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Supreme Court Without A Clue: *14 Penn Plaza Llc V. Pyett* and The System Of Collective Action And Collective Bargaining Established By The National Labor Relations Act

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ARTICLES

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> [I]t was the appeal of stepping into some black hole in American culture, with all the American values except one: individualism. And here, in this black hole, paunchy, middle-aged men, slugging down cans of beer, come to hold hands, touch each other, and sing "Solidarity Forever." O.K., that hardly ever happens, but most people in this business, somewhere, at some point, see it once, and it is the damnedest un-American thing you will ever see. . . .
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> . . . Solidarity. Union. It is the love, the only love left in this country, that dare not speak its name.[1]

The Supreme Court will not speak its name. The Supreme Court and various National Labor Relations Boards have been engaged for more than two decades in statutory interpretations of the National Labor Relations Act[2] (as amended, the Labor-Management Relations Act[3]) that substantially undermine and narrow those statutes.[4] Recent decisions of

* Professor of Law, University of Miami School of Law. This article extends remarks first offered on *Pyett* at the Labor Coordinating Committee annual meeting of the AFL-CIO, May 2009.

1. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 5, 8 (1991).

2. National Relations Labor Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–69) (2006)).

3. Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–97 (2006)).

4. "[D]ecisions like *Darlington Mills* can no longer be considered aberrations from the common wisdom, cases of judicial temporary insanity. Rather, the case is perhaps the more shocking example of the continuation of judicial policy making. As in *First National Maintenance*, the Court has indicated that there exists a body of inherent managerial interests, an assumption that not only was reflected in common-law decision making prior to 1935 but that also underlies NLRA adjudication." JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 142 (1983). On the Board and the Supreme Court, see Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95 (1985). On the Board, see Dana Corp., 351 N.L.R.B. 434 (2007); Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 TEX. L. REV. 703 (2001). For earlier judicial narrowing of the statute's protections, see Karl E. Klare,

the Supreme Court have crossed the line into judicial re-legislation. The most brazen judicial legislation occurred in the recent case of *14 Penn Plaza LLC v. Pyett*.[5] Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined Justice Thomas's majority opinion. The Supreme Court, in enforcing an express contractual duty to arbitrate union members' federal statutory individual rights, has remade the collective-bargaining system in the United States. First, the Court equated collective-bargaining arbitration with individual employment contract dispute arbitration and antitrust arbitration, thus transforming the role of collective-bargaining arbitration in ways that ignore bedrock case precedent, while claiming to rely upon it. Second, it destroyed the doctrine of mandatory versus permissive subjects of the duty to bargain in good faith. Third, it shifted the purpose of collective bargaining away from protecting collective action by workers and toward achieving the aggregated individual interests of a bare majority of a union's membership, contrary to the plain language of the statute.[6] This agenda of individualizing the interpretation and enforcement of the collective-bargaining agreement, and the system of employer/employee relations built upon such agreements, ignores both stare decisis and longstanding consensus on the purposes of federal labor statutes, to the detriment of both employers and employees.[7]

Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 MINN. L. REV. 265 (1978); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

5. 129 S. Ct. 1456 (2009). On judicial legislation, see *id.* at 1475 (Stevens, J., dissenting). On denying employees free choice after *Pyett*, see Gary Minda & Douglas Klein, *The New Arbitral Paradigm in the Law of Work: How the Proposed Employee Free Choice Act Reinforces Supreme Court Arbitration Decisions in Denying Free Choice in the Workplace*, 2010 MICH. ST. L. REV. 51 (2010). For a critical view of *Pyett* analyzing multiple doctrinal issues yet to be decided, see Alan Hyde, *Labor Arbitration of Discrimination Claims After* 14 Penn Plaza v. Pyett*: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. ON DISP. RESOL. 975 (2010). On the difference between judicial and arbitral forums for statutory claims, see Eric B. Sposito, 14 Penn Plaza v. Pyett*: Into the Abyss Between Judicial Process and Collectively Bargained Agreements to Arbitrate Individual Statutory Claims*, RUTGERS L. REC. (forthcoming 2011), *available at* http://ssrn.com/abstract=1578623. On the unsuitability of arbitration for statutory rights with excellent explanation of the doctrinal development of the support for arbitrating employment rights, see also Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

6. "Anglo-American common law historically has defined legal rights as the proprietary privileges of isolated individuals. The Wagner Act set forth a unique form of right: the collective entitlement of a body of workers 'to engage in . . . concerted activit[y] for . . . mutual aid or protection.'" Craig Becker, *Individual Rights and Collective Action: The Legal History of Trade Unions in America*, 100 HARV. L. REV. 672, 688 (1987) (book review) (alterations in original) (quoting 29 U.S.C. § 157 (1982)).

7. "By its statutes, labor relations have been cut loose from the individualistic traditions which have anchored thinking in the area. It is benignly misguided, but irrevocably wrong, to

Since the *Pyett* decision, there has been no reported decision in the Eleventh Circuit applying that decision to a dispute between a member of a union and an employer or the member's union. This is not surprising since such a case would most often reach an Eleventh Circuit court in an appeal from a decision made by the NLRB on an unfair labor practice. It is too soon for such cases to have reached the appellate stage. In the alternative, a federal district court action to enforce provisions of a collectively bargained contract could be brought under the LMRA, section 301,[8] but very few such actions have been reported anywhere since *Pyett*. Such decisions will be coming soon. However, as applied in a district court decision in the circuit, *Campbell v. Pilot Catastrophe Services, Inc.*,[9] in enforcing an arbitration clause in an individual employment contract, the disturbing collapse of the same interpretations of *Pyett*'s reach for arbitration of statutory rights in individual employment and collectively bargained contracts is assumed. Enforceability and procedures should be similarly treated if agreed to by the parties. The *Campbell* judge claimed that the only distinction in enforceability of arbitration clauses was the requirement from *Wright v. Universal Maritime Service Corp.*[10] that coverage of statutory claims exclusively through arbitration in a collectively bargained contract must be "explicitly stated."[11] This implies that all other considerations involved in arbitration should follow the precedents set in cases involving individual employment contracts. For example, in *Campbell*, the obligation to arbitrate Title VII claims is established from a series of employment contracts entered into by the employee.[12] Seemingly, such cumulated duties could not be the case from a series of collective bargains, and certainly should not be the result given the negotiations required for collective bargaining, where agreement to any clause may depend on reaching agreement on other issues decided in the contract. But such an understanding of *Pyett* within a subsequent district court opinion should not be surprising, especially given the vagaries of the Supreme Court's opinion and the usual reticence of a district court judge to broadly elaborate the Supreme Court's language. Whether parallelism is the appropriate outcome, however, is much more contestable.

Most of the criticism of the *Pyett* decision and of the earlier

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decide labor relations cases wholly in individualistic terms." Robert Brousseau, *Toward a Theory of Rights for the Employment Relation*, 56 WASH. L. REV. 1, 24 (1980).

8. Labor Management Relations Act § 301, 29 U.S.C. § 185(a) (2006).

9. No. 10-0095-WS-B, 2010 WL 3306935 (S.D. Ala. Aug. 19, 2010).

10. 525 U.S. 70 (1998) (approved of in *Pyett*, 129 S. Ct. at 1465).

11. *Campbell*, 2010 WL 3306935, at *4 (internal quotation marks omitted) (quoting *Pyett*, 129 S. Ct. at 1465).

12. *Id.* at *1–5.

mandatory arbitration upheld in individual employment contracts under *Gilmer v. Interstate/Johnson Lane Corp.*[13] focuses on the damage to enforcement of Title VII rights. This article does not. Rather, it focuses on the damage done to the system of collective bargaining itself by requiring mandatory arbitration of statutory rights under a collective-bargaining agreement.[14] Particularly, in refusing to acknowledge the difference in federal law between protecting individual rights and protecting rights to collective actions, the Supreme Court ignored the almost unique quality of federal labor law within American law—that of protecting group rights—thus contributing to making the experience of solidarity almost literally, legally unimaginable.[15]

The suspicion cannot be avoided that this is the Court majority's intent as part of a related and larger strategy of enforcing rights more narrowly in order to prevent rights from being used to dismantle systematic delegations of governing power to private actors, insulating such powers from government responsibility in creating such power. The Court simultaneously insulates the private delegatees in utilizing such power when they follow market practices, thus encouraging entrenchment of social subordination of particular groups.[16] Similarly, refusing to acknowledge solidaristic practices as an important part of mobilizing effective union bargaining on behalf of a union of workers facing off against a management representing a union of stockholders undermines a clearly stated statutory purpose of the National Labor Relations Act, untouched by the Taft-Hartley revisions of the Act.[17] Prior to the NLRA, individuals could not effectively bargain for contracts protecting their

13. 500 U.S. 20 (1991).

14. This article should not be taken as a blanket endorsement of the present collective-bargaining system as it has evolved in the United States. Overall, the NLRA represents a weak and archaic protection of labor organization. This status, however, provides no justification to emasculate NLRA protections further, as the Supreme Court did in *Pyett*.

15. *See generally* James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996).

16. Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247 (2000). See particularly the cramped construction of 42 U.S.C. § 1983 in *Rizzo v. Goode*, 423 U.S. 362, 370–71 (1976), equating the specific-causation-in-fact standing doctrine to limits on equitable relief and the substance of rights under § 1983. *See also* Kenneth M. Casebeer, *Memory Lost:* Brown v. Board *and the Constitutional Economy of Liberty and Race*, 63 U. MIAMI L. REV. 537 (2009); Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000).

17. "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." National Labor Relations Act of 1935 § 1, 29 U.S.C. § 151 (2006).

interests when faced with the great inequality of bargaining power possessed by vast corporations.[18] Only if management were credibly persuaded by bargaining demands on behalf of an almost entirely mobilized and solidaristic workforce would voluntary contract redress power imbalances affecting the economic health of the entire country.[19]

In the *Pyett* case, the plaintiffs were members of the Service Employees International Union (SEIU) representing building cleaners, porters, and doormen who had a New York City-wide collective-bargaining agreement (CBA) with a voluntarily organized multiemployer bargaining group called the Realty Advisory Board (RAB).[20] One of RAB's members, 14 Penn Plaza LLC, decided to contract out the workers' jobs to an independent company. This necessitated reassigning bargaining-unit members covered by the collective-bargaining agreement to other jobs. Unit members objected that the new jobs were less well paid and less desirable. SEIU began a grievance proceeding, demanding arbitration of the dispute that called for submitting all contract claims of discrimination and all such statutory claims to arbitration under the contract's arbitration clause. Thereafter, the union withdrew its demand for arbitration. The affected members initiated a claim before the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act (ADEA). 14 Penn Plaza filed a motion to compel arbitration of the issue under sections 3 and 4 of the Federal Arbitration Act.[21] The Supreme Court held the arbitration of Title VII statutory claims enforceable under the CBA, despite the fact that the union could decline to process such arbitration on behalf of its members.[22]

I. COLLECTIVE-BARGAINING ARBITRATION VS. INDIVIDUAL EMPLOYMENT ARBITRATION

Justice Thomas relied on the individual employment contract case, *Gilmer v. Interstate/Johnson Lane Corp.*,[23] for two beginning proposi-

18. *See* NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 33 (1937) (emphasis added) ("Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. *That is a fundamental right.*").

19. "An integral part of any strike is persuading other employees to withhold their services and join in making the strike more effective. . . . '[R]espect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest.'" NLRB v. S. Cal. Edison Co., 646 F.2d 1352, 1363 (9th Cir. 1981) (quoting NLRB v. Union Carbide Corp., 440 F.2d 54, 56 (4th Cir.1971)).

20. 14 Penn Plaza LLC v. Pyett, 129 S. Ct 1456, 1461 (2009).

21. *Id.* at 1462–63.

22. *Id.* at 1464.

23. 500 U.S. 20 (1991).

tions. First, an individual may waive the right to a judicial forum by individual employment contract agreement to submit the right to an independent arbitrator, as long as such forum is adequate to vindicate the statutory right.[24] It is not the substantive right that is waived, but only the right to have it enforced through a court. Second, "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."[25] The only distinction between arbitration clause enforcement in the two types of employment contracts is that, to be enforceable under a collective bargain, the arbitration clause must explicitly state that statutory claims are to be covered. At another point, Justice Thomas asserted that labor arbitrators must be competent to interpret federal statutory law in the Title VII context because commercial arbitrators routinely interpret more complex antitrust law in arbitrations between corporations.[26] One-size arbitration fits all.[27]

That is wrong as a matter of law. The role and prominence of labor arbitration was the logical extension of the legal enforcement of collective-worker action envisioned by the provisions of the Wagner Act, and is still the unquestioned purpose and structure of federal labor law. This is so in order to redress imbalances in bargaining power necessary to actual free and voluntary contracting of employees with employers, which in turn stabilizes production by reducing the catalysts of disputes and transfers a greater share of the increasing wealth produced by employing companies to the purchasing power of employees necessary to sustain national economic health. The Act thus emphasized the *public* interest in protecting unions pursuing their *members'* interests through contracts negotiated by collective bargaining. This "contractualism" of labor–management relations in turn would produce industrial peace. Actual peace then required a dispute-resolution mechanism that would mediate disputes between *employees* and their employer over issues and rights defined by the contract during the course of the contract, usually under contracts of long duration and anticipated renegotiation and renewal. Dispute mechanisms matured as multiple-stage negotiation and discipline by the *representatives* of labor and management culminated in neutral arbitration of the contract dispute. The arbitrator must therefore

24. *Pyett*, 129 S. Ct. at 1465.

25. *Id.*

26. *Id.* at 1471.

27. Labor arbitration is entirely different from commercial or antitrust arbitration, which usually involves one-shot disputes between parties without an ongoing relationship. "[Labor] [a]rbitration is an informal process, voluntarily embraced by parties whose interaction is on-going and whose relationship is of a relative permanence. The disputes under review are flowing out of a comprehensive contractual relationship." John E. Dunsford, *The Role and Function of the Labor Arbitrator*, 30 ST. LOUIS U. L.J. 109, 131 (1985).

stay within the letter and intent of the parties so that the aggregate decisions of the arbitrators form the basis of a private or "common law of the shop"[28] as an extension of bargaining itself. The collective bargain was thus a *collective action* to be understood as a "constitution of the workplace and workplace relations," within dynamic contract interpretation and enforcement. Because of this "constitutive" nature of the collective bargain, the bargain's inevitable complexity and at the same time open-ended provisions covering inevitably unforeseen circumstances required a common law of the shop to fulfill the intent of the parties. Labor arbitration is thus a particular *institution* keyed to the protection of legitimate *collective action* necessary to the formation, development, maturity, and legitimacy of the American system of collective bargaining.[29]

Complexity aside, the majority did not understand this important role of labor arbitrators in enforcing collective-bargaining agreements.[30] The collective-bargaining arbitrator serves the purpose of promoting industrial peace[31] under the NLRA by providing an alternative dispute-resolution procedure to referree disputes between labor and management during the course of long contracts (two-, three-, or five-year CBAs are not unusual).[32] By this alternative, neither side needs to resort to economic leverage, strikes, or lockouts to enforce a contract interpretation it believes the other side has breached.[33] This is the rationale for the legal fiction that an arbitration clause in the collective-bargaining agreement

28. United Steelworkers of Am. v. Warrior Gulf & Navigation Co., 363 U.S. 574, 580 (1960).

29. On the history of the Wagner Act system of collective bargaining, see, for example, DAVID BRODY, IN LABOR'S CAUSE: MAIN THEMES ON THE HISTORY OF THE AMERICAN WORKER 237 (1993).

30. "Instead, [collective-bargaining agreements] provide a general code governing wages, hours and working conditions. This code is refined into specific contract rights through case-by-case negotiation between the union and employer through the grievance procedure. Deferral of the refinement to case-by-case negotiation facilitates the reaching of a collective bargaining agreement by enabling the parties to provide generalized standards governing situations, such as discipline and discharge, which are likely to be so varied as to make further specificity impractical." Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L J. 77, 85 (1996); *see* Dennis O. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237 (1989).

31. Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274 (1947); *see also* Textile Worker Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 454 (1957).

32. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court explicitly stated that the "fundamental aim" of collective bargaining is "the establishment and maintenance of industrial peace . . . defusing and channeling conflict between labor and management." *Id.* at 674 (footnote omitted). This limiting assumption about collective rights is itself highly disputed, but for purposes of this section is acknowledged.

33. "Labor arbitration, unlike commercial arbitration, is not a substitute for litigation. It is a substitute for a strike." Brief for Petitioner at 8, *Lincoln Mills*, 353 U.S. 448 (No. 211).

creates a quid pro quo for a no-strikes agreement to be read into the agreement, although not mentioned.[34] Unless the contract explicitly exempts strikes or limits the issues to be arbitrated, disputes under the contract are presumed to be arbitrable.

Because the arbitrator is limited to a decision that is arguably an interpretation of a contract provision, the labor arbitrator is relied upon not to issue his or her own brand of industrial justice.[35] This is true even though the arbitrator is to use the "common law of the shop" to interpret provisions, on the ground that the collective-bargaining agreement constitutes not an ordinary contract, but a "constitution of the workplace" and therefore of employment relations.[36]

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or a particular plant.
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> A collective bargaining agreement is an effort to erect a system of industrial self-government.
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> 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. A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. *He has no general charter to administer justice for a community which transcends the parties.* He is rather part of a system of self-government created by and *confined* to the parties.[37]

Ordinarily, arbitrators are not to refer to outside statutes to justify their interpretations of the contract except in helping to enforce the par-

34. Local 174, Teamsters v. Lucas Flour Co. 369 U.S. 95, 104–05 (1962).

35. Katherine Van Wezel Stone has noted the irony that section 301 law provides for routine preemption of state-law claims in enforcing broadly interpreted arbitration clauses in a collective-bargaining agreement precisely because the arbitrator should decide the dispute only under provisions of the contract without any reference to state law. This is said by the courts to be an important exclusion in order to support a uniform federal common law of interpreting collective-bargaining agreements. *See* Stone, *supra* note 5, at 1029.

36. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 334–35 (1944) ("Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement . . . .").

37. United Steelworkers of Am. v. Warrior & Gulf Navigation, 363 U.S. 574, 578–81 (1960) (emphasis added) (citations omitted) (internal quotation marks omitted).

ties' intended agreement.[38] "The opinion of the arbitrator in this case . . . is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission."[39] Justice Thomas might respond that the parties in *Pyett* incorporated Title VII into their agreement. That would not be an adequate legal answer, for that response would seem internally inconsistent with the need to separate the substance of the right—statutory and not to be decided by contract approval or contraction—from waiver of the forum to vindicate the right decided by contract.

Such an approach tells the arbitrator to import the role of "public tribunal" into the arbitral domain. The natural tendency will be to increasingly turn to statutes for interpretations of what the parties intended in other contract clauses defining their relations.[40] Such a statutorily based reading of contract terms undermines the assumption of virtually no judicial review of the arbitrator's substantive interpretation of the contract.[41] Further, arbitration of statutory claims, which would allow the individual worker to arbitrate if the union decided not to proceed to arbitration (an option seemingly open after *Pyett*), could decrease incentives for both employers and employees to bargain or attempt to resolve the issue at the pre-arbitration stage of grievance pro-

38. Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 737 (1981).

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

40. *See generally* Minda & Klein, *supra* note 5.

41. In effect, *Pyett* subjects an arbitrator's decision interpreting and applying a CBA that expressly incorporates federal antidiscrimination law to highly deferential review on appeal. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1471 n.10 (2009) (arbitrator's decision subject to limited judicial review under 9 U.S.C. § 10(a)). As a result, *Pyett* directly contradicts the *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539 (6th Cir. 2008), majority's interpretation of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and its progeny by sanctioning limited federal court review of earlier arbitrated federal antidiscrimination claims. If an arbitrator's actions can directly limit judicial review of federal antidiscrimination laws, deference to an arbitrator's interpretation and application of a CBA in a later-filed federal court action is warranted even if that deference precludes an employee's statutory claims. *See Nance*, 527 F.3d at 561 (Batchelder, J., concurring). Therefore, a court affords an arbitrator's decision interpreting and applying the terms of a CBA "an extraordinary level of deference" in a later Title VII action in federal court and affirms the decision "so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." Crawford Grp., Inc. v. Holekamp, 543 F.3d 971, 976 (8th Cir. 2008) (internal quotation marks omitted) (quoting Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793, 798 (8th Cir. 2004)); Tewolde v. Owens & Minor Distrib., Inc., No. 07-4075 (DSD/SRN), 2009 WL 1653533, at *9 (D. Minn. June 10, 2009). "The danger is that errors of law made by arbitrators will go unremedied because the lower federal courts will only vacate those arbitral awards that display a 'manifest disregard for the law'—the relevant standard for labor arbitration awards." Minda & Klein, *supra* note 5, at 84–85 (footnote omitted); *see* Buffalo Forge Co. v. United Steelworkers of Am., 428 U.S. 397 (1976); *see also* Wholesale Produce Supply Co. v. Teamsters Local Union No. 120, No. 02-2911 ADM/AJM, 2002 WL 31655844 (D. Minn. Nov. 22, 2002).

cedure.[42] This also interferes with the choice of arbitrator. Some arbitrators formerly chosen for their knowledge of shop and industry may be foregone in favor of legal specialists.[43] Antitrust arbitrators interpret the law; labor arbitrators do not—until now.[44]

Most importantly, labor arbitration has been referred to as *an extension of the collective-bargaining process itself*.[45] "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process."[46] Both employer and employee may bargain on an issue without specifying the exact future circumstances of a provision's application, secure in the knowledge that an experienced labor arbitrator will make the provision work for both parties, favoring neither side in the finding of factual predicates.[47] Because the collective-bargaining agreement is a *private* constitution of the workplace, because the collective-bargaining contract is like a trade agreement and not a commercial or individual contract, and because the parties need to rely on arbitrators as extensions of the collective-bargaining process itself, making labor arbitrators substitutes for courts inevitably interferes with longstanding understandings of the NLRA and

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42. David L. Gregory & Edward McNamera, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Emplyment:* 14 Penn Plaza v. Pyett, 19 CORNELL J.L. & PUB. POL'Y 429, 455 (2010). While acknowledging that *Pyett* has a strong likelihood of radically altering grievance and other labor-arbitration practices—and reducing their effectiveness in handling contract disputes—the authors are generally very favorable to the decision. David Gregory is a frequent labor arbitrator.

43. "In principle anyway, most arbitrators appear to adopt Meltzer's view that their authority extends only to the business of determining the intent of the parties as reflected in their contract . . . . Among these considerations is the fact that arbitrators are not necessarily skilled in deciding what the law requires in a given case, nor for that matter did the parties choose them for that purpose." Dunsford, *supra* note 27, at 121.

44. *See* Mathews v. Denver Newspaper Agency LLP, No. 07-CV-02097-WDM-KLM, 2009 WL 1231776, at *4–6 (D. Colo. May 4, 2009) (applying res judicata to an arbitrator's interpretation of Title VII, thus precluding any access to a federal court following an arbitration under a collective-bargaining agreement after *Pyett*).

45. *See* Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571 (1990).

46. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960); Dunsford, *supra* note 27, at 127 ("But as part of the continual collective bargaining relationship, the arbitrator is surely expected to fill a role different from that of the judge the parties would get if they went to a court.").

47. "The parties to collective agreements share a degree of mutual interdependence which we seldom associate with simple contracts. Sooner or later an employer and his employees must strike some kind of bargain. The costs of disagreement are heavy. The pressure to reach agreement is so great that the parties are often willing to contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator's ruling if decision is required." Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490–91 (1959) (footnote omitted).

substantive collective bargaining as it has operated for seventy-five years.[48]

II. DESTROYING THE MANDATORY/PERMISSIVE DISTINCTION IN COLLECTIVE BARGAINING

The NLRA requires the employer and the union to bargain in good faith over issues of "wages, hours, and other terms and conditions of employment . . . ."[49] Justice Thomas began his exclusive representation argument for inclusion of Title VII under disputes governed by the arbitration clause by stating, without elaboration, "[t]his freely negotiated term between the union and the RAB easily qualifies as a 'conditio[n] of employment' that is subject to mandatory bargaining under § 159(a)."[50] Thomas then cited without irony *Steelworkers v. Warrior & Gulf Navigation Co.* and *Textile Workers v. Lincoln Mills of Alabama*.[51] For the majority, apparently any decision of management that *could* be arbitrated if agreed to by the parties is a condition of mandatory bargaining as part of determining the scope of subjects to be arbitrated.[52] Justice Thomas, in fact, later in his opinion, seeking to distinguish *Alexander v. Gardner-Denver Co.*,[53] argued that excluding a statutory Title VII claim "would create a direct conflict with the statutory text, which encourages the use of arbitration for dispute resolution without imposing any constraints on collective bargaining."[54] Thus, resolution of statutory claims otherwise outside the contract, when the employer insists on arbitration, are clearly permissive subjects of bargaining, until they become part of which decisions of the parties are to be arbitrated; then they become

48. "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement." *Id.* at 1498–99; *see also* Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

49. 29 U.S.C. §§ 158(a)(5), (d) (2006).

50. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1464 (2009) (second alteration in original) (Justice Thomas assumes that the substantive issues to be included are also subject to mandatory bargaining); Util. Vault Co., 345 N.L.R.B. 79 (2005) (holding that the mechanism of contractually based grievance arbitration is a mandatory subject of bargaining); *see also* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991).

51. *Pyett*, 129 S. Ct. at 1464.

52. "[T]he arbitration duty is a creature of the collective-bargaining agreement," and the matter of arbitrability must be determined by reference to the agreement, rather than by compulsion of law. Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 250–51 (1977).

53. 415 U.S. 36 (1974).

54. *Pyett*, 129 S. Ct. at 1465 n.6.

mandatory. Something of a smoking gun on mandatory bargaining of arbitration subjects appears in a recent circuit court opinion:

> [I]n *Mendez v. Starwood Hotels*, the Court of Appeals for the Second Circuit upheld the lower court's denial of a motion to compel arbitration based on a letter agreement signed by Starwood and Mendez because the subject matter of the agreement to arbitrate employment related discrimination claims was subject to mandatory bargaining under the NLRA, and the employer had no right to go outside the collective bargaining context to obtain this letter.[55]

The majority in *Pyett* continually rested its decision on the Steelworkers' Trilogy. In *United Steelworkers v. American Manufacturing Co.*,[56] whether seniority rights, just-cause dismissal, management rights, or a comprehensive arbitration clause would decide an issue over a refusal to rehire a partially disabled employee was decided as a duty to arbitrate the dispute. The legal issue on appeal by the union was based solely on the union's right to have the issue heard by an arbitrator. In *United Steelworkers v. Warrior & Gulf Navigation Co.*,[57] the scope of the management-rights clause had to be arbitrated because the requirement to arbitrate all local disputes under the scope of the arbitration clause modified the management-rights clause and required arbitration under the contract of a decision to contract out bargaining-unit work.[58]

Some commentators on *Pyett* believe that employers will push for broad arbitration of all potential legal disputes and force unions to agree in order to make progress on other subjects more core to employee interests.[59] But what is good for the employer's goose must also be good for the employee's gander.

Of course, the majority did not refer to Justice Stewart's concurrence in *Fibreboard Paper Products Corp. v. NLRB*,[60] long since followed as limiting decisions that lie at the "core of entrepreneurial control"[61] to permissive subjects of bargaining about which both sides

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55. David P. Twomey, *The Supreme Court's* 14 Penn Plaza v. Pyett *Decision: Impact and Fairness Considerations for Collective Bargaining*, 61 LAB. L.J. 55, 60–61 (2010) (citation omitted).

56. 363 U.S. 564 (1960).

57. 363 U.S. 574 (1960).

58. "Douglas adopted the union's position that a promise to arbitrate contained in a collective bargaining agreement is enforceable without regard to the court's view of the merits of the underlying grievance." Katherine Van Wezel Stone, *The Steelworkers' Trilogy: The Evolution of Labor Arbitration, in* LABOR LAW STORIES 149, 181 (Laura J. Cooper & Catherine L. Fisk eds., 2005). The Stone chapter clearly connects the union's litigation strategy for extending *Lincoln Mills* to the Douglas opinions in the three cases.

59. *See* Minda & Klein, *supra* note 5, at 90.

60. 379 U.S. 203, 217 (1964) (Stewart, J., concurring); *see also* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674–80 (1981).

61. *Fibreboard Paper Prods.*, 379 U.S. at 223 (Stewart, J., concurring).

need to agree to negotiate. Such subjects are substantively permissive because unions supposedly should not be able to force agreement about decisions that impact decisions about return on investment but only incidentally affect member job security. Union members nonetheless increasingly have concerns about such management decisions in the global economy. Under *Pyett*, unions can insist on mandatory bargaining of such decisions to impasse as an issue they want to be submitted to arbitration, not as to any management-prerogatives clause itself, but as part of the subjects covered by the arbitration clause.[62] The subject of arbitration is, after all, "easily a condition of employment." Furthermore, Justice Thomas required that inclusion of statutory claims within the scope of arbitration under a collective-bargaining agreement must be "explicitly stated."[63]

Now the union, rather than management, will race to bring up a broad arbitration clause as a mandatory issue that must be bargained to impasse before other issues can be agreed to. Of course, before *Pyett*, permissive issues could, in theory, hold hostage other mandatory issues in bargaining, but the practice of actually doing so depended upon a careful calculation of union bargaining leverage and was unlikely to be insisted upon for very long.[64] Bringing *Gilmer* so blithely to *Pyett* would seem to bring unions into the ordinary and daily management of the enterprise. That outcome may be a good thing given the disruptions caused by the global economy, although this was likely not contemplated by the draftsmen of the NLRA,[65] nor by a long line of Supreme Courts.[66]

III. IGNORING NLRA PROTECTION OF COLLECTIVE ACTIONS OF WORKERS

The most general protection of employees under the NLRA is the protection under sections 7 and 8(a)(1) "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

62. "Yet, arbitration, as the Court itself often reminds us, is 'part and parcel of the collective bargaining process,' and it is conceptually difficult to separate the obligation to arbitrate from the obligation to bargain." ATLESON, *supra* note 4, at 164.

63. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1468 (2009) (quoting Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998)); *see also* Campbell v. Pilot Catastrophe Servs., Inc., No. 10-0095-WS-B, 2010 WL 3306935, at *4 (S.D. Ala. Aug. 19, 2010) (citation omitted).

64. *See* John Thomas Delaney, Donna Sockell & Joel Brockner, *Bargaining Effects of the Mandatory-Permissive Distinction*, 27 INDUS. REL. 21 (1988).

65. "A third possible argument, that *all* proposed subjects were to be considered mandatory, was generally neither suggested nor discussed." ATLESON, *supra* note 4, at 119.

66. *See* Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 475 (1983).

protection . . . ."[67] Thus, the NLRA does not only protect workers engaged in collective bargaining over a contract, but other collective actions as well.[68] One does not need to be a member of a union to participate in protected activities, which may include activities that support a union action or that involve no union presence at all.

Justice Thomas took a quotation from Justice Marshall in *Emporium Capwell Co. v. Western Addition Community Organization*[69] out of context in his assertion that "[t]his 'principle of majority rule' to which respondents object is in fact the central premise of the NLRA."[70] In fact, the Marshall quotation following this assertion by Thomas includes the preface, "'Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power . . . .'"[71] The central purpose of the NLRA is not now, and has never been, majority rule per se. Majority rule is simply the mechanism of democracy through which union members determine the collective actions that they will commit themselves to as a unit.[72] The central purpose of the NLRA is the protection of collective actions for mutual aid and protection, including union organization and subsequent collective bargaining if so desired:

> The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping, *and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.* So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. . . . It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained . . ., but it seems to us that the [A]ct has put an end to this.[73]

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67. National Labor Relations Act of 1936 § 7, 29 U.S.C. § 157 (2006).

68. This claim is so commonplace it underlies recent teaching materials on the most important cases in American labor law: "Workers could gain substantive rights under the NLRA only by joining together in labor organizations and using their collective economic power to persuade employers to grant employee rights in collective bargaining agreements. . . . The entire regime of individual and group rights is premised on assumptions about the social and economic importance of collective action." Laura J. Cooper & Catherine L. Fisk, *The Enduring Power of Collective Rights*, *in* LABOR LAW STORIES, *supra* note 58, at 1.

69. 420 U.S. 50, 62 (1975).

70. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1472 (2009).

71. *Id.* (quoting *Emporium*, 420 U.S. at 62).

72. The effectiveness of their collective strategies will then largely depend on the solidarity of the group. *See* David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268 (1988).

73. Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 856 & n.294 (1989)

Even after the Taft-Hartley revisions in 1947, the right under section 7 to refuse to join a union, or to resign from one, is only a right to opt out of a union. This in no way undermines the right of protected collective action for those who do decide to join or assist a union.[74]

While the exclusive bargaining agent of the appropriate unit may be chosen by majority vote, the bargaining representative must represent all unit members as a unit.[75] The union that served only a current majority would be short-lived before being decertified. The union needs strong consensus on most issues to convince management to seriously bargain, instead of betting that it is safe and precipitating a strike—and then replacing up to half the bargaining unit permanently.[76] That the union may not be able to satisfy all members simultaneously, and that the final agreement is in force only after majority ratification, does not diminish the fact that the collective-bargaining agreement is on behalf of the collective unit and a result of leverage achieved through collective action.[77] Justice Thomas is thus part of a solely judicial agenda of individualizing federal labor law:[78]

In the name of protecting individual workers' rights to violate their

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(alterations in original) (quoting NLRB v. Peter Cailler Swiss Chocolates Co., 130 F.2d 503, 505–06 (2d Cir. 1942)).

74. "Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by the union rest fundamentally on the mutual reliance that inheres in the 'pact.'" NLRB v. Granite State Joint Bd., 409 U.S. 213, 221 (1972) (Blackmun, J., dissenting).

75. "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it *collectivizes* the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944) (emphasis added).

76. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) (upholding the replacement of strikers "with others in an effort to carry on the business"); *see also* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (prohibiting additional seniority credit for permanent replacements of strikers).

77. "[T]he law of labor relations is designedly and necessarily anti-individualistic. The collective interest is made paramount . . . ." Brousseau, *supra* note 7, at 12.

78. *See, e.g.*, Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95, 104–05 (1985) (refusing to uphold union fining of a member who resigned during a strike despite the union's constitutional agreement not to do so); Abood v. Detroit Bd. of Educ., 431 U.S. 207, 233–37 (1977) (limiting agency fees required of non-members to support collective-bargaining activities and allowing opt-out of support for political or other activities supportive of the union or unions generally). Even the duty of the union to fairly represent all members of the unit can be seen in its enforcement to "fractur[e] the collective entitlement of a body of labor into the aggregated rights of individual employees to be fairly represented. What had been the union's obligation to an entire unit became a duty to each member within it." Becker, *supra* note 6, at 680. Nor is such judicial revisionism limited to the post-Rehnquist Court. The Burger Court contributed in the lead-up to *Patternmakers*. *See Granite State Joint Bd.*, 409 U.S. at 215–18 (prohibiting union's fining of members during strike).

> contractual agreements, the Court debilitates the right of all workers to take effective collective action. The conclusion that freedom under the NLRA means freedom to break a freely made promise to one's fellow workers after they have relied on that promise to their detriment is not only a notion at odds with the structure and purpose of our labor law, but is an affront to the autonomy of the American worker.[79]

For the *Pyett* majority, a union gets what it can for members understood as a majority aggregate of the majority's individual interests. This view of labor law is at odds with a number of statutory provisions and makes totally unnecessary any goal of solidarity as an experience of union, particularly, but not solely, a union's last recourse in effective bargaining leverage—a strike.[80] It is certainly contrary to what most Americans in favor of unionization think is more important to them than the highest possible wage rate; that is, dignity and collective voice.[81]

This is the unkindest cut of all. It creates a judicial veto of an act, the NLRA, in an opinion repetitiously invoking the *absence* of congressional language in the ADEA prohibiting arbitration of Title VII or other statutory claims to justify arbitration. Thus, a collective action is used to protect a collective union decision not to pursue to arbitration an individual's non-waivable statutory right in the name of an individualized membership organization. This is true even where, as in *Pyett*, the union's decision not to arbitrate ends the members' attempt to get a hearing of any kind for their Title VII right. It is recognized that the *Pyett* majority refused to reach any conclusion on whether such members not receiving any arbitration could then go to court under Title

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79. *Pattern Makers'*, 473 U.S. at 133 (Blackmun, J., dissenting).

80. "The strike is 'the ultimate weapon in labor's arsenal.' It works to foster both collective bargaining and union democracy—the former by compelling employers to take their workers' needs seriously, the latter by providing the experience of identity formation and collective action." Abraham, *supra* note 72, at 1336 (quoting NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967)). Further, "[i]n strike and similar situations, workers, if they are to have any chance of success, must operate on the basis of a collective identity which overcomes the individuality of their resources and interests rather than simply aggregating them." *Id.* at 1287.

81. "Putting aside the particular form of representation that workers favored, the main finding of the survey was that the vast majority of workers—85% to 90%, depending on the particular questions—wanted a greater collective say at the workplace than they had. Moreover, most workers thought that greater representation and voice to employees at their workplace would be good for their firm as well as for them." RICHARD B. FREEMAN, ECON. POLICY INST., DO WORKERS STILL WANT UNIONS? MORE THAN EVER 1 (2007), *available at* http://www.shared prosperity.org/bp182/bp182.pdf. "[A]n August 2005 Hart survey gave the following list of top concerns: health care costs (35%), jobs going overseas (31%), rising gas prices (29%), raises that don't keep up with the cost of living (23%), lack of retirement security (14%), and work schedules interfering with family responsibilities (10%)." *Id.* (citing Peter D. Hart Research Associates, *Study #7704*, AFL-CIO (Aug. 2005), http://www.aflcio.org/aboutus/laborday/upload/toplines.pdf).

VII[82]; but nothing in the majority's paeans to arbitration suggests that such a "union letter to sue"[83] would not be perverse to the role of arbitration in pursuit of industrial peace or, as now entirely fabricated into the statute, the pursuit of the avoidance of litigation.

Instead of guaranteeing statutory redress, Justice Thomas insisted that if the union fails to pursue a member's statutory claim, the union may have violated its duty of fair representation.[84] The abandoned members could sue the union instead of being able to pursue a statutory claim in court. First, such a claim is notoriously hard to prove, depending on a showing of union conduct that is "arbitrary, discriminatory, or in bad faith."[85] Second, the Supreme Court has explicitly authorized a union to drop an individual's grievance without arbitration if doing so would advance another legitimate objective of the union or a wider number of its members. Ironically, in *Emporium Capwell*, Justice Marshall upheld the unit's protection of exclusive-representation status and control of dispute resolution under the CBA, preventing a minority from bargaining independently with management precisely because Title VII provided potential alternative relief completely independent of the collective-bargaining process for the minority member's discrimination claim.[86]

It is into this judicially re-legislated statute that the *Pyett* majority's impossible reading, but not overruling, of *Gardner-Denver* must be placed.[87] The CBA must expressly submit not only contract terms preventing discrimination, but also statutory rights to arbitration in whatever form called for in the contract.[88] This article will not rehearse at length Justice Souter's dissent demonstrating the majority's mangling of the case, as accomplished by referencing bits and pieces of it. Allowing a union to choose whether to arbitrate a Title VII claim or sacrifice its pursuit in favor of placing its bargaining or contract-enforcement chips on something else of more widespread member enthusiasm underscores the necessary tension between collective action (NLRA) and individual protection (Title VII). It is disingenuous to say that Congress did not rewrite the NLRA in passing an ADEA with no mention of

82. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009).

83. If the EEOC does not wish to prosecute a complaint on behalf of an individual under Title VII, it issues a "right to sue letter" to the complainant.

84. *Pyett*, 129 S. Ct. at 1473. This is ironic and question-begging given that the duty of fair representation already may be said to undermine union collective actions. *See supra* note 78.

85. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

86. *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 60–70 (1975).

87. *Pyett*, 129 S. Ct. at 1479 (Souter, J., dissenting).

88. Still, Justice Thomas found it necessary in a footnote to threaten the dissenters that if they push their reading of *Gardner-Denver*, the case will be overruled in a future case. *See id.* at 1469 n.8 (majority opinion).

prohibiting arbitration, or that a statutory recognition of alternative dispute resolution in order to promote industrial peace under the NLRA should be read to cover statutory claims entirely to be determined on merits that could not be modified by a collective bargain.[89] Nor should the theoretical possibility of an adequate alternative forum be used to substantially change the role of labor arbitration as an integral part of a continual bargaining process.[90]

IV. CONCLUSION: SUPREME COURT WITHOUT A CLUE

A bare Supreme Court majority, in discovering the religion of arbitration in *Pyett*, has, if it is to be believed, summarily altered the system of labor–management relations in the United States. The role of the labor arbitrator has been redeployed in contradiction of the reason such arbitration was desirable and could be trusted by both employers and employees.[91] The mandatory/permissive distinction between bargaining subjects has been rendered meaningless, much to the coming and predictable chagrin of employers. Solidarity has been mortally wounded and with it most of the reason for wanting unions as part of the determination of employment relations at all.[92] Nothing will prevent, not just the arbitration of discrimination in the workplace, but the arbitration of

89. "There were 'statutory rights related to collective activity,' which 'are conferred on employees collectively to foster the processes of bargaining [, which] properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members.' But 'Title VII . . . stands on plainly different [categorical] ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities.'" *Id.* at 1477 (Souter, J., dissenting) (alterations in original) (quoting Alexander v. Gardner-Denver Co, 415 U.S. 36, 51 (1974)).

90. Mark Berger has suggested that the union, in agreeing to arbitration of statutory claims, must remain in charge of what kind of arbitration is to be used, including what procedures are to be used and the representation provided as part of the collective-bargaining process that was agreed to in the arbitration clause. Mark Berger *A Step Too Far:* Pyett *and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV 55, 83 (2009); *see* Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 542, 223 N.L.R.B. 533, 533 (1976) (explaining that even if union provides a lawyer for an individual's grievance arbitration, the individual cannot direct legal strategy or witnesses called). It is also unclear whether labor arbitrators have any power to subpoena witnesses. *See* Gary Furlong, *Fear and Loathing in Labor Arbitration: How Can There Possibly be a Full and Fair Hearing Unless the Arbitrator Can Subpeona Evidence?*, 20 WILLAMETTE L. REV. 535 (1984).

91. Mark Berger suggests the union member who does not want her statutory claim to be arbitrated has the option of individual employment contract employees; that is, to quit. *See* Berger, *supra* note 90, at 81.

92. "The willingness of individuals prudently and responsibly to make cause with others, to make some personal sacrifice for the common good even when they may not directly benefit from it, is the *sine qua non* for the labor movement. Such habits also are central to the survival of any democracy." Julius G. Getman & Thomas C. Kohler, *The Story of* NLRB v. MacKay Radio & Telegraph Co.*: The High Cost of Solidarity, in* LABOR LAW STORIES, *supra* note 58, at 13, 53.

all federal remedial statutes at issue between employers and employees, and afortiori, all state-law disputes between employers and employees as well.[93] The *Pyett* majority, under Justice Thomas's opinion, has truly empowered a private constitution, not simply of the workplace, but of substantial federal *and* state law replacement as well.[94] Such is the price of ignorance—or was that privatization of law the intent all along?[95]

93. On the required arbitration of state-law claims, see, for example, Johnson v. Tishman Speyer Props., L.P., No. 09 Civ. 1959(WHP), 2009 WL 3364038, at *3 (S.D.N.Y. Oct. 16, 2009). On section 301 preemption, see Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968).

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

95. "[A]rbitrators who want to interpret the statutes correctly will have no authoritative statutory interpretations to look to for guidance. It also means that the law cannot play an educational role of shaping parties' norms and sense of right and wrong, and therefore it cannot shape behavior in its shadow." Stone, *supra* note 5, at 1043 (footnote omitted).