* at 581. Justice Douglas reasoned, "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." *Id.* In addition, in *Cole*, Judge Ed-

trator is not fashioning an opinion that affects any "community which transcends the parties."[227] To this end, the labor arbitrator is better equipped than a judge to interpret the parties' dispute over a term in their collective bargaining agreement because he is part of the ongoing system of workplace governance.[228]

By comparison, the Court has indicated that arbitrators in the *commercial* setting do not interpret disputes better than judges; rather, arbitrators can be "just as good as" the judge.[229] The Supreme Court, in its commercial arbitration trilogy, stated that commercial arbitration represents an alternative to litigation.[230] The Court presumed that parties do not forfeit their substantive rights in commercial arbitration; instead, parties substitute the forum to secure a quicker, less costly resolution.[231] The Court approved of commercial arbitration as an equal, but not better, substitute for dispute resolution.[232]

The federal policy in favor of arbitration recognizes that arbitration is a swifter alternative to litigation.[233] The process is more expeditious for three reasons.[234] First, a court has a narrow role when reviewing an arbitration agreement; if the parties agree to arbitrate, the court honors this commitment and sends the dispute to arbitration, regardless of the claim's merit.[235] When a court refrains from a substantive review of a dispute, the parties can reach a resolution more cheaply and efficiently.[236] Second, the process is more expeditious because the parties select rules for discovery and evidence.[237] Third, arbitrators are not bound by legal precedent and they do not need to apply legal stan-

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wards referred to the labor arbitrator as the parties' "alter ego," meaning he bargains for agreements that were unresolved or unanticipated when the collective bargaining agreement was formed. *See* 105 F.3d at 1474–75.

[227] *See Warrior & Gulf*, 363 U.S. at 581.

[228] *See* Gelernter, *supra* note 27, at 10–11.

[229] *Id.* at 16.

[230] *See* Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628 (1985).

[231] *See id.*

[232] *See* Gelernter, *supra* note 27, at 17.

[233] *See Gilmer*, 500 U.S. at 31; Stone, *supra* note 8, at 188.

[234] *See infra* notes 235–241 and accompanying text.

[235] *See* Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010) (limiting judicial review of a contract to the arbitration agreement clause only, and sending all other disputes arising out of the contract to an arbitrator).

[236] *See* Malin & Ladensen, *supra* note 32, at 1192 (recognizing speed and efficiency as systemic advantages, but not the primary justification for court deference).

[237] *See Gilmer*, 500 U.S. at 31 (noting that parties may trade robust court procedures for the simplicity and informality of arbitration).

dards comprehensively in resolving disputes.[238] With more liberal proceedings in place, parties escape the formalities of court.[239] Yet, as the formalities subside, so too do many of the protections.[240] In sum, courts' deferential position toward labor and commercial arbitration derives from distinctly different justifications.[241]

III. The FAA and Section 301 Merge: The Collision and Consequences

Although commercial and labor arbitration have distinct histories, at present, labor arbitration law seems to be merging with commercial arbitration law.[242] This merger is significant because the U.S. Supreme Court's deference toward arbitration under the FAA continues to grow.[243] The Court has justified the FAA expansion by regularly citing to the federal policy in favor of arbitration.[244] As its affection for the FAA has expanded, section 301 labor arbitration jurisprudence has faded from the Court's radar.[245] In fact, the most recent arbitration disputes before the Court pertained to questions under the FAA.[246]

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[238] *See* Moses, *supra* note 201, at 182.

[239] *See* David M. Kinnecome, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B.U. L. Rev. 745, 761–62 (1999).

[240] *Id.*

[241] *See* Gelernter, *supra* note 27, at 18–19.

[242] *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 266 (2009) (resolving a labor arbitration dispute under the FAA and not section 301); Hayford, *supra* note 9, at 783.

[243] Horton, *supra* note 5, at 13. For instance, the Act initially covered merchants' agreements, and today the FAA covers consumer and employment arbitration agreements as well. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (holding that the FAA applies to employment contracts); Horton, *supra* note 5, at 13.

[244] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1985).

[245] *See* Stone, *supra* note 8, at 189 (stating that labor arbitration has diminished because of the weakening status of unionism, whereas commercial arbitration has continued to expand since the 1980s).

[246] *See, e.g.*, *Concepcion*, 131 S. Ct. at 1753 (holding that contract defenses that limit the purposes of the FAA cannot be used to challenge an arbitration agreement); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010) (limiting a party's capacity to challenge an arbitration agreement as unconscionable to challenges directed at the delegation clause only); *Adams*, 532 U.S. at 109 (holding that employment contracts are included within the FAA); *Gilmer*, 500 U.S. at 26 (holding that individual employees can be compelled to arbitrate statutory claims); *see also* Stone, *supra* note 222, 1019–20 (recognizing that lower courts are resolving union and nonunion arbitrability questions under the FAA).

This Part addresses the merger of section 301 (the statute governing labor arbitration) with the FAA (the statute governing commercial arbitration).[247] Section A traces case law leading to the convergence of the FAA and section 301.[248] Section B then introduces the 2011 U.S. Supreme Court decision, *AT&T Mobility LLC v. Concepcion*, which begins to unpack the consequences of such a merger.[249] Exploring the similarities and differences of the arbitration acts provides a basis for arguing, in Part IV, that employees are worse off under a merged system.[250]

A. *The FAA and Section 301 Merge*

The merger story begins with the Supreme Court's consideration of whether employees, subject to valid arbitration agreements, can be compelled to arbitrate their statutory claims in addition to any contractual claims.[251] If answered affirmatively, this means that employees who allege that their employer violated their statutory rights (such as the Title VII right to be free from discrimination in the workplace) must submit their claims to an arbitrator.[252] The Court's answer to this question departed from its past jurisprudence.[253] For decades, changes in commercial arbitration law evolved after similar changes occurred in labor arbitration law.[254] Yet, on the question of the arbitrability of statutory claims, the Court first adopted a rule in the commercial context, and then applied the same reasoning to the labor context.[255]

Stopping here, this story sounds less like a merger and more like the Court reversed paths and decided that FAA jurisprudence should

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[247] *See infra* notes 248–320 and accompanying text.

[248] *See infra* notes 251–290 and accompanying text.

[249] *Concepcion*, 131 S. Ct. at 1753; *see infra* notes 291–320 and accompanying text.

[250] *See infra* notes 321–365 and accompanying text.

[251] *Gilmer*, 500 U.S. at 26; *see also* Paul Salvatore & John F. Fullerton, III, *Arbitration of Discrimination Claims in the Union Setting: Revisiting the Tension Between Individual Rights and Collective Representation*, 14 Lab. Law. 129, 129 (1998) (considering whether, after the 1991 Supreme Court case, *Gilmer v. Interstate/Johnson Lane Corp.*, nonunion arbitration rules would control in a comparable labor dispute).

[252] *See, e.g.*, *Gilmer*, 500 U.S. at 23, 26 (determining that the employee's statutory claims under the Age Discrimination Employment Act were arbitrable).

[253] *See* Roy, *supra* note 204, at 1347, 1354.

[254] Stone, *supra* note 8, at 188 (arguing that the *Steelworkers Trilogy* influenced developments in commercial arbitration law).

[255] *See* Stone, *supra* note 8, at 188; Roy, *supra* note 204, at 1347–48. Beginning in 1991, nonunionized employees could be compelled to arbitrate their statutory claims. *Gilmer*, 500 U.S. at 26. Then, in 2009, in *14 Penn Plaza LLC v. Pyett*, the Court extended the rule to the labor context. *Pyett*, 556 U.S. at 266.

guide section 301 jurisprudence.[256] But the story continues.[257] In 2009, in *14 Penn Plaza LLC v. Pyett*, the U.S. Supreme Court took a unforeseen turn: it resolved a labor arbitration dispute using the FAA, without even mentioning section 301.[258]

The *Pyett* decision suggests that a merger between labor arbitration law and commercial arbitration law is well underway.[259] The consequences of this merger, described below, serve as a significant example of how the collective bargaining process can suffer when commercial arbitration policy interferes with the separate and distinct area of labor law policy.[260]

Prior to the 1990s, neither unionized nor nonunionized employees could be compelled to arbitrate their statutory claims.[261] The U.S. Supreme Court first considered whether a union could agree, on behalf of its representatives, to arbitrate rather than litigate a Title VII (statutory) claim in the 1974 case, *Alexander v. Gardner-Denver Co.*[262] There, the Court firmly stated that unions could not waive an individual's right to judicial review of a discrimination claim, in spite of an arbitration agreement.[263] Unions lacked authority, in part, because arbitration proceedings were meant to resolve only *contractual* disputes.[264] The arbitrator, as a referee, understood the inner workings of a particular industry, but was not a decisionmaker equipped to interpret statutes.[265] The arbitrator's function, then, was limited to interpreting the collective bargaining agreement, not issuing, "his own brand of industrial justice."[266]

The reasoning advanced in *Alexander* fell on deaf ears when the U.S. Supreme Court held in the 1991 case, *Gilmer v. Interstate/Johnson Lane Co.*, that nonunionized employees could waive their right to judicial review of statutory claims if they signed valid agreements to arbi-

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[256] *See supra* note 246 and accompanying text (tracing courts' growing deference toward the FAA as it applies to the union and nonunion setting).

[257] *See infra* note 258 and accompanying text.

[258] *See Pyett*, 556 U.S. at 251; Seth Galanter & Jeremy M. McLaughlin, *Does the Supreme Court Decision in* 14 Penn Plaza *Augur the Unification of the FAA and Labor Arbitration Law*, Disp. Resol. J., May–July 2009, at 56, 56.

[259] *Pyett*, 556 U.S. at 266.

[260] *See infra* notes 291–365 and accompanying text.

[261] *See* Roy, *supra* note 204, 1347–48.

[262] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974).

[263] *Id.*

[264] *See id.* at 56.

[265] *Id.* at 57.

[266] *Id.* at 53 (*quoting* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

trate.[267] The Court concluded that statutory claims were arbitrable absent a showing that Congress expressly intended to exclude the claim from arbitration.[268] By describing the agreement to arbitrate as a contractual right afforded to the individual employee, the Court reframed arbitrability as a privilege.[269] Concerns over parties' unequal bargaining power and the possible incompetence of an arbitrator adjudicating public laws were dismissed with limited explanation.[270] Instead, the Court reasoned that arbitration agreements were like any other contract, and nothing in the law requires that parties possess equal bargaining power when forming a contract.[271] Additionally, the Court differentiated *Gilmer* from *Alexander*, noting that the *Gilmer* dispute arose under the FAA, whereas *Alexander* was governed by section 301.[272] Further, the Court confirmed that the FAA should be read with a "healthy regard for the federal policy favoring arbitration."[273] This federal policy, though, grew out of the labor law *Steelworkers Trilogy*.[274]

The Court's holding in *Gilmer*—that arbitration proceedings could effectively serve the broader social purposes associated with statutory rights even though the proceedings are private—has been fiercely criticized.[275] For example, employer misconduct goes unreported because the proceedings are conducted in private.[276] Arbitrators are not required to produce written opinions, and even where written opinions are prepared, they need not reflect the arbitrator's interpretation of the law.[277] Further, confidentiality provisions prevent arbitration awards

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[267] *See Gilmer*, 500 U.S. at 26.

[268] *See id.*

[269] *See id.* at 29. This reframing began several years earlier, in the 1989 U.S. Supreme Court case, *Rodriguez de Quijas v. Shearson/Am. Express, Inc. See* 490 U.S. 477, 481 (1989) ("Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features [that prohibit a waiver of judicial review.]").

[270] *See Gilmer*, 500 U.S. at 30, 32–33.

[271] *See id.* at 33.

[272] *See id.* at 35.

[273] *Id.* at 26.

[274] *See* Stone, *supra* note 8, at 188; *supra* notes 91–95 and accompanying text.

[275] *See, e.g.*, Moses, *supra* note 201, at 182 & n.196 (citing Chief Justice Warren Burger for the proposition that civil rights claims are best protected through judicial review); Sternlight, *supra* note 115, at 686 (arguing that the confidential nature of arbitration advantages the company over the individual claimant by shielding the company from public scrutiny).

[276] *See* Moses, *supra* note 201, at 182 (contending that keeping arbitration decisions confidential limits future parties' capacity to understand and comply with legal obligations).

[277] *See* Stone, *supra* note 222, at 1043.

from serving as precedent; yet even if there was precedent on an issue, the arbitrator would not be bound to follow it.[278] In effect, the privatization of dispute resolution means that fewer cases are resolved publicly, making it difficult for employers and employees to understand the legal obligations imposed by statutory law.[279]

Despite these criticisms, the Court, in the 2009 case *Pyett*, extended the *Gilmer* holding by applying it to the labor context.[280] This case concerned whether a union could waive an individual employee's right to file statutory claims in federal court as part of a collective bargaining agreement.[281] The Court held that a union could waive the statutory rights of its members to file suits in federal court so long as the union included a clear and unmistakable waiver in the collective bargaining agreement.[282] Whereas in most collective bargaining agreements the agreement to arbitrate is fairly vague, in *Pyett*, the union expressly agreed that individual employees would arbitrate statutory discrimination disputes arising under the Age Discrimination Employment Act.[283]

This case is not significant for its holding, because after *Pyett* it is unlikely that another union would agree to such an express waiver.[284] Rather, this case is significant because it was brought under the FAA

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[278] *See* Malin, *supra* note 200, at 595; Stone, *supra* note 222, 1043.

[279] *See* Moses, *supra* note 201, at 182.

[280] *Pyett*, 556 U.S. at 266; *see Gilmer*, 500 U.S. at 35; Galanter & McLaughlin, *supra* note 258, at 56.

[281] *See Pyett*, 556 U.S. at 251. The statutory right at issue in *Pyett* arose under the Age Discrimination Employment Act. *Id.*; *see* 29 U.S.C. §§ 621–634 (2006).

[282] *See Pyett*, 556 U.S. at 274.

[283] *See id.* at 251–52; *see also* Dennis R. Nolan, *Disputatio: "Creeping Legalism" as a Declension Myth*, 2010 J. Disp. Resol. 1, 15 (noting that the express waiver at issue in *Pyett* was uncommon). The arbitration provision at issue in *Pyett* states the following:

> § 30 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.

Pyett, 556 U.S. at 252 & n.1.

[284] *See* Nolan, *supra* note 283, at 15; *see also* Hodges; *supra* note 186, at 31 (projecting that *Pyett* will be significant in instances in which a union and management agree to an express, *Pyett*-styled waiver).

and *not* section 301.[285] Neither the majority nor the dissent challenged the employer's application of the FAA.[286] Instead, the FAA was applied as the relevant source of law for this labor-related arbitration dispute.[287] Prior to *Pyett*, courts looked to labor arbitration law for support in deciding commercial arbitration cases, and now, in a radical turn, the Court used commercial arbitration law to decide a labor arbitration dispute.[288] Therefore, *Pyett* serves as evidence of an FAA and section 301 merger.[289] Additionally, the fact that the Court promoted this merger with no comment or justification suggests that FAA policy may come to preempt section 301.[290]

B. *Consequences of a Merger:* AT&T Mobility LLC v. Concepcion

While the consequences of the FAA and section 301 merger unfold, the Court has continued to broaden its deferential policy toward arbitration.[291] In 2011, the U.S. Supreme Court held in *Concepcion* that the FAA preempts state contract laws that interfere with the goals of the FAA.[292] The state contract law at issue in this case concerned the unconscionability defense, which, the Court stated, interfered with the objectives of the FAA.[293] Consequently, the *Concepcion* decision contributed to the FAA's ongoing expansion, which, as *Pyett* shows, is significant because the FAA now affects both commercial and labor arbitration.[294]

The *Concepcion* dispute concerned the right of consumer-based class action arbitration.[295] The plaintiffs in *Concepcion* had purchased cell phones from AT&T and signed a service contract whereby they agreed to arbitrate individually any disputes arising out of the agreement.[296] After a dispute arose over the terms of the phone purchase,

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[285] *See* Gelernter, *supra* note 27, at 22–24 (describing the Court's passive application of the FAA to resolve a labor dispute).

[286] *See id.* at 23.

[287] *See Pyett*, 556 U.S. at 266.

[288] *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987) (reciting that the FAA did not apply to collective bargaining agreements but that labor policy was influential in understanding commercial arbitration); Hayford, *supra* note 9, at 910.

[289] *See* Galanter & McLaughlin, *supra* note 258, at 60; LeRoy, *supra* note 11, at 109; Gelernter, *supra* note 27, 22–24.

[290] *See* LeRoy, *supra* note 11, at 109.

[291] Erwin Chemerinsky, *Abandoning the Courts*, 47 Trial 50, 52 (2011).

[292] *Concepcion*, 131 S. Ct. at 1753.

[293] *Id.* at 1746, 1750, 1753.

[294] *See* Chemerinsky, *supra* note 291, at 52–54.

[295] *Concepcion*, 131 S. Ct. at 1744.

[296] *Id.*

the plaintiffs filed suit seeking court review.[297] AT&T moved to compel arbitration, citing the arbitration agreement.[298] The plaintiffs refuted, arguing that the arbitration agreement was unenforceable because it was an unconscionable contract of adhesion.[299]

Prior to *Concepcion*, many jurisdictions recognized the unconscionability doctrine as a viable defense against arbitration agreements.[300] The unconscionability doctrine was applied to determine whether an agreement was too one-sided to justify enforcing its terms.[301] For instance, agreements were unconscionable when parties of starkly different bargaining power signed adhesion contracts.[302] Because section 2 of the FAA provides that arbitration agreements are revocable "upon such grounds that exist at law or in equity,"[303] parties cited state law, including the unconscionability defense, to escape unfair arbitration agreements.[304] This defense was viable for parties in both the consumer and employment contexts.[305] Despite its widespread application, the

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[297] *Id.* AT&T advertised the phones as "free," but in fact charged the plaintiffs sales tax. *Id.* In response, the plaintiffs filed suit in the U.S. District Court for the Southern District of California claiming fraud and false advertising; their claims were consolidated with a pending class action. *Id.*

[298] *Id.* at 1744–45. AT&T argued that the plaintiffs could not join in a class action because they had agreed to arbitrate their disputes individually. *Id.*

[299] *Id.* at 1745.

[300] Horton, *supra* note 5, at 17–18; *see, e.g.*, Davis v. O'Melveny & Meyers, 485 F.3d 1066, 1072 (9th Cir. 2006) (holding that a nonunionized employee's arbitration agreement was unconscionable because the employee was not afforded a meaningful way to opt out); McMullen v. Meijer, Inc., 355 F.3d 485, 493–94 (6th Cir. 2004) (holding that an arbitration agreement that gave the employer exclusive control over selecting the arbitrator was unfair and unenforceable); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172–73 (9th Cir. 2003) (holding an arbitration agreement unconscionable because (1) there was no reasonable means to opt-out, and (2) it contained biased terms that included unfair filing fees, a short statute of limitations, and the prohibition of class actions); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) (holding that an arbitration agreement contained too many biased rules to be enforceable); *see also* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 Ohio St. J. on Disp. Resol. 757, 804–07 & nn.165–76 (2004) (identifying cases across jurisdictions that discuss "specific traits that may brand an arbitration clause as unconscionable").

[301] Horton, *supra* note 5, at 13, 17–18. To prove unconscionability, a party must show that an agreement is procedurally and substantively unconscionable. *Id.* The procedural prong considers how the contract came to be—for example, whether it is a contract of adhesion. *Id.* at 18. The substantive prong considers whether the terms of the contract are too one-sided. *See id.*

[302] *Davis*, 485 F.3d at 1072–73; Discover Bank v. Superior Court, 113 P.3d 1100, 1103, 1108–10 (Cal. 2005).

[303] 9 U.S.C. § 2 (2006).

[304] *See Davis*, 485 F.3d at 1072.

[305] *See id.* (employment context); *Discover Bank*, 113 P.3d at 1103 (consumer context).

Supreme Court decided, in *Concepcion*, that the unconscionability defense inhibited the federal policy favoring arbitration.[306]

In the *Concepcion* opinion, Justice Antonin Scalia confirmed that section 2 of the FAA permits parties to use contract defenses such as duress, fraud, and unconscionability.[307] Yet, the Court reasoned that these defenses are preempted by federal law where the state law interferes with the purposes of the FAA.[308] The FAA's purposes are twofold: (1) to ensure that courts enforce private agreements, and (2) to allow parties to select a more cost- and time-effective means of dispute resolution.[309] The *Concepcion* majority held that allowing parties to challenge an agreement as unconscionable in advance of arbitration proceedings interferes with the intended expediency of arbitration.[310] Therefore, the Court signaled that the unconscionability defense is no longer viable.[311]

Although *Concepcion* relates specifically to commercial class action arbitration issues, the effects of the decision can be felt in the labor context as well.[312] Justice Stephen Breyer argued in his dissent that the unconscionability defense was not limited to commercial class action disputes, but rather referred to the unconscionability doctrine more generally.[313] States, he argued, should be free to craft their own common law on contract formation so long as the law does not *specifically* discriminate against arbitration.[314] Further, the speed and cost benefits of arbitration do not justify courts' deferential treatment of arbitration agreements as compared to other types of contracts.[315]

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[306] *See Concepcion*, 131 S. Ct. at 1753. From the 1980s until 2011, most courts recognized the unconscionability doctrine as a viable defense against arbitration agreements. Horton, *supra* note 5, at 18–19. Corporations pushed back, urging the Supreme Court to dismiss the defense in the *Concepcion* decision. *Id.* at 19.

[307] *See Concepcion*, 131 S. Ct. at 1748.

[308] *See id.*

[309] *See id.* at 1748–49.

[310] *See id.* at 1749.

[311] *See id.* at 1750–51 (overruling the 2005 California Supreme Court case, *Discover Bank v. Superior Court*, which upheld the California state contract law permitting the unconscionability defense).

[312] *See id.* at 1757 (Breyer, J., dissenting).

[313] *See id. see also Discover Bank*, 113 P.3d at 1108 (citing the general principles of the unconscionability doctrine).

[314] *See Concepcion*, 131 S. Ct. at 1760.

[315] *See id.* at 1761 (referring to the purpose of the FAA as treating an arbitration agreement just like any other contract, and arguing that by prohibiting the use of the traditional contract defense of unconscionability, the majority suggested that the FAA deserves special treatment). As Justice Breyer stated in his dissent, "These cases do not concern the merits and demerits of class actions; they concern equal treatment of arbitration contracts and other contracts. Since it is the latter question that is at issue here, I am not

In conclusion, recent case law shows that the FAA's reach continues to grow.[316] This shift reflects two notable developments.[317] First, the FAA, which traditionally governed commercial arbitration, can control in a labor arbitration dispute.[318] Second, as *Concepcion* illustrates, the Court has weakened workers' capacity to defend against unfair arbitration agreements by disabling the unconscionability defense.[319] These developments shift labor arbitration law far from where it started, diluting the policies that supported its initial growth.[320]

IV. The FAA and Section 301: A Misguided Merger

The Supreme Court should refrain from conflating the FAA and section 301 because labor and commercial arbitration are supported by different policies.[321] In the 1960 *Steelworkers Trilogy*, the Court eschewed a favorable policy toward labor arbitration based on the unique features of the collective bargaining process.[322] The Court contemplated the use of economic warfare, the mandates of the NLRA, and the bargaining power of the parties involved.[323] Taken together, labor arbitration

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surprised that the majority can find no meaningful precedent supporting its decision." *Id.* at 1762.

[316] *See* Moses, *supra* note 163, at 845–55 ("The 1925 Congress was concerned that arbitration be voluntary and that it not be imposed by powerful parties on weaker parties. The Court did not begin to enforce arbitration clauses in adhesion contracts until the last twenty to twenty-five years."). To restore the FAA to its original purpose, Congress proposed the Arbitration Fairness Act of 2009 that limits the Court's expansive application of the FAA. *Id.* at 854.

[317] *See Concepcion*, 131 S. Ct. at 1753 (majority opinion) (limiting the use of the unconscionability defense); *Pyett*, 556 U.S. at 274 (allowing unions to agree to arbitrate individual statutory claims).

[318] *Pyett*, 556 U.S. at 266.

[319] *See Concepcion*, 131 S. Ct. at 1753 (overturning the *Discover Bank* rule permitting parties to defend against arbitration agreements using the unconscionability defense).

[320] *See* Moses, *supra* note 163, at 845–47. Professor Margaret Moses argued that the Supreme Court's policy on the arbitrability of statutory claims in the labor context has shifted dramatically. *See id.* at 845. The Court previously declared that choice of forum affects a party's capacity to vindicate its rights. *Id.* For example, the lack of jury, procedural protections, and judicial review in arbitration isolates parties from public accountability. *See id.* at 845–50. Additionally, in the past the Court expressed concern that arbitrators were ill-equipped to resolve statutory disputes; yet over time, the "Court asserted, without any support except its own judicial fiat," that this misperception no longer stands. *Id.* at 846. Finally, the *Pyett* holding cements the Court's new position that arbitration constitutes a suitable substitute for courts in resolving statutory claims. *See id.* at 847.

[321] *See id.* at 845–47.

[322] Corrada, *supra* note 166, at 928, *supra* notes 91–95 and accompanying text.

[323] *See id.* at 924–25 (NLRA encourages self-governance); Getman, *supra* note 166, at 916 (workers' bargaining power); Lopatka, *supra* note 166, at 95 (workplace stability).

constitutes a fair alternative to court proceedings.[324] These policies become meaningless, however, if applied in the commercial arbitration setting.[325]

The 2009 U.S. Supreme Court case, *14 Penn Plaza LLC v. Pyett*, effectively demonstrates how conflating labor and commercial arbitration law undermines all three labor arbitration policies.[326] Recall that in *Pyett* the Court held that unions could agree to arbitrate statutory claims of individual workers under the FAA.[327] Thus, unions can collectively waive an employee's right to litigate statutory claims, even where the purpose is to substitute arbitration for litigation.[328] In essence, the Court expanded the deferential policy toward labor arbitration, founded in the *Steelworkers Trilogy*, without contemplating the meaning behind such deference.[329]

First, the *Pyett* holding disturbs the industrial peace policy that supports the courts' longstanding deference toward labor arbitration.[330] In 1960, the U.S. Supreme Court held, in *United Steelworkers v. Warrior & Gulf Navigation, Co.*, that labor arbitration agreements should be read broadly, such that all doubts relating to arbitrability should be

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[324] *See* Corrada, *supra* note 166, at 924–25.

[325] *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1473–79 (D.C. Cir. 1997) (contrasting arbitrating disputes that arise out of the collective bargaining agreement with arbitrating statutory claims). As Judge Edwards stated in the 1997 U.S. Court of Appeals for the D.C. Circuit case, *Cole v. Burns International Security Services*,

> Because the legitimacy of the arbitration process and judicial deference to arbitration awards depends heavily upon unique features of the collective bargaining process, it is not surprising that many commentators have questioned the logic and desirability of extending arbitral jurisprudence developed in labor cases beyond the confines of the collective bargaining context.

Id. at 1475.

[326] *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009); LeRoy, *supra* note 11, at 109; Gelernter, *supra* note 27, 28–29; *supra* notes 166–211 and accompanying text (discussing labor arbitration policies). *Pyett* conflated the FAA and section 301. LeRoy, *supra* note 11, at 109. Accordingly, some courts may find that FAA standards displace labor law standards. *Id.*

[327] *Pyett*, 556 U.S. at 274.

[328] Gelernter, *supra* note 27, at 28–29.

[329] *See* Moses, *supra* note 163, at 859; *see also id.* at 825 ("The *Pyett* decision demonstrates how the Supreme Court has freely disregarded a statute's text, its legislative history, and even the Court's own judicial precedent when fashioning a law of arbitration to suit its policy preferences.").

[330] *See* Lopatka, *supra* note 166, at 95 (addressing whether the no-strike agreement in a collective bargaining agreement extends to the agreement to arbitrate individual statutory claims).

resolved in favor of coverage.[331] This deferential principle is intimately tied to the notion that by arbitrating labor disputes parties are less likely to break out in economic warfare.[332] Effectively, the presumption in favor of arbitration supports ongoing negotiations.[333] Yet, this presumption does not contemplate a union's waiver of an employee's statutory claim.[334] Parties to a collective bargaining agreement can create and modify the terms of their agreement as needed to accommodate changes in their industry.[335] In contrast, statutory rights are devised and modified by Congress.[336] It is unclear how, or even why, the *Warrior & Gulf* philosophy aimed at encouraging union-management cooperation would support labor arbitrators resolving statutory claims intimately tied to the public interest.[337]

The *Pyett* decision introduces public law into private ordering, which compromises effective self-governance in labor relations.[338] For example, as described above, the labor arbitrator is deemed to be more competent than a judge in interpreting the collective bargaining agreement.[339] The parties bargained for specialized knowledge that fits the demands of the particular workplace.[340] At the time of the *Steelworkers Trilogy*, labor arbitrators served this limited function as contract interpreters.[341] Nevertheless, labor arbitrators are ill-equipped to interpret statutory rights, especially because most are not attorneys.[342] Whereas labor arbitrators once were praised for possessing competencies that exceeded their judge counterparts, now with the duty to interpret statutory claims, these same decisionmakers are seemingly unqualified for the job.[343]

Finally, the *Pyett* decision distorts the unique features of labor arbitration that protect workers' interests, such as the duty of fair represen-

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[331] *See* United Steelworkers v. Warrior & Gulf Navigation, Co., 363 U.S. 574, 582–83 (1960).

[332] *See* Malin & Ladenson, *supra* note 32, at 1192.

[333] *See id.*

[334] *See Cole*, 105 F.3d at 1473–74.

[335] *See id.* at 1476.

[336] *See id.*

[337] *See id.*

[338] Moses, *supra* note 163, at 847 & n.125.

[339] *See* Gelernter, *supra* note 27, at 10–11; *supra* notes 223–228 and accompanying text.

[340] *See* Gelernter, *supra* note 27, at 11.

[341] *See* Malin, *supra* note 200, at 589.

[342] *See Cole*, 105 F.3d at 1477.

[343] *See id.*

tation.[344] Prior to *Pyett*, a union could not agree to arbitrate the statutory claims of its individual members because such an agreement could present a conflict of interest between the union and its members.[345] For example, a union might forfeit an individual's statutory claim in exchange for other terms that could benefit the union as a whole, leaving the union member without a remedy.[346] By incorporating statutory claims into the labor arbitration process, unions may be forced to choose between honoring their duty of fair representation to individual workers and pursuing the greater goals of the general workforce.[347]

In sum, the *Pyett* holding diminishes the substance of labor arbitration policies by applying a commercial arbitration standard to the labor context.[348] Because the Court conflated the FAA and section 301 in *Pyett*, other FAA standards could come to control in future labor arbitration disputes as well.[349] If that occurs, the policies underpinning labor arbitration law will lose legitimacy.[350] The 2011 U.S. Supreme Court case, *AT&T Mobility LLC v. Concepcion*, illustrates just how FAA jurisprudence contributes to this loss.[351]

As a result of *Pyett*, unions can agree to arbitrate statutory claims of individual workers under the FAA.[352] Presumably, then, unionized workers could hope to combat forced arbitration of statutory claims with an

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[344] *See Pyett*, 556 U.S. 254–56; Roy, *supra* note 204, at 1368 (concluding that unions usually pursue vigorous representation of their members in order to avoid costly claims for breach of their duty of representation).

[345] Moses, *supra* note 163, at 827; *see also* Hodges, *supra* note 186, at 23 & n.35 (referencing criticisms by courts and scholars that disapprove of *Pyett* because it ignores conflict of interest issues between the individual and the collective).

[346] *See* Roy, *supra* note 204, at 1364 (explaining that usually the union, not the individual worker, decides to bring a claim to arbitration). Unions may refuse to arbitrate because a union's bargaining objective aims to satisfy the interests of the average worker, which often includes terms regarding job security, benefits, seniority, and workplace safety measures generally. Dau-Schmidt & Haley, *supra* note 196, at 321.

[347] Janet McEneaney, *Arbitration of Statutory Claims in a Union Setting: History, Controversy and a Simpler Solution*, 15 Hofstra Lab. & Emp. L.J. 137, 158–61 (1997) ("It is not so far-fetched to imagine a union, charged with getting the best deal it can for the majority of its members, agreeing not to take an individual's statutory claim to arbitration in return for the employer's promise of some benefit to the majority.").

[348] *See* Moses, *supra* note 163, at 845–47 (criticizing *Pyett* sharply for abandoning prior policy objectives of labor arbitration).

[349] *See* LeRoy, *supra* note 11, at 109.

[350] *See* Moses, *supra* note 163, at 845–47.

[351] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Hodges, *supra* note 186, at 42 n.154 (recognizing that after *Pyett*, questions emerged as to whether the unconscionability defense could be asserted in a labor arbitration dispute governed by the FAA).

[352] *Pyett*, 556 U.S. at 274.

unconscionability defense, but *Concepcion* now suggests this defense is no longer viable.[353] Justice Scalia, writing for the majority in *Concepcion*, stated that the purposes and objectives of the FAA can trump the traditional unconscionability defense long recognized in contract law.[354] Justice Scalia inferred that arbitration agreements deserve special treatment not afforded to other types of contracts.[355] Therefore, *Concepcion* effectively limits parties' capacity to defend against unfair arbitration agreements.[356]

What was once called a "healthy regard" in favor of arbitration has become an outright affinity for privatizing dispute resolution.[357] The *Concepcion* decision reflects this affinity because, without the unconscionability defense, workers will struggle to successfully defend against unfair arbitration agreements without the unconscionability defense.[358] This consequence is particularly meaningful in the labor context where a union can agree, without the consent of the worker, to arbitrate individual statutory claims.[359] Therefore, if the Court continues, as it has, to expand its deferential policy toward arbitration, unionized workers can expect fewer and fewer individual protections.[360]

In conclusion, as the Court's application of the FAA continues to expand, labor arbitration law continues to shift far from where it

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[353] *See Concepcion*, 131 S. Ct. at 1753; Hodges, *supra* note 186, at 42 n.154.

[354] *See Concepcion*, 131 S. Ct. at 1753. If the unconscionability doctrine, like other contract defenses, does not interfere with the purposes of the FAA, it may possibly survive the Court's holding in *Concepcion*. Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 Nw. U. L. Rev. Colloquy 53, 53 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/19/LRColl2011n19Friedman.pdf. Yet, it is unlikely that the unconscionability doctrine could be asserted without obstructing the FAA because unconscionability means nonenforcement, which inhibits the arbitral process. *Id.* at 56. Thus, arbitration agreements, unlike other contracts, can remain enforceable despite possible pleas of unconscionability. *See id.* at 56–57.

[355] *See Concepcion*, 131 S. Ct. at 1753.

[356] *See id.*; Friedman, *supra* note 354, at 54–55 (arguing that the *Concepcion* decision will prevent parties from successfully using the unconscionability defense to invalidate an agreement to arbitrate).

[357] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (tracing the courts' growing favoritism of arbitration).

[358] *See* Bruhl, *supra* note 3, at 1436–37 (noting that the unconscionability defense, as of 2008, was one of the few defenses available to employees to defend against arbitration agreements). Following the *Concepcion* decision, the unconscionability defense no longer constitutes a viable means of escaping an agreement to arbitrate. *See Concepcion*, 131 S. Ct. at 1753.

[359] *See* Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 St. Louis U. L.J. 77, 87 (1996) (arguing that because individual unionized workers cannot negotiate with their employers as provided for in the NLRA, they have no meaningful opportunity to negotiate over the agreement to arbitrate statutory claims).

[360] *See* Moses, *supra* note 163, at 855.

started.[361] Notably, at each stage of the FAA's growth, the Court has always referred back to its policy in favor of arbitration—*a policy born in the labor context.*[362] With each reference, labor arbitration policy has become more and more deformed.[363] The touchstones of this policy, including industrial peace, self-governance, and unionized workplace protections, are becoming expressions without meaning.[364] Before proceeding, we should ask: is private resolution of *all* workplace disputes necessarily a suitable substitute for public adjudication?[365]

Conclusion

Labor arbitration, subject to section 301, and commercial arbitration, subject to the FAA, initially developed along parallel tracks. The Supreme Court reasoned in the 1960 *Steelworkers Trilogy* that the unique features of the collective bargaining process justified a deferential policy toward labor arbitration. The Court then echoed its deferential attitude in the context of the commercial arbitration trilogy. There, the Court affirmed that commercial arbitration served as an expeditious substitute for litigation.

Once proclaiming a deferential policy toward commercial arbitration, the FAA grew to cover more and more types of disputes. Eventually, the FAA expanded so far that it governed the outcome of *14 Penn Plaza LLC v. Pyett*, a labor arbitration dispute. The *Pyett* decision suggests that the FAA and section 301 have merged.

The consequences of this merger are now unfolding. The *AT&T Mobility LLC v. Concepcion* case illustrates that the Court's commitment to arbitration is unwavering. Although this dispute concerned commercial arbitration, the holding also affects labor arbitration because, as *Pyett* shows, the FAA's reach extends to the labor context as well.

The Court's misguided merger of section 301 and the FAA is troubling because the policies supporting labor and commercial arbitration are considerably different. By incorporating the FAA into the labor context, the policies announced in the *Steelworker's Trilogy* lose meaning. Essentially, labor arbitration may become a substitute for litigation,

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[361] *Compare Pyett*, 556 U.S. at 274 (permitting unions to arbitrate statutory claims), *with* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (refusing to permit arbitration of statutory claims in the labor context).

[362] *See Concepcion*, 131 S. Ct. at 1745; *Gilmer*, 500 U.S. at 25; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1985).

[363] *See* Moses, *supra* note 163, at 845–47.

[364] *See Cole*, 105 F.3d at 1473–79.

[365] *See id.*; Kinnecome, *supra* note 239, at 761–62.

rather than a tool to support the collective bargaining process. This shift reflects a sharp departure from the original purposes of labor arbitration.