HEY, WE WERE HERE FIRST!:

UNION ARBITRATION AND THE FEDERAL ARBITRATION ACT

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I. INTRODUCTION

The U.S. Supreme Court in its 2018 decision in *Epic Systems* held, contrary to the position of the National Labor Relations Board (Board or NLRB), that under the Federal Arbitration Act (FAA) employer-employee agreements requiring employees to waive their right to participate in class action lawsuits were enforceable and that they did not interfere with the right of employees, under Section 7 of the Labor Management Relations Act (LMRA), to "engage in concerted activity."[1] In Justice Neil Gorsuch's opinion for the majority in that five-four decision, he stated repeatedly that "§7 focuses on the right to organize unions and bargain collectively."[2] Justice Gorsuch further stated, and pointed out that the dissent in the decision did the same, that "the legislative policy embodied in the NLRA is aimed at 'safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining.'"[3] The references to both the majority and dissenting opinions demonstrate that all Justices of the U.S. Supreme Court in 2018 agreed that the "foremost" policy of the LMRA was protecting employees' rights to be represented by a union and have that union bargain collectively with their employer on their terms and conditions of employment.[4]

One aspect of that should include union-controlled arbitration of claimed violations of collective bargaining agreements, as an estimated 99% of major union-employer agreements include a grievance procedure that terminates in binding arbitration by a person or panel.[5] And more than 90% of collective-bargaining agreements have a provision protecting employees from termination by requiring employers have "just

1. Epic Sys., Inc. v. Lewis, 138 S. Ct. 1612, 1646 n.13 (2018).
2. *Id*. at 1617.
3. *Id*. at 1630 (quoting *id.* at 1636 (Ginsburg, J., dissenting)).
4. *See id.*
5. THE BUREAU OF NAT'L AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 37 (Collective Bargaining Negotiations & Contracts eds., 11th ed. 1995). There appears to have been no systematic study of the incidence of grievance and arbitration provisions since the 1990s.

cause" or something equivalent to fire an employee,[6] meaning that in most union agreements an employee's termination can be challenged as a contract violation subject to arbitration. The term "union-controlled" for such arbitration was not chosen lightly, but rather was based on the fact that most grievances are over some action of the employer that the union is trying to reverse or otherwise alter, an action that will remain unchanged unless the union decides to bring the grievance to arbitration.[7]

In the United States, arbitration between unions and employers began in the nineteenth century, although it was sporadic until the last couple decades of the 1800s.[8] In 1888, Congress even enacted a federal statute to authorize enforceable voluntary arbitration between railroad unions and employers.[9] In subsequent decades in that industry, and others like coal mining and garment-making, disputes between unions and employers were resolved through "interest arbitration" to set terms of new agreements and "grievance" or "rights" arbitration to interpret existing agreements.[10] In 1926, Congress enacted the Railway Labor Act, still in force, which requires arbitration of so-called "minor disputes" between unions and employers that involve interpretation and application of existing agreements.[11] After the enactment of the 1935 National Labor Relations Act, which gave most private sector employees the right to choose a union to represent them, many more unions and employers included

6. Martin H. Malin and Monica Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. PA. J. BUS. & EMP. L. 175, 190 (2008); BASIC PATTERNS IN UNION CONTRACTS, *supra* note 4, at 37; *see* Tom Juravich, Kate Bronfenbrenner & Robert Hickey, *Significant Victories: An Analysis of Union First Contracts*, CORNELL U. IRL SCH., 87, 93 (2006) (even with difficult-to-obtain first contracts between unions and employers, 75% had provisions limiting terminations to "just cause").

7. *See* Vaca v. Sipes, 386 U.S. 171, 190–91 (1967) (explaining why the union, rather than the individual employee, should decide whether a grievance should go to arbitration); Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 534 (2001) ("Under a collective bargaining agreement, the union, not the employee, controls the decision about whether to arbitrate and how to arbitrate, including who serves as arbitrator, what arguments to make, and who represents the union in the arbitration."); Clyde Summers, *Worker Participation in Sweden and the U.S.: Some Comparisons From An American Perspective*, 133 U. Pa. L. Rev. 175, 193 n.72 (1984) ("the practice in the United States, where the employer acts and the union grieves, with the employer's action continuing until the dispute is settled."); Int'l Ass'n of Machinists and Aerospace Workers, Dist. Lodge No. 100 v. Eastern Air Lines, Inc., 826 F.2d 1141, 1148 (1st Cir. 1987) (in "traditional labor relations [the] employer acts, union files grievance, arbitrator decides.").

8. *See* CHARLES J. MORRIS, LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES 5 (Max Zimny et al. eds., 1990).

9. *Id*. at 8.

10. *Id*. at 9.

11. ABA SECTION OF LABOR & EMPLOYMENT LAW, THE RAILWAY LABOR ACT 1, 3 (Douglas W. Hall & Michael L. Winston eds., 4th ed. 2016).

grievance and arbitration provisions in their agreements until by 1953, 89% of union-employer agreements provided for arbitration of alleged contract violations.[12]

The U.S. Supreme Court made union arbitration decisions enforceable in its 1957 decision in *Lincoln Mills*.[13] The Court reasoned based on the language of LMRA Sections 301(a) and 301(b) that federal courts had jurisdiction to enforce union-employer agreements to arbitrate.[14] The Court in *Lincoln Mills* also held that the law governing Section 301, including union arbitration cases, would be "federal law, which the courts must fashion from the policy of our national labor laws."[15] The Supreme Court and other federal courts have done so ever since.

The Federal Arbitration Act (FAA), so important to the Supreme Court's *Epic Systems* decision, went into effect in 1926, the same year the Railway Labor Act, and that statute's provisions on union arbitration, became law.[16] The first time that a Supreme Court majority discussed the relationship between union arbitration and arbitration under the Federal Arbitration Act was in the 1987 decision in *United Paperworkers International Union v. Misco, Incorporated.*[17] The Court in that decision mentioned that . . .

> the federal courts have often looked to the [Federal Arbitration] Act for guidance in labor arbitration cases, especially in the wake of the holding that § 301 of the Labor Management Relations Act, 1947 . . . empowers the federal courts to fashion rules of federal common law to govern "[s]uits for violation of contracts between an employer and a labor organization" under the federal labor laws."[18]

Misco has since been relied on by lower federal courts for using the FAA and FAA precedents to decide issues in cases involving grievance and arbitration under collective-bargaining agreements.[19]

The Supreme Court's first decision on FAA arbitration based on an employee's individual agreement with an employer came four years after

12. Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RESOL. 19, 31 n.72 (2001) (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, PUB. NO. 1166, LABOR-MANAGEMENT CONTRACT PROVISIONS 10 (1953)).

13. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 458–59 (1957).

14. *Id.* at 451–52.

15. *Id.* at 456.

16. Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2012) (identifying statute's effective date as January 1, 1926); Railway Labor Act, 45 U.S.C. §§ 151–188 (2012).

17. 484 U.S. 29, 35 (1987).

18. *Id.* at 40 n.9 (quoting *Lincoln Mills*, 353 U.S. at 461 n. 1 (Frankfurter, J., dissenting)).

19. *Id.*

Misco, in the Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation*.[20] *Gilmer* also marked the first time that the Court held an employee was required to arbitrate a statutory employment law or discrimination claim against their employer instead of pursuing the claim in court.[21] As will be discussed more fully below,[22] the Court in *Gilmer*[23] distinguished its prior ruling in *Alexander v. Gardner-Denver Company*, in which the Court had unanimously held that employees covered by arbitration provisions in collective bargaining agreements were not bound to arbitrate their statutory discrimination claims and could pursue such claims in court.[24] Ten years later the Court settled an issue that they had left unresolved in *Gilmer* and some subsequent decisions, and held in 2001 in *Circuit City Stores, Incorporated v. Adams* that the FAA's Section 1 exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"[25] did not apply to non-transportation employees.[26]

Even prior to resolving the extent of FAA's Section 1 exemption, the Supreme Court dealt with how its FAA jurisprudence applied to union arbitration.[27] The Court held in its 1998 decision in *Wright v. Universal Maritime Service Corporation*, that an employee covered by a collective bargaining agreement is not required to arbitrate a statutory claim instead of pursuing that claim in court unless that agreement includes a "clear and unmistakable waiver" of the right to bring statutory claims to court.[28] The Court found that standard was not met by the agreement covering Mr. Wright.[29]

The Court did find a collective bargaining agreement that met that standard in 2009 in *14 Penn Plaza LLC v. Pyett*.[30] In the *Pyett* case the

20. 500 U.S. 20, 23–24 (1991).

21. *Id.*; *see* Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. KAN. L. REV. 583, 596 (2004). The employee in *Gilmer* claimed his discharge violated the Age Discrimination in Employment Act. *Id.*

22. *See infra* notes 188–90 and accompanying text.

23. *Gilmer*, 500 U.S. at 33–35 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 (1974)).

24. 415 U.S. at 59–60.

25. 9 U.S.C. § 1 (2012).

26. 532 U.S. 105, 109 (2001). In 2019, the Supreme Court held that independent contractor truck drivers who drive interstate, along with other interstate transportation employees, are covered by the FAA's Section 1 exemption. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 543–44 (2019).

27. *See generally* 525 U.S. 70 (1998) (applying FAA jurisprudence to union arbitration).

28. 525 U.S. 70, 81–82 (1998).

29. *Id.*

30. 556 U.S. 247, 251 (2009).

Court also distinguished *Alexander v. Gardner-Denver Company* in expressly holding that employer-union agreements could require an employee to bring their discrimination claim to arbitration instead of to court.[31] Although the Court in *Pyett* did not admittedly overrule *Alexander*, it did question many of that earlier decision's rationales for holding that unions could not waive, in collective bargaining negotiations, represented employees' right to pursue their statutory discrimination claims in court instead of in arbitration.[32] A couple of the rejected rationales involved doubts by the *Alexander* Court[33] as to whether unions could and would fully protect the interests of employees who alleged statutory violations. The Court in *Pyett* determined that through the LMRA and other statutes, Congress had created means and remedies through which union-represented employees could protect their statutory rights from disregard or worse by unions.[34]

From 2009 until 2019, the above-discussed legal rules are the ones that governed the relationship between the FAA and union arbitration. During those years, an increasing number of employees became covered by individual agreements with their employers to arbitrate their statutory claims.[35] According to a 2018 study by the Economic Policy Institute, sixty million employees in the United States, more than half of all American workers, are covered by agreements with their employers that require them, as a condition of being hired or retained, to bring any claims that their employer violated their statutory or other rights to arbitration instead of to court.[36]

Of course union arbitration, and litigation over such arbitration, also continued. Some of the litigation has been over whether courts should apply the precedents on union arbitration under LMRA Section 301 or FAA precedents or both. Some federal courts of appeals have adopted and maintained the position that, though FAA precedents can be referred

31. *Id.* at 260–64 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 (1974)). Alexander and other past precedents distinguished on the grounds that the collective bargaining agreement arbitration provisions in those cases did not explicitly apply to statutory claims and that the issue in those cases was whether an arbitration decision precluded judicial consideration of employee statutory claims, rather than whether the employee had to go first to arbitration prior to obtaining such judicial consideration.

32. *Id.*

33. *Id.* at 265–74.

34. *Id.* at 271–72.

35. *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

36. *Id.*

to for guidance as the Supreme Court said in *Misco*, the FAA does not apply to claims involving arbitration based on union-employer collective bargaining agreements and such claims are brought under LMRA Section 301.[37] By contrast, a 3-judge panel of the Tenth Circuit has held that the FAA applies to arbitration provisions in collective bargaining agreements,[38] and a split 3-judge panel of the Ninth Circuit in 2020 has found that a 2010 United States Supreme Court decision requires that FAA instead of LMRA precedents be applied to labor arbitration cases.[39]

The split 2020 Ninth Circuit decision might now be the greatest threat to the continued viability of Supreme Court and other labor arbitration precedents, but the unkindest cut to them might well be a decision by the federal agency with primary responsibility for administration and enforcement of the Labor Management Relations Act.[40] In *Anheuser-Busch, LLC*, a 2-1 Board majority held that an employer had acted lawfully when, after a discharged union-represented employee sued for discrimination in court, that employer moved to compel that employee to arbitrate that claim under the FAA based on an individual arbitration agreement that employee had signed when hired into the unionized unit.[41] The Board majority disagreed with the General Counsel and the Administrative Law Judge's decision it was reviewing that it was an unfair labor practice for the employer to seek to enforce the individual arbitration agreement against a union-represented employee when the employer's agreement with the union did not clearly waive employees' right to bring

37. Roy v. Buffalo Philharmonic Orchestra Soc'y, Inc., 682 F. App'x 42, 44 (2d Cir. 2017) ("[a]lthough the Federal Arbitration Act ("FAA") does not apply to arbitrations conducted pursuant to the Labor Management Relations Act ("LMRA"), federal courts often look to the FAA for guidance in labor arbitration cases"); Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 380 F.3d 1084, 1097 (8th Cir. 2004); Int'l Chemical Workers Union, Local 683C v. Columbian Chems. Co., 331 F.3d 491, 494 ("when reviewing a case involving a CBA and arising under Section 301, courts are not obligated to rely on the FAA but may rely on it for guidance"); Coca–Cola Bottling Co. of New York, Inc. v. Soft Drink & Brewery Workers Union Local 812, Int'l Bhd. of Teamsters, 242 F.3d 52, 53 (2d Cir. 2001) ("[w]e hold that in cases brought under Section 301 . . . the FAA does not apply.").

38. *See* Int'l Bhd. of Elec. Workers, Local # 111 v. Pub. Serv. Co. of Colo., 773 F.3d 1100, 1107 (10th Cir. 2014). However, the court in that case also acknowledged and did not express disagreement with Seventh Circuit precedent that held that if applying the FAA to arbitration under a collective bargaining agreement caused a conflict with LMRA Section 301, that conflict would be resolved in favor of Section 301. *See id.* (quoting Smart v. Int'l Bhd. of Elec. Workers, Local 702, 315 F.3d 721, 724–25 (7th Cir. 2002)).

39. *See* SEIU Local 121RN v. Los Robles Med. Ctr. *,* No. 19-55185, 2020 WL 5583677 (9th Cir. Sept. 18, 2020).

40. *See generally* 367 N.L.R.B. No. 132 (May 22, 2019) (NLRB weighing the relationship between individual arbitration agreements and collective bargaining agreements).

41. *Id.* at *7.

claims in court instead of arbitration and the employer did not bargain with the union prior to seeking to compel arbitration.[42]

The Board majority emphasized that the employer's "petitioning" a court through a motion to compel was protected by the First Amendment, and that—as the majority put it—to "protect this essential right," the U.S. Supreme Court had established standards limiting when petitioning a court could be found an unfair labor practice.[43] As will be discussed more fully in Part II of this article, the majority found that Anheuser-Busch's conduct did not meet any of those Supreme Court definitions of when recourse to court could be deemed an unfair labor practice and violation of the LMRA.[44] Part II of this article will also explain why the Board majority's decision in *Anheuser-Busch* violated existing U.S. Supreme Court and other precedents under the LMRA and the FAA.[45] Part III of the article discusses other issues regarding the relationship between LMRA and FAA arbitration, and Section A of that Part explaining why most current federal precedent is correct that FAA substantive rules and precedents should remain only something to be considered in LMRA arbitration but not always binding in the latter; Section B relies on current federal precedent to explain why parties should be able to use FAA statutory procedures, as long as they're not inconsistent with the LMRA, in LMRA cases; and Section C discusses LMRA and FAA precedents that convincingly demonstrate why parties should be bound to the dispute resolution processes to which they've agreed even if decisionmakers in that process are arguably not absolutely disinterested in the matter being arbitrated.

II. THE NATIONAL LABOR RELATIONS BOARD'S DECISION IN *ANHEUSER-BUSCH*, AND ITS ATTEMPTED REVISION OF FEDERAL LABOR LAW

A. Bases for the Majority's Decision, and the Dissent's Counters

The NLRB General Counsel's only allegation in the *Anheuser-Busch* case was that Anheuser-Busch (A-B) had violated Sections 8(a)(5) and (a)(1) of the LMRA when it made a unilateral change in terms of employment "without notice to the union and without affording the union an opportunity to bargain."[46] The factual basis for this charge was that A-B, through a motion to a federal district court in Florida, acted to compel

42. *Id.*
43. *Id.*
44. *See infra* notes 45–90 and accompanying text.
45. *See infra* notes 45–223 and accompanying text.
46. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *10.

discharged former employee Matthew C. Brown (Brown) to bring his discrimination claim against A-B to arbitration through A-B's Dispute Resolution Program (DRP) instead of to court.[47] Brown had been a unionized hourly employee working in an A-B bargaining unit represented by the Teamsters union, and the DRP did not apply to A-B's union-represented employees because, by its terms, the DRP "applied to 'salaried and non-union hourly employees.'"[48] In applying the DRP to a union-represented employee outside its stated scope, A-B was alleged to have changed a "term[] and condition of employment" regarding which it was legally required to bargain with the union.[49] As A-B did not dispute that it never notified or bargained with the union about this change,[50] the change was made unilaterally and therefore in violation of Sections 8(a)(5) and (1) of the LMRA, which obligated A-B to bargain with the union about such an employment term.[51] The Administrative Law Judge (ALJ) agreed with the General Counsel that A-B's motion to compel Brown to arbitrate was a unilateral change in violation of Section 8(a)(5),[52] and ordered A-B to "desist" from making this change and to withdraw its motion to compel arbitration.[53]

Respondent A-B "excepted to" the ALJ's decision and appealed it to the Board.[54] A-B's chief argument in its initial brief to the Board was

47. *Id.* at *11.

48. *Id.* at *14.

49. *Id.* at *12.

50. *See id.*

51. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *14.

52. *Id.* A-B in its Memorandum in Support of its Exceptions to the Decision of the Administrative Law Judge (A-B's Exceptions Mem.) distinguished the Board's decision in *Utility Vault Company*, which the ALJ had quoted for the proposition that "the implementation of the Dispute Resolution Process (DRP) agreement, which requires that employees arbitrate claims involving their terms and conditions of employment . . . is a mandatory subject of bargaining," on the grounds that the Board in *Utility Vault* had relied on the facts that employees were subject to discharge if they did not agree to arbitrate statutory claims, while employee Brown was already discharged, and Utility Vault's arbitration agreement—unlike A-B's motion to compel—also required waiver of an employee's right to file charges with the NLRB. 345 N.L.R.B. at *79 n.2 (Aug. 22, 2005); *see* Respondent's Memorandum in Support of Its Exceptions to the Decision of the Administrative Law Judge at 18–19, Anheuser-Busch, LLC (Oct. 24, 2013) (No. 12-CA-094114), https://apps.nlrb.gov/link/document.aspx/09031d45814701e3 [hereinafter A-B's Exceptions Mem.]. However, for purposes of this article, these bases for distinguishing *Utility Vault* are irrelevant, given that the U.S. Supreme Court in 14 Penn Plaza LLC v. Pyett held that provisions requiring union-represented employees to arbitrate statutory claims are mandatory subjects of bargaining. *See* 556 U.S. 246, 256 (2009) (quoting the statement in Litton Financial Printing Division v. NLRB, that "arrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining." 501 U.S. 190, 199 (1991)).

53. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *14.

54. A-B's Exceptions Mem., *supra* note 51, at 6.

that employee Brown "long after being terminated" by A-B did not "continue[] to be an employee under Section 2(3)" and thus was not someone who could claim an LMRA Sections 8(a)(5) and (1) violation based on his former employer's motion to compel him to arbitrate his statutory discrimination claim.[55] The Board majority reserved on that argument,[56] and chose to make new labor law in a different way.

Central to the Board majority's conclusion was the "Petition Clause" of the First Amendment of the U.S. Constitution.[57] Also central to the Board majority was the U.S. Supreme Court's interpretation of that Clause in *Bill Johnson's Restaurants, Incorporated v. NLRB*, in which the Court "placed limits on the Board's authority to find that a party's litigation efforts constitute an unfair labor practice."[58] The Board majority was correct that *Bill Johnson's Restaurants*, was highly relevant to whether A-B violated the LMRA, but the majority misapplied that Supreme Court decision.

Specifically, the Board misapplied footnote five, in which the Supreme Court stated, "[w]e are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law."[59] The Supreme Court added that the employer petitioner in that case "concedes that the Board may enjoin these latter types of suits."[60] And even the Board majority in *Anheuser-Busch* acknowledged that these examples from footnote five of *Bill Johnson's Restaurants*, remain unchanged by the U.S. Supreme Court and are still valid.[61]

The *Bill Johnson's Restaurants* example most relevant to this article is an employer's petitioning of a court for an "objective that is illegal under federal law."[62] The Board majority in *Anheuser-Busch* rejected the General Counsel's contention that this example applied to A-B's motion

55. *Id.* at 6.

56. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *3 n.9. "In light of our conclusion that the Petition Clause resolves this case, a finding that does not turn on Brown's employment status or membership in the bargaining unit at the time the Motion to Compel was filed, we need not address those issues." *Id.*

57. *Id.* at *3. The Petition Clause states "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. The U.S. Supreme Court has held that the Petition Clause protects the rights of persons to petition courts, through lawsuits and in other ways, to obtain the protected "redress." *See* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741–44 (1983).

58. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *3.

59. *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 737 n.5.

60. *Id.*

61. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *3 n.11.

62. *Bill Johnson's Restaurants, Inc* , 461 U.S. at 737 n.5.

to compel former employee Brown to arbitrate his discrimination claim.[63] In explaining why, the Board majority first stated that its "review of Board precedent uncovered no examples analogous to this case."[64] The Board majority's first example of a "case" that might be "analogous" was when "a court filing is contrary to a prior Board award."[65] The Board majority might have based that example on A-B's argument that "the phrase 'objective that is illegal under federal law' must be narrowly interpreted to only include litigation intended to circumvent Board orders.[66] In filing the motion to compel arbitration, Respondent has not tried to circumvent any Board order, and the motion therefore does not have an '"unlawful objective."'"[67] The Board majority's example was not quite as narrow as what A-B argued for and, in any event, the Board majority immediately added another example of what could be enjoined based on footnote five of *Bill Johnson's Restaurant*: "where a court filing seeks to enforce an unlawful policy or contractual provision."[68] As will be further discussed below,[69] this second example should have been applied in the *Anheuser-Busch* decision.

Instead, the Board majority added what is, arguably, a new rule: "the enforcement of a policy or contractual provision is not an illegal objective if the policy or provision is not itself illegal."[70] The only authority the Board cited that could arguably support this requirement as necessary was the Board's 2001 decision in *Regional Construction Corporation*, in which the Board had stated that the alleged wrongdoer's lawsuit had to "have involved a matter . . . which if granted would commit the court to countenance an underlying act by the [alleged wrongdoer] which would be a violation of some federal law."[71] In the immediately following paragraph, the Board majority began referring to the "illegal . . . policy or provision" as the "underlying act" requirement,[72] as it did repeatedly in its decision.[73] The keys to the majority's finding that this "underlying act" requirement was not met were that:

63. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *4.

64. *Id.*

65. *Id.*

66. *Bill Johnson's Restaurants, Inc* , 461 U.S. at 737 n.5.

67. *Anheuser-Busch, LLC,* 367 N.L.R.B. at *4–5.

68. *Id.* at 4.

69. *See infra* notes 136–42 and accompanying text.

70. *Anheuser-Busch, LLC,* 367 N.L.R.B. at *4.

71. *Id.* at *4 (quoting Regional Constr. Corp., 333 N.L.R.B. 313, 320 (Feb. 14, 2001)). The quoted statement in *Regional Construction Corporation* was actually made by an ALJ in a decision adopted by the Board.

72. *Id.*

73. *Id.* at *4, *5 n.16.

> The DRP is not alleged to be facially unlawful. The sole violation alleged is the manner in which the Respondent sought to apply it to Brown, i.e., by filing a motion in court without giving the Union notice and an opportunity to bargain. The General Counsel cites no case in which the Board has found that a court filing had an "illegal objective" solely because the filing itself amounted to a unilateral change.[74]

Dissenting Member Lauren McFerran, the sole Democrat on the Board at the time of the decision, had the following to say about the "underlying act" requirement:

> First, the majority errs in placing so much weight on the word "underlying." The judge's statement [in *Regional Construction*] summarized common fact patterns of prior cases, but nothing in *Regional Construction* suggests that a court filing that is *itself* the "act . . . in violation of some federal law" cannot be found to have an illegal objective. Board precedent refutes any such suggestion. Thus, a grievance seeking an unlawful interpretation of a contract provision was held to have an illegal objective, without any "underlying act" in violation of law. The majority's position is more akin to a semantic quibble than a legally significant distinction.[75]

The Board majority responded that an underlying illegal act was "indispensable" for footnote five of *Bill Johnson's Restaurant* to apply, because otherwise any lawsuit or motion against an employee or union could be found inherently unlawful, and thus obviate the other requirements of *Bill Johnson's Restaurants* that lawsuits without illegal objectives must be found "baseless and retaliatory."[76] The Board majority did not explicitly say what kinds of lawsuits and motions were at risk of being targeted as inherently unlawful, but dissenting Member McFerran was probably correct in reasoning that the majority meant litigation treated as itself "coercive" under Section 8(a)(1).[77] Member McFerran explained that the unfair labor practice alleged in this case was distinguishable,

74. *Id.* at *4 (citing *Regional Constr. Corp.*, 333 N.L.R.B. at 320 n.2).

75. *Anheuser-Busch, LLC,* 367 N.L.R.B. at *9 (McFerran, L., dissenting). The Board majority criticized Member McFerran's reliance, here and elsewhere, on *Long Elevator*, and distinguished that decision by stating that the "contract provision" a union sought to enforce in that case,

> was amenable to an interpretation that rendered it unlawful, and when the union adopted that interpretation, the contract became the underlying unlawful act, and the Board found the 'illegal objective' exception met. Here, in contrast, nobody, including our colleague, contends that the DRP is amenable to an interpretation that would render it unlawful.

Id. at *5 n.16.

76. *Id.* at *5.

77. *Id.* at *9 n.9 (McFerran, L., dissenting).

because A-B's motion, like the union's lawsuit in *Long Elevator*, was not per se unlawful interference or coercion, but used by the employer to achieve an unlawful objective of making a unilateral change in violation of Section 8(a)(5).[78]

Member McFerran's assertion that A-B's motion had an illegal objective was also challenged by the Board majority as was her reliance on the *Long Elevator* decision.[79] The Board majority distinguished that decision by stating that the "contract provision" a union sought to enforce in that case "was amenable to an interpretation that rendered it unlawful, and when the union adopted that interpretation, the contract became the underlying unlawful act, and the Board found the 'illegal objective' exception met" while "nobody, including our colleague, contends that the DRP is amenable to an interpretation that would render it unlawful."[80] Member McFerran, in her turn, denigrated the majority's grounds for distinguishing *Long Elevator*, referring to the "oddity of [their] claim" that the contract was an "act" when "the contract was not an 'act' in any ordinary sense," and contending that the Long Elevator union's seeking an unlawful interpretation of its contract was comparable to A-B's "interpretation" of its Dispute Resolution Program to apply to a formerly union-represented employee, thereby seeking an "unlawful outcome" by unilaterally changing terms and conditions of employment.[81] In this article's next subsection, it will expand on these and other points made by Member McFerran.[82]

The Board majority, when distinguishing *Long Elevator* and in other parts of its decision, relied on the fact that no one in the case had claimed that the terms of the DRP were themselves unlawful.[83] However, the DRP expressly applied only to "salaried and non-union hourly employees,"[84] meaning it did not apply to union-represented employees, which employee Brown was when he was discharged. The Board majority acknowledged that "the DRP does not apply to employee claims against the Respondent that are covered by the collective-bargaining

78. *Id.*

79. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *5.

80. *Id.* at *5 n.16.

81. *Id.* at *9 n.10 (McFerran, L., dissenting).

82. *See infra* notes 90–142.

83. *See, e.g., Anheuser-Busch, LLC*, 367 N.L.R.B. at *4–5. "The DRP is not alleged to be facially unlawful." *Id.* "Our position is that the filing of the motion did not have an illegal objective within the meaning of the Supreme Court's Petition Clause jurisprudence because the DRP is lawful." *Id.* at *5.

84. *Id.* at *2.

agreement."[85] The majority never mentioned that had the DRP applied to union-represented employees covered by the collective-bargaining agreement, it would have been unlawful and void, as explained in the next subsection of this article.[86]

Although the Board majority never expressly stated that Brown's discrimination claim was no longer covered by the collective bargaining agreement, implicit in their decision not to enjoin A-B's motion to compel arbitration was that the court could decide that issue in ruling on A-B's motion.[87] And the Board expressly stated, in reserving on employer arguments based on the collective bargaining agreement, that "[t]hose issues are for the court to decide, not the Board."[88] In this same part of their decision discussing the DRP, the Board majority likely sought to bolster their implicit conclusion that the DRP could lawfully be applied to Brown, and perhaps also meant to suggest possible new legal rules, with footnotes four and five.[89] Footnote four stated that "[t]here is no allegation that the Respondent violated the Act by requiring applicants, including Brown, to agree to final and binding arbitration under the DRP (unless a written contract provides to the contrary)."[90] And footnote five stated, "[c]ontrary to the dissent's apparent implication, however, the collective-bargaining agreement's grievance-arbitration provision contains no language explicitly making it 'permissible' for employees to resort to federal court proceedings after completing the contractually specified process" as a condition of employment.[91]

These two statements the Board majority made in these footnotes early in their decision, as well as their implicit conclusion that a court could lawfully compel arbitration of an employee's statutory claim after that employee's union decided not to arbitrate that claim, demonstrate why their reasoning was erroneous, at least under current precedents of the U.S. Supreme Court, other federal courts, and the Board itself. This article's next subsection will explain why.

85. *Id.*
86. *See infra* notes 90–142.
87. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *2 n.8.
88. *Id.*
89. *Id.* at *2 n.4.
90. *Id.*
91. *Id.* at *2 n.5.

B. The Relationship Between Individual Employer-Employee Agreements and Collective Bargaining Agreements

Section 9(a) of the LMRA established that after a majority of employees in a unit have selected a union to represent them in collective bargaining with their employer, that union becomes the exclusive representative of such employees.[92] And it is an illegal unfair labor practice for an employer of such employees to "refuse to bargain collectively with the representative" union, "subject to the provisions of section [9a]."[93] In 1944, in two of the earliest U.S. Supreme Court decisions defining the employer's obligation to bargain with a union representative under these provisions, *J.I. Case* and *Medo Photo Supply*, the Court held that an employer could not refuse to bargain with a union representative of its employees on the ground that it had made individual agreements with any such employees, and that such agreements were void and unenforceable.[94]

J.I. Case, a manufacturing employer, in 1937 offered to each of its employees at its Rock Island, Illinois factory a voluntary individual employment contract with a term of one year, with each contract to be renewed or renegotiated annually by July 31.[95] By the time of a 1942 NLRB decision, about 75% of the employees had accepted and worked under the individual employer-employee agreements.[96] Nonetheless, in February 1942, a majority of employees voted for the United Automobile Workers (UAW) union to represent them in dealings with their employer.[97]

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92. *See* Labor Management Relations Act § 9(a), 29 U.S.C. §159(a) (2012).

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Id.

93. Labor Management Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5).

94. J.I. Case Co. v. NLRB, 321 U.S. 332, 334 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 687 (1944). In *Anheuser-Busch*, dissenting Member McFerran relied on the *J.I. Case* decision to support her statement that "for an individual agreement between the Respondent and a unit employee like Brown to waive benefits or protections afforded by the collective-bargaining agreement, unless the Union and the Respondent had negotiated such a waiver." *Anheuser-Busch, LLC*, 367 N.L.R.B. at *7 (McFerran, L., dissenting). As promised earlier in this article, this section will expand upon Member McFerran's points.

95. *In re J.I Case Co.*, 42 N.L.R.B. 85, 88 (Jul. 7, 1942).

96. *Id.*; *see J.I. Case Co.*, 321 U.S. at 333.

97. *In re J.I Case Co.*, 42 N.L.R.B. at 90; *see J.I. Case,* 321 U.S. at 333. "The Board . . . directed an election, which was won by the union. The union was thereupon certified as the

When the UAW asked J.I. Case to bargain over terms of employment, J.I Case replied that it could not bargain over any pay and any other terms covered by its agreements with individual employees.[98] The union responded by filing an unfair labor practice charge and the Board found that J.I. Case's refusal to bargain with the union over employment terms, based on individual agreements with employees, violated what were then Section 8(5) and 8(1) of the LMRA.[99] The United States Court of Appeals for the Seventh Circuit enforced this aspect of the Board's decision.[100]

The U.S. Supreme Court recognized that the central issue in the case—similarly to the Board's 2019 *Anheuser-Busch* case—is the relationship between individual employer-employee agreements and any agreements that are or could be bargained by a union representative of the same employees.[101] The Court began its analysis of this issue by finding that a union-employer collective bargaining agreement is not a "contract of employment except in rare cases" because "no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone."[102] The Court went on to refer to collective bargaining agreements as "trade agreement(s),"[103] and a bit later declared, "[t]he individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, [or] the insurer the benefit of standard provisions . . . ."[104]

In analyzing the relationship between individual employer-employee agreements and collective bargaining agreements, the Court stated at the outset that the individual must yield to the collective:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [LMRA] looking to collective bargaining . . . nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.[105]

exclusive bargaining representative of the employees in question in respect to wages, hours, and other conditions of employment." *J.I. Case,* 321 U.S. at 333.

98. *J.I. Case Co.*, 321 U.S. at 334.

99. *Id.*

100. *Id.* The unfair labor practices in Section 8 were not divided into (a) and (b) subsections until the 1947 Taft-Hartley amendments added unfair labor practices of "labor organizations." Labor Management Relations (Taft-Hartley) Act §§ 8(b)(1)-8(b)(6), 29 U.S.C. § 158(b)(1)-(b)(6) (2012).

101. *J.I. Case Co.*, 321 U.S. at 334.

102. *Id.* at 335.

103. *Id.* at 335–36.

104. *Id.* at 336.

105. *Id.* at 337.

The Court also made clear that "benefits" in collective bargaining agreements preempt anything to the contrary in individual employee agreements with their employer, when it stated that "[i]t is equally clear since the collective trade agreement is to serve the purpose contemplated by the [LMRA], the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement."[106]

The Court in *J.I. Case* did acknowledge and accept that individual employer-employee agreements could exist in union-represented workplaces, as when the Court said, "whether under some circumstances they [individual contracts] may add to them [collective agreements] in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices."[107] However, the Court shortly afterwards cautioned that individual employee agreements could not be inconsistent with the collective agreement that employees' union representative bargained with the employer, whether better or worse:

> We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement . . . . But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation *or any increase of those of employees in the matters covered by collective agreement*.[108]

Less than two months after issuing its *J.I. Case* decision, the Supreme Court decided a similar issue in *Medo Photo Supply*.[109] In that case, employer Medo Photo—like Anheuser-Busch in the Board's 2019 decision—had already recognized a union as a representative of its employees; specifically, the representative of its twenty-six shipping and receiving department employees.[110] Medo even began negotiating with the union over a first collective bargaining agreement.[111] However, a dozen of the union-represented employees told Medo's manager that they, and six other employees, would drop the union as a representative if Medo granted the wage increases listed on a document they gave the manager.[112] Medo granted most of the requested wage increases, the eighteen employees accepted them, four of those employees told the union it was

106. *J.I. Case Co.*, 321 U.S. at 338.
107. *Id.* at 339.
108. *Id.*
109. *See Medo Photo Supply Corp.*, 321 U.S. at 679.
110. *Id.* at 680.
111. *Id.*
112. *Id.*

no longer desired as a representative, and Medo stopped dealing with the union.[113]

The U.S. Supreme Court agreed with the Board that Medo's conduct violated then-Sections (5) and (1) of the LMRA.[114] The Court began its reasoning by observing, "[t]he [LMRA] makes it the duty of the employer to bargain collectively with the chosen representatives of his employees.[115] The obligation being exclusive, see Section 9(a) of the Act, it exacts "the negative duty to treat with no other."[116] The Court described as a . . .

> violation of the essential principle of collective bargaining and an infringement of the [LMRA] for the employer to disregard the bargaining representative *by negotiating with individual employees, whether a majority or a minority*, with respect to wages, hours and working conditions.[117]

The Court added that an employer's bargaining with a majority or minority of employees who have a bargaining representative "would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found."[118] According to the Court, subordination of individual employee agreements to the collective was central to collective bargaining because "orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves."[119]

In the *Medo Photo Supply* decision the Court addressed the consent of individual unionized employees, and perhaps even such employees' preferences, by holding,

> [t]he [LMRA] was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent, or the employees suggest the conduct found to be an unfair labor practice, at least where

113. *Id.* at 681.

114. *Medo Photo Supply Corp.*, 321 U.S.at 683.

115. *Id.*

116. *Id.* at 683–84 (quoting NLRB v. Jones & Laughlin Corp., 301 U.S. 1, 44 (1937)).

117. *Id.* at 684 (emphasis added) (citing *J.I. Case Co.*, 321 U.S. at 332).

118. *Id.* at 684. The Court did reference the "expert Board" here, but anyone seeking to rely on that statement to support the 2–1 2019 Board decision in *Anheuser-Busch* should be expected to explain why no other "expert Board" in the 75 years since the Supreme Court's 1944 decision in *J.I Case* and *Medo Photo* had decided it was completely lawful and acceptable for an employer to insist a union-represented employee adhere to an alleged individual agreement with their employer rather than relying on the agreement and judgment of their union representative.

119. *Medo Photo Supply Corp.*, 321 U.S. at 685.

> the employer is in a position to secure any advantage from the practices.[120]

For all these discussed reasons, the Supreme Court upheld the Board's decision that Medo Photo Supply had violated the LMRA by negotiating separately with union-represented employees, and also upheld the Board's order to Medo to, among other things, resume bargaining with the union that Medo had previously recognized as its employees' representative.[121]

The rule that employer agreements with unionized employees are preempted by the employer's relationship with an "exclusive representative" of employees, an "essential" principle of the LMRA according to the U.S. Supreme Court, has been applied in numerous Board and court decisions over the years.[122] One of the first and an important ones was *Stewart Oil Company*.[123] In that case the employer, after receiving notice that some classifications of its employees were now lawfully represented by a union,[124] the employer insisted that two of those employees sign individual contracts covering conditions of employment.[125] In response to the employer's argument that it intended for these individual contracts to apply only until it had made a collective bargaining agreement with the employer, the Board explained, "the vice of the Respondent's conduct lies not in the duration of the contracts but *in the imposition of unilateral terms of employment in derogation of the existing bargaining representative* with whom the Respondent was duty bound to deal."[126] Thus, even ten years prior to the U.S. Supreme Court's 1962 *NLRB v. Katz* decision,[127] which in the 2019 *Anheuser-Busch* decision dissenting Member McFerran relied on,[128] the Board relied on *J.I. Case* and *Medo Photo Supply* to hold that making unilateral changes to any employees' conditions, without bargaining with their union representative and thereby disregarding the union, violated the LMRA.[129]

120. *Id.* at 687.

121. *Id.*

122. *Id.* at 684 (citing *J. I. Case Co.*, 321 U.S. 332, 339 (1944).

123. 100 N.L.R.B. 4 (Jul. 7, 1952), *enforced*, NLRB v. Stewart, 207 F.2d 8 (5th Cir. 1953).

124. *Stewart*, 207 F.2d at 10–11. The bases for the union being a "lawful representative" in Stewart Oil are probably no longer valid in LMRA law, but the Board's reasoning in the decision is applicable to any union that is a lawful representative for any reason.

125. *Id.*

126. *Stewart*, 100 N.L.R.B. 4 at 7 (emphasis added).

127. 369 U.S. 736 (1962).

128. *See Anheuser-Busch, LLC*, 367 N.L.R.B. at *7 (McFerran, L., dissenting).

129. Additionally, there were other decisions in which the Board relied on *J.I. Case* or *Medo Photo Supply* to hold that an employer's unilateral changes in employees' terms and conditions of employment, without notice to or bargaining with the employees' union, were

Employers and others have had a variety of purposes for violating the LMRA's prohibition on individual agreements with unionized employees without the union's consent. For example, in *Gino Morena*, individual employment contracts were raised as a possible bar to a representation election.[130] Even though these individual contracts stated that each employee was required to be their "own representative during the duration of the contract," the Board relied on *J.I. Case* to hold that the individual contracts could not be used as contract bars because individual employment contracts cannot be used to "interfere with employees' rights to organize and bargain collectively [and] do not relieve an employer from the duty of collective bargaining with a union" that a majority of employees have chosen as their representative.[131]

When a union was already a representative of employees, employer Malwrite of Wisconsin—without reaching agreement with that union—tried to use its written contracts with three employees that they'd perform certain work to have those non-represented employees perform bargaining unit work.[132] The Board relied on *J.I. Case* to conclude Malwrite's bargaining with and making agreements with the three employees was illegal, because it disregarded the union's representative role in setting conditions of employment like work assignments.[133] In *Malwrite of Wisconsin* the Board also stated that "individual bargaining is generally considered to be a serious violation of the Act."[134]

Another corporation, Limpco Manufacturing, that already had employees represented by a union tried to negotiate individually with employees prior to changing its business structure (by creating a new related

violations of the LMRA. *See* Bueter Bakery Corp., 223 N.L.R.B. 888, 890 (Apr. 13, 1976) (employer unilaterally reduced wages of union-represented employees); L. C. Cassidy & Son, Inc., 185 N.L.R.B. 920, 928 (Oct. 8, 1970) (employer unilaterally ended sick pay); and Chevron Oil Co., 168 N.L.R.B. 574, 580 (Nov. 30, 1967) (employer unilaterally changing working conditions).

130. 181 N.L.R.B. 808, 808 (Mar. 25, 1970).

131. *Id.* at 809 n.4 (citing *J.I. Case Co.*, 321, U.S. at 337).

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

J.I. Case Co., 321, U.S. at 33

132. Malwrite of Wisconsin, Inc., 213 N.L.R.B. 830, 830 (Oct. 4, 1974).

133. *Id.* at 831 (citing *J.I. Case Co.*, 321, U.S. at 337).

134. *Id.*

company) and the arrangements of its foundry, and unilaterally changing foundry work assignments even after employees said they first wanted to discuss proposed changes with the union.[135] The Board adopted the ALJ's decision holding that these actions by Limpco, because they were made in disregard of the union's status as representative of the foundry employees, violated Sections 8(a)(5) and (1) of the LMRA.[136]

Based on the rules established by the U.S. Supreme Court in *J.I. Case* and *Medo Photo Supply* and applied in the examples discussed above and numerous other Board and court decisions, Anheuser-Busch should have been found to have committed an unfair labor practice. The *Anheuser-Busch* majority itself said that an employer is not protected by the *Bill Johnson's Restaurants* rule if that employer seeks to "commit the court to countenance an underlying act . . . which would be a violation of some federal law."[137] In moving for a court to compel unionized employee Brown to arbitrate his discrimination claim, without notice to or bargaining with his union, Anheuser-Busch sought the court to approve its disregard of Brown's union representative, unlawful under *J.I. Case* and that decision's progeny. Arbitration is a mandatory subject of bargaining,[138] and that in itself obligated A-B to bargain with Brown's union over whether his claim would be arbitrated. Moreover, A-B had bargained with that union over grievance and arbitration provisions applicable to all the employees the union represented, and any exceptions to those provisions' terms on when an employee's claim would be arbitrated should and must have been bargained with the union.[139]

In seeking to compel Brown to arbitrate, A-B not only made a unilateral change in Brown's terms of employment, as dissenting Member McFerran said, A-B in the words of the *Stewart Oil Company* decision, "impos[ed] unilateral terms of employment in derogation of the existing bargaining representative."[140] Indeed, it is difficult to imagine a more absolute "derogation" of a union's role as a representative than A-B's effort to have a court compel arbitration of an employee's claim that the employee's union determined should not be submitted to arbitration. And to

135. Limpco Mfg. Inc., 225 N.L.R.B. 987, 990 (1976).

136. *Id.* at 991. The Board also adopted the ALJ's holdings that Limpco later committed additional unfair labor practices by withdrawing recognition of the union as the representative of its foundry employees and laying off foundry employees who supported the union and its rejection of the new arrangements. *Id.*

137. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *4 (quoting Regional Constr. Corp., 333 N.L.R.B. 313, 320 (Feb. 14, 2001)).

138. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 256 (2009) (citing 29 U.S.C. § 159(a) (2012)).

139. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *1–2.

140. 100 N.L.R.B. 4, 7 (Jul. 7, 1952).

the extent that a specific, concrete underlying employer "act" is required, over which the *Anheuser-Busch* majority and dissenting Member McFerran debated,[141] that requirement would be met by the service of the motion to compel on employee Brown or his representative, or by whatever concrete means A-B notified employee Brown that even though his union had decided his claim should not be arbitrated, A-B intended to have a court in effect submit his claim to arbitration. Such notification likely made clear to employee Brown, and any of his co-workers who learned this course of action from him or otherwise, that A-B did not take seriously the union's representative role regarding arbitration.

This subsection has described the law regarding, and the reasons why, A-B's motion to compel arbitration violated an employer's obligation under the LMRA to respect a union's representative status with regard to arbitration of claims of represented employees. The next subsection will discuss another longstanding labor law rule disregarded by A-B and overlooked by the Board majority: for employees represented by a union, the collective-bargaining agreement negotiated between the union representative and the employer, and not any other agreement, dictates who decides whether such employees' statutory claims will be brought to arbitration.[142] And that is usually the union representative.[143]

C. Employer-Union Agreements Govern Arbitration of Unionized Employees' Statutory Claims

The U.S. Supreme Court has long recognized that collective agreements negotiated between employers and unions define whether and how employee claims against their employer, including statutory claims, will be brought to arbitration.[144] Therefore, when an employer-union agreement includes grievance and arbitration provisions, as an estimated 97–100% of such agreements do,[145] and the collective bargaining agreement between Anheuser-Busch and the Teamsters did,[146] it is those provisions—not any alleged individual agreements—that govern whether a unionized employee's statutory claim will go to arbitration.

This rule was stated by the Court in *Republic Steel v. Maddox* when it declared,

141. *See supra* notes 74–80 & accompanying text (summarizing this debate).
142. *See infra* notes 143–87 and accompanying text.
143. *See id.*
144. *See, e.g.*, Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).
145. *See* BASIC PATTERNS IN UNION CONTRACTS, *supra* note 5, at 33.
146. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *1–2.

[a]s a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress.[147]

In that case, the employee had pursued in Alabama state court a breach of contract suit against the employer for failing to pay severance he alleged was required by his employer-union collective bargaining agreement after the mine he worked in was permanently closed.[148] The state courts in Alabama had found that employee Maddox was not required to use the grievance and arbitration process set forth in the collective bargaining agreement, but the Supreme Court disagreed.[149]

The Court in fact stated that,

> unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant.[150]

The Court next explained that federal labor policy required this outcome because of the interests of the union and the employer that are served by collectively bargained grievance and arbitration processes.[151] The Court referenced as "clear" the "[u]nion interest in prosecuting employee grievances" as a doing that "complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract."[152] The Court added, "conscientious handling of grievance claims will enhance the union's prestige with employees."[153] The interests of employers are also served, the Court said, because requiring use of the collectively bargained process "limit[s] the choice of remedies available to aggrieved employees."[154]

This language in *Maddox* on why Congressional labor policy favors resolution of employer-unionized employee disputes through the collectively bargained grievance and arbitration process points out an error in the Board's 2019 decision in *Anheuser-Busch*. The erroneous approach

147. *Republic Steel Corp.*, 379 U.S. at 652.

148. *Id.* at 650–51.

149. *Id.*

150. *Id.* at 652–53 (citing Labor Management Relations Act § 203(d), 29 U.S.C. §§ 173(d), 201(c), 171(c) (2012)).

151. *Id.* at 653.

152. *Republic Steel Corp.*, 379 U.S. at 653.

153. *Id.*

154. *Id.*

of *Anheuser-Busch* is probably even more fully exposed by the Supreme Court's immediately following statements in *Maddox*:

> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive an employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'[155]

The attempt of the employer in *Anheuser-Busch* to "sidestep" the grievance and arbitration procedures regarding employee Brown's claim should not be any more acceptable than employee Maddox's effort to do that regarding Republic Steel. And yet the Board's majority allowed the employer to do that.[156] Anheuser-Busch apparently chose to disregard its "interest" served by the grievance and arbitration procedures it had negotiated.[157] But it also disregarded the union's role in and interests served by those provisions, which the Supreme Court in *Maddox* held were an important part of Congressional labor policy. The *Anheuser-Busch* Board in allowing evasion of these policies, and the long-standing legal rules supporting them, did not even bother to distinguish the rules and precedents, but rested its decision almost entirely on the Petition Clause of the First Amendment.[158] However, Congress was presumably aware of that Petition Clause when it expressed the policy reasons for favoring collectively bargained grievance and arbitration to settle employee claims, and the U.S. Supreme Court was surely aware of that Clause when it relied on those Congressional policies to interpret the LMRA as "limiting" litigation avenues for recourse, and requiring deference to the union's role in the process.[159] After Congress and the U.S. Supreme Court have found that barriers to litigation caused by collectively bargained grievance and arbitration processes, in which unions have decisive roles, do not breach the Petition Clause, the Board could not validly hold otherwise.

The Supreme Court in *Maddox* also set forth the unsurprising rule that "if the parties to the collective bargaining agreement [the employer and the union] expressly agreed that arbitration was not the exclusive

155. *Id.* (quoting Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 103 (1962)).

156. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *6.

157. *Id.* at *5.

158. *Id.*

159. *Republic Steel Corp.*, 379 U.S. at 653.

remedy," then an employee (and presumably a party) could sue in court for breach of that agreement.[160] The Board majority in *Anheuser-Busch* did not state that any such provision was included in employee Brown's collective bargaining agreement.[161] The *Maddox* Court also observed that "[i]f the union refuses to press or only perfunctorily presses the individual's claim," that individual employee would have "forms of redress."[162]

Two years after *Maddox* in *Vaca v. Sipes* the Supreme Court further clarified the rules regarding the relationship between the collectively bargained grievance and arbitration process and employee efforts to use litigation rather than that process to pursue claims.[163] The Court, creating another exception to the rule that a unionized employee is bound by the collectively bargained grievance and arbitration process, held that an employee would not be so bound "when the conduct of the employer amounts to a repudiation of those contractual procedures."[164] The Court next created an exception much more commonly utilized by employees when it ruled that an employee could prevail on a claim against their employer for breach of the collective bargaining agreement if the employee additionally proved their union breached its duty of fair representation in its treatment of the employee's claim through conduct that was "arbitrary, discriminatory, or in bad faith."[165] The Board in its 2019 *Anheuser-Busch* decision did not claim that employee Brown's union had breached its fair representation duty or that his employer had repudiated its agreement with the union.[166]

In *Vaca* the Court relied, as it had in *Maddox*, on Congressional labor law policy to support its restrictions on employees' bringing breach

160. *Id.* at 657–58. The Court also stated that such a lawsuit would be based on LMRA Section 301 and be governed by federal law. *See id.* at 658 n.15 (citing Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 450–51 (1957)).

161. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *1–3.

162. *Republic Steel Corp.*, 379 U.S. at 652. It is also worth noting that the Anheuser-Busch Board, which did not rely on the fact that discharged employee Brown was a former employee, could not have relied on that fact anyway to distinguish the Court's *Maddox* decision because Maddox was also a laid-off former employee. *See Anheuser-Busch*, *LLC*, 367 N.L.R.B. at *4 n.12; *Maddox*, 379 U.S. at 650–51.

163. 386 U.S. 171, 185 (1967).

164. *Id.* (citing Drake Bakeries, Inc. v. American Bakery & Confectionary Workers Int'l, 370 U.S. 254, 260–63 (1962)).

165. *Id.* at 190 (citing Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)). If an employee covered by a collective bargaining agreement believes a union did not represent them fairly in handling or arbitrating a grievance, the employee must prove both that the employer violated the agreement and that the union breached its duty of fair representation. *See* COMMITTEE ON THE DEVELOPMENT OF THE LAW UNDER THE NATIONAL LABOR RELATIONS ACT, THE DEVELOPING LABOR LAW: THE DUTY OF FAIR REPRESENTATION 42–43 (John E. Higgins, Jr. et al. eds., 17th ed. 2017) (discussing the duty of fair representation and remedies for its breach).

166. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *3–6.

of contract claims directly to court or bringing a court action to require their union to arbitrate such a claim.[167] The Court relied on Congress's statement in the LMRA that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[168] The Court, which had earlier observed that in this case the union had "sole power" under the agreement to "invoke the higher stages of the grievance procedure,"[169] next identified (as, again, it had earlier in *Maddox*) the parties' and policy interests supported by favoring the grievance and arbitration process over litigation. The Court first stated,

> [i]n providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. *Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures*.[170]

Shortly thereafter the Court again referenced the key role of the union by stating that "the settlement process furthers the interest of the

167. *See Vaca*, 386 U.S. at 191. "[W]e do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement." *Id.* Interestingly, in *Anheuser-Busch*, the employer originally treated its court action as one to compel Mr. Brown's union to bring his claim to arbitration. *See Anheuser-Busch, LLC*, 367 N.L.R.B. at *2.

168. *Vaca*, 386 U.S. at 191 (quoting Labor Management Relations Act § 203(d), 29 U.S.C. 173(d)(2012)).

169. *Id.* at 185.

170. *Id.* at 191 (emphasis added). The added emphasis underscores that the U.S. Supreme Court has recognized that arbitration is costly, a feature of arbitration which the Board's decision in *Anheuser-Busch*, like most decisions favoring individual employee arbitration of claims based on statutes or contracts or both, overlooks or dismisses. *See Anheuser-Busch, LLC*, 367 N.L.R.B. at *3–6*; see* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Toward Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV.. 155, 179 (2019) (noting that individual harassment claims might be "too costly" to arbitrate, "particularly in relation to expected relief"); David Seligman, *The National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act: Protecting Consumers, Employees, and States from the Harms of Forced Arbitration Through State-Level Reforms*, 19 J. CONSUMER & COM. L. 58, 59 (2016); Paul B. Radvany, *Recent Trends in Discovery in Arbitration and the Federal Rules of Civil Procedure*, 34 REV. LITIG. 704, 741–48 (2015) (discussing efforts to make discovery in arbitration less costly); Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights* ECONOMIC POLICY INSTITUTE (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/#epi-toc-9> (discussing developments of the Supreme Court's shift toward expanding arbitration).

union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement."[171]

The Court reasoned that if an individual employee could compel arbitration of their grievance without the union's consent, "the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation."[172] The Court added that empowering employees to compel unions to arbitrate would greatly increase the number of grievances going to arbitration, and that "would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully."[173]

These points the Supreme Court made in *Vaca v. Sipes*, regarding an employee's argument that they should be able to bring their claim to arbitration without the union's consent, are also applicable to the effort by the employer in *Anheuser-Busch* to compel arbitration of a unionized employee's claim without the consent of that employee's union. The employer, Anheuser-Busch, chose to ignore the union's roles as "statutory agent" in representing employees in the grievance and arbitration process, and "coauthor of the agreement" Anheuser-Busch had negotiated with the union.[174] The Board should not have permitted Anheuser-Busch to do that with its motion to compel arbitration.

In fact, although the Court did not expressly so state in *Maddox* or *Vaca*, it is widely recognized that for most collective bargaining relationships, the union controls how far the grievance advances in the grievance process, and the union decides whether the grievance will be submitted to arbitration.[175] The Supreme Court itself stated in *Alexander v. Gardner-Denver* that one of its "concerns" regarding statutory discrimination claims being handled through collectively bargained grievance and arbitration was "the union's exclusive control over the manner and extent to which an individual grievance is presented."[176] When thirty-five years later in *Pyett* the Court revisited its "concern" in *Alexander*, and disagreed with it, the Court did not disagree with or question the statement in that decision, which it quoted, that unions typically control the grievance and

171. *Vaca*, 386 U.S. at 191 (citing Archibald Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 605, 615, 621 (1956)).

172. *See id.* at 191.

173. *Id.* at 192 (citing NLRB v. Acme Indus. Co., 385 U.S. 432, 438–39 (1967)).

174. *Id.* at 191.

175. *See e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1973).

176. *Id.* at 58 n.19.

arbitration process.[177] And when the Court in *Pyett* wanted to express disagreement with *Alexander*, it certainly did so.[178]

Expert commentators have related the union's control over the grievance and arbitration process (absent contrary language in the applicable collective bargaining agreement) to the union's statutory role as "exclusive representative" of employees, including as protected and furthered in the Supreme Court's *Maddox* decision.[179] The U.S. Seventh Circuit of Appeals has also held that "the grievance and arbitration procedure can be invoked only by the union, and not by the worker. The worker has to persuade the union to prosecute his grievance and if it loses in the early stages of the grievance proceedings to submit the grievance to arbitration."[180] Similarly to the expert commentators, the Seventh Circuit related this rule to the union's role as the elected majority representative of employees.[181] Anheuser-Busch disregarded the union's role in the grievance and arbitration process when it refused to abide by that union's decision on employee Brown's grievance, which is another reason—along with Anheuser-Busch's making a unilateral change and also relying on an individual employee agreement without the union's consent—that Anheuser-Busch's conduct was unlawful and should have been found so by the Board.[182]

A possible ground for distinguishing *Republic Steel v. Maddox* and *Vaca v. Sipes* from *Anheuser-Busch* is that these Supreme Court decisions clearly referenced contractual claims by former employees, with Maddox seeking contractual severance pay[183] and the employee in *Vaca v. Sipes* claiming his discharge violated the collective bargaining agreement.[184] However, the Board in *Anheuser-Busch* did not rely on any distinction between an employee's statutory and contractual claims, nor did the Board adopt the employer's view that the relevant collective bargaining

177. *See Pyett*, 556 U.S. at 269 (citing *Alexander*, 415 U.S. at 58 n.19).

178. *See id.* at 265–69.

179. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 58–60 (Kenneth May eds., 8th ed. 2016); *see also* Ann C. Hodges, *supra* note 7, at 534 (discussing union control of the arbitration process).

180. Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997) (citing Vaca v. Snipes, 386 U.S. 171, 190–91 (1967)).

181. *Id.*

182. *See generally Anheuser-Busch, LLC*, 367 N.L.R.B. at *14 (finding Anheuser-Busch unilaterally applied a policy "normally applicable to salaried and nonunion employees . . . to Brown, a bargaining unit employee, without notice to or affording the Union an opportunity to bargain[ ]" and accordingly violated Sections 8(a)(1) and (5) of the National Labor Relations Act).

183. 379 U.S. at 650–51.

184. 386 U.S. at 173.

agreement's anti-discrimination and grievance and arbitration provisions together amounted to the requisite waiver of the employee right to sue in court,[185] probably because under current Supreme Court precedent those provisions would not meet the "clear and unmistakable waiver" test.[186] Many union-employer agreements have now for decades included provisions prohibiting discrimination against employees,[187] which can complicate drawing a clear line between contractual and statutory claims.[188] In any event, the next subsection will discuss why under other U.S. Supreme Court decisions, Anheuser-Busch should have been required to at least bargain with the union prior to moving to compel unionized employee Brown to arbitrate his discrimination claim.

D. The U.S. Supreme Court and Arbitration of Unionized Employees Federal Statutory Claims

The 1991 *Gilmer* decision was the first one in which the U.S. Supreme Court required an employee to arbitrate a federal statutory claim.[189] The employee in that case was not unionized, but because he sought to bring a federal discrimination lawsuit, he argued that *Alexander* and its "progeny" precluded arbitration of his claim[190] and the Court

185. *See Anheuser-Busch, LLC*, 367 N.L.R.B. at *9–*10.

186. *See id*; Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998) (quoting Metro. Edison Co. v. NLRB, 460 U.S. 693, 708 (1983)).

187. *See generally* Jessica Moran, *Appearance Standards and Arbitrators: Assessing Disciplinary Actions Pursuant to Grooming Policies in Arbitration*, 19 GEO. J. GENDER & L. 113, 131 (2017) (section on "Antidiscrimination Clauses in the Collective Bargaining Agreement" discusses multiple examples of such provisions being subject to grievance and arbitration); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 172 n.14 (2007) (citing BASIC PATTERNS IN UNION CONTRACTS 7, 127 (14th ed. 1995) ("[A]ntidiscrimination provisions appear in 87% of the collective-bargaining agreements sampled, and "cause" or "just cause" provisions appear in 92% of such agreements.)).

188. *See* ELKOURI, *supra* note 178, at 10-13–10-14 (stating that the "boundary line between interpretation [of collective bargaining agreements] and legislation cannot be drawn absolutely" and that "most labor arbitrators [i.e. those deciding cases under collective bargaining agreements] do resort to federal Title VII, and other employment discrimination statutes' precedents in deciding the employment discrimination claims before them."); *see generally* ELKOURI, *supra* note 178, at 10-3 –10-5 (discussing how arbitrators in cases under collective bargaining agreements consider and apply substantive law, including federal statutory law, in deciding cases).

189. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991); *see* George H. Singer, *Employing Alternative Dispute Resolution: Working at Finding Better Ways to Resolve Employer-Employee Strife*, 72 N.D. L. REV. 299, 319 (1996) (citing *Gilmer*, 500 U.S. at 26).

190. *See Gilmer*, 500 U.S. at 33 (citing McDonald v. W. Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (explaining Petitioner Gilmer's argument based on *Gardner-Denver*, *Barrentine*, and *McDonald*)).

addressed that argument. A key reason that the Court found *Alexander* distinguishable was because in that case the arbitrations "occurred in the context of a collective-bargaining agreement" in which the employees were represented by unions in arbitration, which raised the "important concern [of] the tension between collective representation and individual statutory rights, a concern not applicable to the present case."[191] Thus, even when the Supreme Court first considered arbitration of federal statutory claims, it recognized and relied on the nature of unionized workplaces and the legal rules governing those.

Seven years after the *Gilmer* decision, the Court considered the *Wright* case, in which employers of a unionized employee, similarly to *Anheuser-Busch*, tried to force that employee to arbitrate his discrimination claim.[192] The employer convinced a federal magistrate in South Carolina, and the U.S. Court of Appeals for the Fourth Circuit, that under the general arbitration clause in the union contract the employee should be required to arbitrate his statutory claim even without the union's consent.[193] The Supreme Court unanimously rebuffed this effort.[194] As discussed earlier the Court held that only if the employer and union negotiated a provision that "clear[ly] and unmistakabl[y]" required employees to arbitrate their statutory claim rather than bring it to court would a unionized employee be required to arbitrate.[195] The Court also held that neither in a general arbitration clause nor in any other provision did the union agree to such a waiver of represented employees' right to pursue a statutory claim in arbitration instead of court.[196] In vacating the Fourth Circuit's decision, the Court in effect held that when a union does not agree to such a waiver, the unionized employee can pursue their claim in court.[197]

When in its 2009 *Pyett* decision the Supreme Court held that unionized employees were required to arbitrate their statutory discrimination claims, the Court based that on a "clear and unmistakable waiver" of employees' right to go to court that was included in a collective bargaining

191. *Gilmer*, 500 U.S. at 35.

192. *See Wright*, 525 U.S. at 72–73.

193. *Id.* at 75–76.

194. *Id.* at 77, 80 (finding no waiver of employees' rights by the union and holding that any "union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination" is subject to the "clear and mistakable" standard).

195. *Id.* at 80.

196. *Id.* at 77, 82.

197. *Wright*, 525 U.S at 82. Some media even reported that as the holding in *Wright*. *See, e.g.*, David G. Savage, "High Court Backs Workers' Right to Sue," LOS ANGELES TIMES (Nov. 17, 1998 12:00AM), https://www.latimes.com/archives/la-xpm-1998-nov-17-mn-43822-story.html.

agreement negotiated between the employees' union and their employer.[198] In order to find that requisite waiver, and to distinguish its *Alexander* decision, the Court relied on a "collective-bargaining agreement's arbitration provision" that "expressly covers both statutory and contractual discrimination claims."[199]As discussed in this article's preceding subsection,[200] the Court in *Pyett* did not object to *Alexander's* finding that unions have "exclusive control" over employee grievance and arbitration,[201] but instead the Court reasoned that this was not a basis for preventing unions and employers from negotiating arbitration provisions waiving employees' right to pursue statutory claims in court rather than in arbitration.[202]

Indeed, the *Pyett* Court in distinguishing *Alexander* relied on principles of union "exclusive representation" of employees and deference to "majority rule," labor law principles that, as discussed earlier in this article, were flouted by the employer and the Board in *Anheuser-Busch*.[203] The Court in *Pyett* found that the respondent employees were objecting to the "principle of majority rule," which the Court called "in fact *the* central premise of the NLRA."[204] The *Pyett* Court added, "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands."[205]Likely in deference to these principles, the Court in *Pyett* took the trouble to observe that the respondent employees' union had pursued grievances over their claims, but after an arbitration hearing, the union withdrew the respondents' age-discrimination claims from arbitration, based on the union's view that a contract to which it had consented precluded the union from asserting those claims.[206]

198. *Pyett*, 556 U.S. at 274.

199. *Id.* at 264.

200. *See supra* notes 175–77 and accompanying text.

201. *See Pyett*, 556 U.S. at 269.

202. *See id.* at 270–73.

203. *See supra* notes 91–187 and accompanying text (Part II subsections B & C); *Pyett*, 556 U.S. at 271.

204. *Pyett,* 556 U.S. at 270 (emphasis added) (quoting Emporium Capwell Co. v. Western Addition Cmty. Org., 420 U.S. 50, 62 (1975)).

205. *Id.* at 271.

206. *Id.* at 253.

Given that the Supreme Court must be presumed to also be aware of its past precedents regarding these principles,[207] such as *J.I. Case*[208] and *Medo Photo Supply*,[209] it follows, as discussed earlier, that under Supreme Court precedent regarding and/or referencing unionized employees, it is illegal for an employer to disregard a union's status as an "exclusive" and "majority" representative of its employees, and without that union's consent make or rely on individual agreements with union-represented employees and ignore how that union chose to resolve an employee's grievance claiming violation of contractual and statutory rights.[210] Therefore, when the Board in *Anheuser-Busch* allowed the employer to do just that, through its motion to compel arbitration, the Board's decision conflicted with the Supreme Court's precedents on arbitration of claims by unionized employees.[211]

E. Summary: Why the Board's Anheuser-Busch Decision is Wrong

The Board in *Anheuser-Busch*[212] held that the employer had not committed any unfair labor practice when that employer pursued a motion in court to compel a discharged unionized employee to arbitrate his discrimination claim, when that employer did not notify or bargain with that employee's union prior to filing the motion,[213] and the collective bargaining agreement that employer had bargained with the union did not waive the employee's right to bring statutory claims to court.[214]As

207. *See, e.g.,* Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 404 (1993); Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 584 (1989).

208. J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).

209. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944).

210. *See supra* notes 91–142 and accompanying text (Part II, Subsection B).

211. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *3–*6.

212. *Id.* at *6.

213. *See id.* at *2; *see also supra* note 50 and accompanying text (discussing that Anheuser-Busch did not dispute that it had not notified or bargained with the union).

214. *See id.* at *2 (Board majority's discussion of Anheuser-Busch's collective bargaining agreement), *6 (the collective bargaining agreement "did *not* waive employees' right to sue over employment discrimination.")(McFerran, L., dissenting)(emphasis in original).As discussed earlier, the Supreme Court in *Pyett* found its "clear and unequivocal waiver" standard was met because the antidiscrimination provision expressly stated that anti-discrimination claims must be brought to the collectively-bargained grievance and arbitration process. *See supra* notes 170–73 and accompanying text, In *Wright*, the U.S. Supreme Court held that an agreement's general grievance and arbitration provisions, along with a provision stating that "[i]t is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law" did *not* meet the standard required to

explained earlier, the Board based this conclusion on the First Amendment Right to Petition a court and on the U.S. Supreme Court's ruling in *Bill Johnson's Restaurants* that such petitioning cannot be found an unfair labor practice unless it's a state lawsuit that is preempted by federal law or it "has an objective that is illegal under federal law."[215]

As explained more fully in this Section of this article, the Board unwittingly or deliberately overlooked multiple ways in which Anheuser-Busch's motion to compel, or the means (including service on employee Brown), by which the employer sought to require the employee to arbitrate, violated three current principles governing labor law. First, as dissenting Member McFerran correctly described, Anheuser-Busch illegally ignored the union's role as the exclusive representative of a majority of some unit of employees by making a unilateral change to an agreement and terms that did *not* require those employees to arbitrate statutory claims.[216] Second, Anheuser-Busch in its motion relied on an individual agreement with a unionized employee when the rule established by the U.S. Supreme Court is that an employer's individual agreement with an employee represented by a union does not justify an employer's failing to bargain with the union over a mandatory term of employment, which arbitration of an employee's claim is. Unless the employee's union consents to the individual agreement, which the union representing employee Brown did not do.[217] Third and finally, under current Supreme Court precedent, an employer and union must "clear[ly] and unmistakabl[y]" agree to any waiver of one or more employees' rights to pursue statutory claims in court rather than through arbitration, and no such waiver was agreed to between Anheuser-Busch and its union.[218] By seeking to compel a unionized employee to arbitrate his statutory discrimination claim, Anheuser-Busch again disregarded the union's role as exclusive employee representative because the employer had never succeeded in getting the union to agree to a "clear and unmistakable waiver" of employees' right to sue and sought to circumvent that by itself going to court to compel arbitration.[219]

waive an employee's right to pursue a statutory claim in court. *See Wright,* 525 U.S. at 72–74 (1998).

215. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 737 (1983).

216. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *6 (McFerran, L., dissenting)

217. *Id.* at *2; Especially given that the individual agreement on which Anheuser-Busch relied by its own terms did not apply to claims covered by a collective bargaining agreement, as employee Brown's were. *Id.*

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

219. *Id.*

Anheuser-Busch, through its act(s) described above that flouted its employees' union's rights and duties to represent employees regarding mandatory terms and conditions of employment committed long-recognized violations of Sections 8(a)(5) and (1) of the LMRA.[220] This brought Anheuser-Busch's act(s) squarely within the *Bill Johnson's Restaurants* exception for acts with an illegal objective, which the Supreme Court has held that the Board can not only find to be unlawful but can enjoin.[221] The Board erred in failing to so find. Not so long ago, even when arbitration of statutory claims was agreed-to by an employee's union representative, and that union represented the employee in the arbitration proceeding, courts found that was not sufficient protection for the employees' statutory rights.[222] Of course, the Supreme Court rejected that argument in *Pyett*, reasoning that unions' legal duty to represent employees fairly and the legal prohibitions on union discrimination could and should alleviate any such concerns.[223] But until the Board did so in 2019 in *Anheuser-Busch*, no court or agency had ever found that for unionized employees, who after all work where a union has been chosen by a majority to represent them in dealings with their employer, the employer should be able to choose without the union's consent that the unionized employee must arbitrate their federal statutory claim. Any Board majority or court that does this is disregarding Justice Gorsuch's proclamation that " Section 7 focuses on the right to organize unions and bargain collectively," and the fundamental rules that have governed those rights for almost as long as the LMRA has been in existence.[224]

III. RECONCILING THE FEDERAL ARBITRATION ACT AND "LABOR ARBITRATION": SOME WAYS FORWARD

A. Problems with Full Substantive Integration of FAA and Labor Arbitration Law

1. Introduction

As long as the Board's erroneous approach to arbitration in *Anheuser-Busch* is not adopted by any courts and does not cause widespread effects, then under most collective bargaining agreements, as discussed

220. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *2.

221. *Bill Johnson's Rests.*, 461 U.S. at 747–48*; see supra* note 136–38 and accompanying text.

222. *See, e.g.*, Equal Emp't Opportunity Comm'n v. Indiana Bell Tel. Co., 256 F.3d 516, 521–24 (7th Cir. 2001) (en banc).

223. *See Pyett*, 556 U.S. at 271–72.

224. Epic Systems Corp., v. Lewis, 138 S. Ct. 1612, 1624 (2018).

above in Part II, unions will continue to control the grievance and arbitration process, including whether a grievance will go to arbitration and, if it does, how it will be handled in the arbitration proceeding.[225] Consequently, the question will remain regarding how the FAA relates to arbitration under collective bargaining agreements, which hereafter will be referred to as "labor arbitration." As noted near the outset of this article, at the least the FAA and precedents under it are relevant to labor arbitration.[226]

In response to the Supreme Court's 2009 *Pyett* decision, two management-side lawyers, Seth Galanter and Jeremy M. McLaughlin of the firm of Morrison & Foerster, in the same year proposed that the Court consider 100% integration of FAA and labor arbitration rules and precedents.[227] More than ten years later that level of integration has, rightly, not occurred, though federal appellate courts, other than the Supreme Court, have made important rulings on this issue.

2. Current Uncertainty Regarding the Relationship Between the FAA and Labor Arbitration

The U.S. Court of Appeals for the Eighth Circuit, in its most recent precedents on the issue, has held that regarding the standard for judicial review of an arbitral decision, the "labor arbitration" standard, which that court referred to as the "Section 301 standard" (named after the LMRA provision on which most challenges to labor arbitration have been brought) has effectively been adopted for review of arbitration decisions under the FAA.[228] The petitioner employer challenging the decision argued that Section 10(a)(4) of the FAA provided for "more vigorous judicial review" than did labor arbitration precedents.[229] The court responded

225. *See supra* notes 155–58 and accompanying text.

226. *See supra* notes 18–20 and accompanying text.

227. *See* Seth Galanter & Jeremy M. McLaughlin, *Does the Supreme Court Decision in 14 Penn Plaza Augur the Unification of the FAA and Labor Arbitration Law?*, 64 DISP. RESOL. J. 56, 58 (2009). Business school professor and arbitrator Stephen Hayford preceded them by nine years in expressing the view that FAA and LMRA rules should be the same. *See* 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 (2001). *Contra* Allison Anderson, *Labor and Commercial Arbitration: The Court's Misguided Merger*, 36 B.C. INT'L & COMP. L. REV. 1237, 1269–75 (2013) (contending that full integration of FAA and LMRA rules would be harmful to employees and "distort" the purposes of labor arbitration).

228. Alcan Packaging Co. v. Graphic Commc'n Conference, 729 F.3d 839, 841 (8th Cir. 2013). Interestingly, Judge Harry Edwards of the D.C. Circuit Court of Appeals, a labor-law expert before and since his appointment to the bench, predicted that LMRA standards could increasingly be applied to arbitration under the FAA. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1473 (D.C. Cir. 1997).

229. *Alcan*, 729 F.3d at 841 (citing 9 U.S.C. §10(a)(4)).

by ruling, "[i]f the Act applies, then Section 10(a)(4) does not prescribe a different standard of review [because the] Supreme Court's most recent case applying Section10(a)(4) recited the Section 301 standard and cited authorities arising under the latter statute."[230] The Eighth Circuit at least up to 2019 has continued to apply Section 301 labor arbitration standards in reviewing arbitration decisions involving employer-union disputes.[231]

The Seventh Circuit Court of Appeals has similarly held that the same standards apply when reviewing arbitration decisions under the FAA or the Labor Management Relations Act.[232] That court, however, has also said that "[t]he [FAA] has no particular reference to such contracts [collective bargaining agreements] and so if there were a conflict between the two statutes we would resolve it in favor of section 301 [of the Labor Management Relations Act]."[233] The Tenth Circuit has fully agreed with the Seventh Circuit on both of these points.[234] Meanwhile, the Second Circuit U.S. Court of Appeals has disagreed with these other courts, maintaining that the FAA's standards of review of arbitration decisions do not directly apply to arbitrations conducted under the Labor Management Relations Act.[235] And the Sixth Circuit[236] and the Eleventh Circuit[237] have also held that the FAA does not apply to LMRA arbitration.[238]

230. *Id.* (citing Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013)). For the record, the U.S. Supreme Court has since this Eighth Circuit decision in *Alcan Packaging* cited Section 10 of the FAA only once, in a 2019 decision involving a commercial buyer and seller in which the Court decided the issue of arbitrability of a claim. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527–28 (2019).

231. *See* Nat'l Elevator Bargaining Ass'n v. Int'l Union of Elevator Constructors, 921 F.3d 761 (8th Cir. 2019).

232. *See, e.g.,* McKinney Restoration, Co. v. Ill. Dist. Council No. 1 of Int'l Union of Bricklayers & Allied Craftworkers, 392 F.3d 867, 871 (7th Cir. 2004); Smart v. Int'l Bhd. Of Elec. Workers, 315 F.3d 721, 724 (7th Cir. 2002).

233. *Smart*, 315 F.3d at 724.

234. *See* Int'l Bhd. of Elec. Workers, Local # 111 v. Pub. Serv. Co. of Colo., 773 F.3d 1100, 1107 (10th Cir. 2014); *see also supra* note 38 and accompanying text.

235. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 545 n.13 (2d Cir. 2016) (The FAA does not apply to arbitrations, like this one, conducted pursuant to the LMRA 'but the federal courts have often looked to the [FAA] for guidance in labor arbitration cases.'"); *see* Roy v. Buffalo Philharmonic Orchestra Soc'y, Inc., 682 F. App'x 42, 44 (2d Cir. 2017) (unpublished decision) ("Although the [FAA] does not apply to arbitrations conducted pursuant to the Labor Management Relations Act, federal courts often look to the FAA for guidance in labor arbitration cases.").

236. Int'l Bhd. of Teamsters, Local 519 v. United Parcel Serv., Inc., 335 F.3d 497, 503 n.2 (6th Cir. 2003).

237. United Steel v. Wise Alloys, LLC, 642 F.3d 1344, 1353 n.4 (11th Cir. 2011).

238. This uncertainty in the federal courts about whether to apply LMRA or FAA judicial review standards to arbitration decisions made under employer-union agreements was predicted by Professor Michael H. Leroy in 2010, the year after *Pyett* was decided. *See* Michael

The federal circuit court split regarding the relationship between the FAA and the LMRA may have been widened by the 2020 Ninth Circuit panel decision, also split, in *SEIU Local 121RN v. Los Robles Medical Center,*[239] referenced in the introduction. The majority abrogated a prior 1996 Ninth Circuit decision, *Desert Palace*, in which that court had held that in labor arbitration cases "an arbitrator should decide arbitrability as long as the agreement includes a broad arbitration clause." The majority applied the U.S. Supreme Court's longstanding rule, dating from its 1960 decisions in *Warrior & Gulf*[240] and *American Manufacturing*[241] that whether an employer-union dispute is arbitrable should be decided by courts "unless the parties stipulate otherwise." The Ninth Circuit in *Desert Palace* had apparently found that a broad arbitration clause met that "parties stipulate[d] otherwise" requirement. By contrast, the *Los Robles Medical Center* Ninth Circuit panel majority decided that the correct, more demanding standard was that an employer and union must "clearly and unmistakably" agree to have arbitrability be decided by an arbitrator or else that issue should be decided by the courts.[242] The panel majority reached this finding based on the U.S. Supreme Court's decision in *Granite Rock Co. v. Int'l Bhd. of Teamsters*,[243] even though the union argued, and the majority acknowledged in its decision,[244] that in *Granite Rock* the Court noted that because the parties in that case agreed that the court should decide arbitrability, "there is no need to apply the rule requiring 'clear and unmistakable' evidence of an agreement to arbitrate arbitrability."[245]

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, 107 (2010).

239. No. 19-55185, 2020 WL 5583677 (9th Cir. Sept. 18, 2020).

240. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

241. Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

242. Los Robles Medical Center, 2020 WL 5583677, at *3 & *9.

243. 561 U.S. 287 (2010), *quoted in* Los Robles Medical Center, 2020 WL 5583677, at *2-*8.

244. Los Robles Medical Center, 2020 WL 5583677, at *5.

245. Granite Rock, 561 U.S. at 297 n.5, *quoted in* Los Robles Medical Center, 2020 WL 5583677, at *5. Although given the collective bargaining context in and appellate posture of the Granite Rock case, Granite Rock's statement in its footnote 5 is best read as ambiguous, the Los Robles Medical Center panel majority asserted that this statement "reinforce[d]" its view that the FAA "clear and unmistakable" standard applies to arbitrability in the collective bargaining context Los Robles Medical Center, 2020 WL 5583677, at *6. The panel majority further contended that Granite Rock's citation in that footnote 5 to a prior U.S. Supreme Court FAA decision, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), "indicates the Court's view that" the FAA standard applied in First Options applies in the collective bargaining context. Id. However, it is at least as plausible that Justice Thomas in his majority opinion in Granite Rock, from which Justices Sotomayor and Stevens dissented in relevant part, cited

The *Los Robles Medical Center* decision rather gratuitously presented the determination of arbitrability issue, and the "clear and unmistakable" standard governing it, as being governed by FAA precedents that began in 1995 with *First Options of Chicago, Inc. v. Kaplan*.[246] *Los Robles Medical Center* did so even though the U.S. Supreme Court, in the 2010 *Granite Rock* decision on which *Los Robles Medical Center* heavily relied, correctly identified the source of that standard for who determines arbitrability as its 1986 labor arbitration decision in *AT&T Technologies, Inc. v. Communications Workers*.[247] The panel majority acknowledged the *AT&T Technologies* decision as the source of the "clear and unmistakable" standard only in a footnote responding to the dissent,[248] when it could have reached the same conclusion and even abrogated its prior *Desert Palace* decision based solely on *AT&T Technologies*. The *Los Robles Medical Center* panel majority's insistence on unnecessarily relying on FAA precedents is all the stranger given that in *Granite Rock* the U.S. Supreme Court in footnote 8 distinguished between labor arbitration and FAA precedents,[249] and other federal courts of appeal have had no difficulty in accepting *AT&T Technologies* as the source of the "clear and unmistakable" standard the panel majority applied.[250]

A federal circuit court split has also developed over a judicially added ground for striking down arbitrators' decisions under the FAA: that the decision had "manifest disregard of the law."[251] The "Second, Fourth, Sixth, and Ninth Circuits sometimes allow arbitration awards to be challenged for manifest disregard of the law, but the First, Fifth, Seventh, Eighth, and Eleventh Circuits take the position that Hall Street [the U.S. Supreme Court decision in *Hall Street Associates, LLC v. Mattel*] has eliminated this ground for challenging arbitration an arbitrator's

First Options only to support that "clear and unmistakable" was a test used in FAA cases and to respond to the argument by the employer petitioner that this was the standard that should be used to decide the case. See Reply Brief for Petitioner, Granite Rock, 2009 WL 4271307, at 4-6.

246. Los Robles Medical Center, 2020 WL 5583677, at *1 & *3 (citing First Options, 514 U.S. 938 (1995)).

247. Granite Rock, 561 U.S. at 300 (quoting AT&T Technologies, 475 U.S. 643, 649 (1986)).

248. Los Robles Medical Center, 2020 WL 5583677, at *5 n. 6.

249. Granite Rock, 561 U.S. at 301 n.8.

250. *See, e.g.,* Southside Hospital v. New York State Nurses Association, 732 Fed.Appx. 53, 55-56 (2d Cir. 2018); Soc'y of Professional Engineering Employees in Aerospace v. Spirit Aerosystems, Inc., 681 F. App'x 717, 721-22 (10th Cir. 2017); Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1, 7 (1st Cir. 2014).

251. *See* Brian Forgue, *Rethinking the Federal Arbitration Act §10: Vacating "Manifest Disregard*," 7 Y.B, ARB. & MEDIATION 255, 260–61 (2015).

awards."[252] Other courts have held that the grounds listed in the FAA are the only ones that a court can use to overturn an arbitrator's decision, and that an arbitrator's wrongly applying the law is not sufficient.[253]

Further uncertainty if well-settled labor arbitration law were fully replaced by new FAA precedents could come from the willingness of the U.S. Supreme Court to discount longstanding contract interpretation and other doctrines when deciding FAA cases. As recently as April 2019, the Supreme Court in *Lamps Plus Incorporated v. Varela* in effect held that the maxim that "contract language should be construed against the drafter" (which the Court also referred to as the *contra proferentem* doctrine)—relied on in literally thousands of contracts cases[254] —should be relied on only as a "last resort" and only when "a court determines that it cannot discern the intent of the parties" in an "ambiguous" contract.[255] The four dissenters pointed out that the Court itself had relied on that maxim in its 1995 *Mastrobuono* decision ordering arbitration,[256] a decision in which a nearly unanimous Court (save for a dissent by Justice Thomas)[257] stated its opinion was to further "the central purpose of the Federal Arbitration Act to ensure 'that private agreements to arbitrate are enforced according to their terms.'"[258] The Court in *Lamps Plus* also claimed to be fulfilling that objective,[259] but distinguished *Mastrobuono*,

252. DANA SHILLING AND BARBARA DETKIN, LAWYER'S DESK BOOK SUPPLEMENT §23.03 (2d ed. 2019); *see* Abbott v. Law Office of Patrick J. Mulligan, 440 F. App'x 612, 618–19, 620 (10th Cir. 2011) (explaining the circuit split regarding the "manifest disregard" theory and refusing to "jettison[ ]" the "manifest disregard" standard in the absence of clear guidance from the Supreme Court indicating that it is not encompassed in the grounds enumerated in FAA §10).

253. Aralar v. Scott McRea Auto. Grp., 2018 U.S. Dist. LEXIS 64045, at *4 (M.D. Fla. Apr. 17, 2018); Rent-A-Center, Inc. v. Barker, 633 F. Supp. 2d 245, 257 (W.D. La. 2009) ("[M]isapplication of the law is not grounds for vacating an arbitration award under the FAA . . . . Our review is restricted to determining whether the procedure was fundamentally unfair.").

254. A Westlaw search in the "CASES" folder and file for "contrac!" and "against the drafter" yielded 4,000 decisions from the 21st century alone. *See, e.g.,* BKCAP, LLC v. CAPTEC Franchise Trust 2000-1, 872 F.3d 353 (7th Cir. 2009); Blessey Marine Servs., Inc., v. Jeffboat LLC, 771 F.3d 894 (5th Cir. 2014).

255. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1417 (2019).

256. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995).

257. *See id.* at 64–72 (Thomas, J., dissenting). Justice Thomas dissented on the ground that the majority had wrongly construed the "choice of law" agreed upon between the parties. *See id.* at 64.

258. *See id.* at 53–54.

259. *Lamps Plus, Inc.*, 139 S. Ct. at 1415 ("The FAA requires courts to 'enforce arbitration agreements according to their terms.'").

apparently largely on the rather result-oriented basis that in its earlier decision the maxim favored arbitrating the claims.[260]

The maxim discounted in *Lamps Plus* would be of little significance when an employer and union have together negotiated and agreed on grievance and arbitration provisions, because there then would be no "drafter" to construe ambiguity against. However, in many circumstances grievance and arbitration provisions might not be agreed to by the union, but instead unilaterally implemented by the employer after the employer and union have reached an impasse in bargaining.[261] Professor Ann C. Hodges has made strong and insightful arguments why current labor law forbids and should continue to forbid employers from unilaterally implementing any grievance and arbitration provisions that require employees to arbitrate statutory claims.[262] However, because it is obviously impossible to predict whether future employers might be permitted to unilaterally implement provisions like this and others governing arbitration, it follows that the "ambiguity construed against the drafter" maxim might be highly relevant in future labor arbitration cases.

It is worth noting that the *Lamps Plus* Court plurality's[263] reasons for disagreeing with the Ninth Circuit on the "ambiguity construed against the drafter" maxim might ultimately be understood as dicta because the Court consistently stated it was applying the FAA[264] and found based on its past FAA precedents disfavoring "class" arbitration that the

260. *See id.* at 1419 n.5. In support of this, the Court did not cite any court precedents, but instead "hornbooks" and the Restatement on Contracts. *See id.* at 1417. But by the end of its reasoning for its treatment of the maxim, the Court was relying only on *2 Farnsworth on Contracts*. *Id.* (quoting 2 Farnsworth §7.11, at 303). The Court could have cited some court decisions referring to the maxim as a "last resort" to be used when contract language and (if admissible) extrinsic evidence could not be used to determine the parties' intent. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS SUPPLEMENT 599 (3d ed. 2018). But certainly numerous courts have taken the contrary position, and also relied on treatises to do so. *See, e.g.*, Barrett v. McDonald Inv., Inc., 870 A.2d 146, 149–50 (Me. 2005) (after describing the tension that sometimes occurs between the presumption favoring arbitration and the "bedrock rule of contract interpretation . . . that ambiguities in a document are construed against its drafter," choosing the latter) (citing SAMUEL WILLISON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS 471–72 (4th ed. 1999)).

261. *See* NLRB v. Katz, 369 U.S. 736, 741, 745 (1962).

262. *See generally* Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?* 16 OHIO ST. J. ON DISP. RESOL. 513 (2001) (addressing arguments in favor of forbidding employers to require employees to arbitrate statutory claims).

263. *Lamps Plus, Inc.,* 139 S. Ct. at 1419 (Justice Thomas's concurring opinion agreed with the other Justices in the majority on the ground of "correctly apply[ing] our FAA precedents," but appeared to refrain from agreeing with the other Justices' decision to "evaluate" the contra proferentem rule).

264. *See id.* at 1413.

Ninth Circuit had erred in ordering "class-wide" arbitration of employee claims.[265]

Language in the Court's 2019 *Lamps Plus* decision also indicates that the Court might not have intended (or even considered) that this decision would apply to labor arbitration that is based on collective bargaining agreements. The Court multiple times stated that "individualized arbitration" is what is "envisioned" or "contemplated" by the FAA.[266] Meanwhile, "non-individualized" or "group grievances" are common in labor arbitration when a union pursues grievances on behalf of multiple or all employees it represents,[267] something the U.S. Supreme Court has itself recognized many times that unions have the legal authority to do.[268] And because these are precedents that favored arbitration, they cannot be distinguished on the ground the Court has used in other cases,[269] that they were made by Courts hostile to arbitration. Certainly, as discussed in Part II, the U.S. Supreme Court has repeatedly said that unions have the authority, and even the duty, to act on behalf of all employees whom they represent.[270]

Unfortunately, it is likely to take years before there is a clear answer to all the questions raised by the *Lamps Plus* decision if everything the Court said in that decision does apply to labor arbitration. That is just one more example of the uncertainty that would be created by a rule requiring all FAA rules and precedents to supplant all those that have developed for more than sixty years in labor arbitration.

3. The Development of Distinct Labor Arbitration Law & Practice, and the Threat of the FAA

As this brief discussion indicates, there is considerable uncertainty in the application of the FAA regarding the standard of review of an

265. *See id.* at 1412, 1416, 1418.

266. *See id.* at 1412, 1415, 1416.

267. *See* ELKOURI & ELKOURI, *supra* note 178, at § 5.5B.

268. *See, e.g.,* Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990); Detroit Edison Co. v. N.L.R.B., 440 U.S. 301 (1979); Nolde Bros, Inc. v. Bakery & Confectionery Workers, 430 U.S. 243 (1977); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Local Union No. 721 v. Needham Packing Co., 376 U.S. 247 (1964); Retail Clerks Int'l Ass'n v. Lion Dry Goods, 369 U.S. 17 (1962).

269. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480–82, 484 (1989) (overruling the ruling in Wilko v. Swan, that pre-dispute agreements to arbitrate claims under the Securities Act of 1933 were not enforceable) 346 U.S. 427, 438 (1953); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272–73 (1995).

270. *See* Vaca v. Sipes, 386 U.S. 171, 186 (1967); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 207 (1944).

arbitration decision, an issue relatively well-settled for many years in labor arbitration.[271] That there is uncertainty and disagreement is unsurprising, given that the history and purposes of the FAA and labor arbitration are so different. The Supreme Court explained this at length in its decision in *Warrior & Gulf*,[272] part of the "*Steelworkers Trilogy*" that has governed labor arbitration for sixty years.[273] Using the term "commercial" to refer to arbitration under the FAA and non-labor statutes, the Court compared that to labor arbitration, stating: "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife."[274] The Court's reference here to "industrial strife" meant work stoppages, like strikes and lockouts, of which there were annually hundreds in the U.S. at the time of the Court's decision.[275] A bit later the Court further explained:

> When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.[276]

271. *See* THE DEVELOPING LABOR LAW, *supra* note 164, § 17.III.C, at 13, 16–18.

272. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960).

273. RICHARD A. LORD, WILLISTON ON CONTRACTS § 56:25 (4th ed., 2019).

274. *Warrior & Gulf*, 363 U.S. at 578.

275. *See* U.S. Dep't of Labor, *Annual Work Stoppages Involving 1,000 or More Workers, 1947–2018*, U.S. BUREAU OF LABOR STATISTICS (Mar. 11, 2020), https://www.bls.gov/web/wkstp/annual-listing.htm (showing that between 1958 and 1960 there were no fewer than 222 and as many as 335 major work stoppages annually). The term "industrial strife" is used in Section 1(b) of the LMRA, the Congressional declaration of purpose and policy provision. *See* 29 U.S.C. § 141(b) (2012). At least through 1960, when the Supreme Court used the term in *Warrior & Gulf*, it was usually applied to work stoppages like strikes and events that sometimes occur during such work stoppages. *See, e.g.*, Div. 1142, Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emps. of Am. v. NLRB, 294 F.2d 264, 266 (D.C. Cir. 1961) (referring to "industrial strife" caused by incidents that occur during strikes); United States v. United Steelworkers of Am., 271 F.2d 676, 681, 690 (3d Cir. 1959) (relying on Congressional goal of addressing "industrial strife" to enforce federal government's suit to enjoin a strike), *aff'd* 361 U.S. 39, 44 (1959); Local Union 219, Retail Clerks Int'l Ass'n v. NLRB, 265 F.2d 814, 818 (D.C. Cir. 1959) (discussing the LMRA's statutory dispute resolution processes aimed at preventing or addressing the "industrial strife" of work stoppages).

276. *Warrior & Gulf*, 363 U.S. at 580.

The *Warrior & Gulf* Court sought to have "matters" resolved by "law" rather than "contending forces," very likely because the latter would lead to "industrial strife."[277] To further this sensible objective, the Court decided to treat a collective bargaining agreement as "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . [one that] calls into being a new common law—the common law of a particular industry or of a particular plant."[278]

Two years after *Warrior & Gulf*, in its 1962 decision in *Lucas Flour*, the Supreme Court made explicit as a rule of labor law that arbitration did in fact substitute for "strife" and economic force.[279] The *Lucas Flour* Court held that a "strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement."[280] The Court held that this was so even if, as in that case, the collective bargaining agreement did not include a no-strike clause.[281] Demonstrating the continuity of this ruling with *Warrior & Gulf*, the Court further found "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."[282]

Twenty-six years after the *Steelworkers Trilogy*, the Supreme Court in its 1986 decision in *AT&T Technologies, Inc.*[283] not only reaffirmed but praised the *Trilogy* and its rationales in an opinion by Justice Byron White,[284] who five years later wrote the opinion in *Gilmer* holding that employees could be required to arbitrate their statutory discrimination claims.[285] In its 1986 decision in *AT&T Technologies, Inc.*, the Court explained:

> The principles necessary to decide this case are not new. They were set out by this Court [in the *Steelworkers Trilogy*]. These precepts have

277. *Id.*

278. *Id.* at 578–79 (citing Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004–05 (1955)); *see* Julius Getman, *Was Harry Schulman Right?: The Development of Arbitration in Labor Disputes*, 81 ST. JOHN'S L. REV. 15, 18–19 (2007) (discussing the *Warrior & Gulf* decision's extensive reliance on late Yale Law School Dean Harry Shulman's speech and article).

279. Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

280. *Id.* at 105.

281. *Id.* at 104–05.

282. *Id.* at 105 (citing *Warrior & Gulf*, 363 U.S. at 578).

283. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986).

284. *See id.* at 644, 655.

285. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

> served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.[286]

Other practical differences between FAA arbitration and labor arbitration as it had developed by the late 20th century have been pointed out by federal courts of appeal decisions and scholars. In the D.C. Circuit's 1997 decision in *Cole v. Burns International Security Services*,[287] these observations were really made by both, as the opinion was authored by Judge Harry T. Edwards[288] who, before and since his service on the bench, was and is a labor law professor.[289] In the *Cole* decision Judge Edwards explained that in labor arbitration there are "unique protections" for both employers and employees, often not present in FAA arbitration, "that minimize the risk of unfairness or error by the arbitrator."[290] First, "because both unions and employers are repeat customers of arbitration and have a hand in selecting the arbitrator to hear their disputes, arbitrators who regularly favor one side or the other will not be hired again."[291] Second, while under the FAA an arbitration decision (at least after a court enforces it) finally determines all issues between its parties, that is not necessarily true for the parties in labor arbitration: "Because the parties to a collective bargaining agreement maintain an ongoing relationship, they remain free to rewrite their contract and thereby 'correct' what they perceive to be 'errors' on the part of the arbitrator."[292]

Other federal courts have similarly relied on distinctive features and purposes of labor arbitration in decisions following the U.S. Supreme Court cases establishing that non-unionized and unionized employees

286. *AT&T Techs., Inc*., 475 U.S. at 648.

287. *See* 105 F.3d. 1465 (D.C. Cir. 1997).

288. *See id.* at 1467.

289. *See Harry T. Edwards*, UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT (Feb. 8, 2020, 12:24 PM), https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+HTE (biography on District of Columbia Circuit Judge Harry T. Edwards).

290. *See Cole*, 105 F.3d at 1475.

291. *Id.*

292. *Id.* (citing Am. Postal Workers Union v. U.S. Postal Serv., 789 F.2d 1, 7 (D.C. Cir. 1986); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public–Law Disputes*, 1995 U. ILL. L. REV. 635, 669; 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, 1195 (1993)).

could be required to arbitrate their statutory claims.[293] For example, the Fourth Circuit in 1999, in *Westvaco Corporation v. United Paperworkers International Union, Local Union 676*,[294] rejected an employer's challenge to a labor arbitration decision on the ground that "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures."[295] The court found that labor arbitration does this effectively "by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."[296] Labor law rules for decades have enabled arbitration to operate in this way and thereby satisfy parties and labor policy objectives; at present it is at best uncertain whether arbitration fully governed by FAA rules would do the same.

As recently as 2018, a federal court granted a union's motion to enforce an arbitration decision and denied a medical center employer's suit to vacate based on the features of and policies underlying labor arbitration. The U.S. District Court for New Mexico in *Christus St. Vincent Regional Medical Center v. District 1199NM, National Union of Hospital and Healthcare Employees, AFSCME*,[297] extensively quoted and relied on the *Steelworkers Trilogy* decisions, including specifically relying on the *Warrior & Gulf* holdings that "[a]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself" and "[a]rbitration is the substitute for industrial strife."[298] More specifically, the court held that "[a]rbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions."[299] In addition to such court decisions, multiple scholars in the past dozen years or so have discussed how the singular characteristics of labor arbitration, developed over decades under labor

293. *See supra* notes 20–29 and accompanying text (discussing the 1991 and 1998 U.S. Supreme Court decisions that so held).

294. 171 F.3d 971 (4th Cir. 1999).

295. *Id.* at 974 (quoting Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 249 (1970)).

296. *Id.* (quoting *Warrior & Gulf*, 363 U.S. at 581).

297. 347 F. Supp. 3d 887 (D.N.M. 2018). After an appeal by the employer was filed in the U.S. Court of Appeals for the Tenth Circuit, that court granted the parties' stipulation to voluntarily dismiss the case. *See* Order Granting Motion to Dismiss Case, No. 18-2135 (Feb. 21, 2019).

298. *Id.* at 901 (quoting *Warrior & Gulf,* 363 U.S. at 578).

299. *Id.* at 903 (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960)).

law rules, would be threatened if courts decided that FAA rules—both already existing and those yet to be created—should apply to all arbitrations.[300]

4. Settled Labor Arbitration Law Could Become Unsettled if the FAA Must Be Applied

Employer attorneys and arbitrators who push courts for "unifying" or fully integrating FAA and labor arbitration are setting for courts a very challenging task.[301] Typical FAA employment arbitration is and has always been bilateral, between just the employer and the employee.[302] Labor arbitration usually involves three parties: the employer and employee, and also the union that represents the employee.[303] Under, again, decades of labor law, unions have a well-defined duty of fair representation to employees they represent in arbitration.[304] Under these rules, employees most prove both that the union breached that duty, and that the employer violated the collective bargaining agreement, in a so-called "hybrid" lawsuit.[305] Such lawsuits are common,[306] and federal courts know how to decide them. There are no equivalent precedents under the FAA.[307] Federal courts could adopt the labor law rules on those for cases under the FAA, but if they do, why consider that to be FAA law? And there is no guarantee that all federal courts will in fact do that, nor any way to predict what

300. *See, e.g.*, Allison Anderson, *Labor and Commercial Arbitration: The Court's Misguided Merger,* 36 B.C. INT'L & COMP. L. REV. 1237, 1253, 1261 (2013); Mitchell H. Rubenstein*, Altering Judicial Review of Labor Arbitration Awards,* 2006 MICH. ST. L. REV. 235, 256 (2006).

301. *See* Anderson, *supra* note 287, at 1269, 1272.

302. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (reasoning that the overarching purpose of the FAA is to ensure the enforcement of arbitration according to their terms, which is inconsistent with any requirement for class arbitration). Employee-side lawyers have often attempted to represent clients in "class arbitration," but the U.S. Supreme Court, while not barring such arbitration, has repeatedly made it difficult to arbitrate claims in that way. *See, e.g.*, *Lamps Plus*, *Inc.*, 139 S. Ct. at 1419 (holding Ninth Circuit erred in allowing class arbitration); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 243 (2013) (rejecting argument that high cost of individual arbitration should render unenforceable a waiver of class action arbitration); *Concepcion*, 563 U.S. at 356–57 (FAA preempts California judicial rule on class action waiver unconscionability); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (no person can be required to do class action arbitration without their consent).

303. *See* THE DEVELOPING LABOR LAW, *supra* note 164, § 25.II.A.3, at 21, 23 (discussing parties to fair representation actions, including unions, employers, and employees).

304. *See id.* at 5.

305. *See* Mitchell H. Rubinstein, *Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration*, 42 U. MICH. J.L. REFORM 517, 519 n.7 (2009).

306. *See id.* at 528.

307. *See* THE DEVELOPING LABOR LAW, *supra* note 164, § 25.I.A, at 2.

each and every federal court or judge will do.[308] Thus, more uncertainty arises if the Supreme Court or Congress or anyone with the authority to do so adopts a requirement that FAA rules apply to all arbitrations.[309]

Labor law rules for fair representation/hybrid cases are just one example of the many established and stable labor law rules that would be disrupted by changing the law so that the FAA applies to all arbitrations.[310] Other rules include, but are not limited to, NLRB deferral to the grievance and arbitration processes and labor arbitration rulings,[311] resolving decisions by two different arbitrators,[312] the possible role of the Federal Mediation and Conciliation Service in providing arbitration procedures,[313] the rules for precedential effect of an arbitration decision interpreting an agreement on future arbitrations under the same agreement,[314] circumstances that can justify failing to comply with a collective bargaining agreement's arbitration provisions,[315] and the rules governing an "exhaustion requirement" for employees covered by a collective bargaining agreement.[316] Moreover, if the rule becomes that the FAA and its precedents apply to labor arbitration, does that mean that the *Steelworkers Trilogy* and *Lucas Flour* U.S. Supreme Court decisions that never mentioned the FAA, no longer apply to labor arbitration?[317] Meaning in turn

308. *Cf. id.* at 8–15 (discussing how different circuit courts ruled on issues under current labor law rules concerning the duty of fair representation, including jurisdiction and contractual remedies, suggesting different interpretation of law within the federal court system).

309. *See id.* at 2, 8–15 (discussing that after courts judicially fashioned the duty of fair representation, federal courts have enforced the duty under different procedures, implying that adopting labor law rules for claims arising under the FAA will lead to similar uneven application).

310. *See, e.g.*, ELKOURI & ELKOURI, *supra* note 178, at § 2.2.A.ii.c.2; Huber, Hunt & Nichols, Inc. v. United Ass'n & Apprentices of the Plumbing & Pipefitting Indus., Local 38, 282 F.3d 746, 747 (9th Cir. 2002); 29 C.F.R. §§ 1404.8, 1404.12; Elizabeth Williams, Annotation, *Binding Precedential Effect of Prior Arbitrator's Construction of Provision of Collective Bargaining Agreement*, 121 A.L.R. Fed. 487, 498 (1994); Anne M. Vann, Annotation, *Breach or Repudiation of Collective Labor Contract as Subject to, or as Affecting Right to Enforce, Arbitration Provision in Contract*, 29 A.L.R.3d 688, 702 (1970); Kevin D. Hart, Annotation, *What Circumstances Justify Employee's Failure to Exhaust Remedies Provided in Collective Bargaining Agreement Before Bringing Grievance Suit Against Employer in Federal Court, Under § 301 of the Labor Management Relations Act of 1947 (29 U.S.C.A. § 185)*, 52 A.L.R. Fed. 591, 596 (1981).

311. *See* ELKOURI & ELKOURI, *supra* note 178, at § 2.2.A.ii.c.2.

312. *See, e.g.*, *Huber, Hunt & Nichols, Inc.*, 282 F.3d at 747.

313. *See* 29 C.F.R. §§ 1404.8, 1404.12.

314. *See* Williams, *supra* note 297, at 498.

315. *See, e.g.*, Vann, *supra* note 297, at 702.

316. *See, e.g.,* Hart, *supra* note 297, at 596–97.

317. *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 566 (1960) (deciding labor dispute under the LMRA of 1947); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 577–78 (1960) (deciding labor dispute under the LMRA of 1947);

that unions can now strike during the terms of collective bargaining agreements over alleged employer violations of such agreements?[318] Insisting that FAA rules are binding on labor arbitration would raise all these issues and more, and thus would certainly generate a great deal of court litigation, which would actually conflict with one of the goals of applying the FAA to workplace cases.[319]

For all the reasons discussed in this subsection, the status quo that the U.S. Supreme Court recognized in 1987 in *Misco*,[320] that courts may rely on FAA precedents for guidance in labor arbitration cases without being necessarily bound by them, is preferable.[321] That has worked well for many decades and it would be misguided and also unnecessarily disruptive to contracts and expectations involving millions of workers to upset it now.

United Steelworkers of Am. v. Wheel & Car Corp., 363 U.S. 593, 596 (1960) (deciding labor dispute based on basic federal policy of settling labor disputes); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 104 (1962) (deciding labor dispute under Section 301 of the LMRA of 1947 and federal labor law).

318. *See Lucas Flour Co.*, 369 U.S. at 106.

319. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation."); Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1024 (11th Cir. 1982) (Arbitration "reliev[es] congested federal court dockets."); Sw. Indus. Imp. & Exp., Inc. v. Wilmod Co., 524 F.2d 468, 470 (5th Cir. 1975) ("Courts should endeavor to give full effect to arbitration agreements not only to effectuate the intent of the parties but also to ease the congestion of Court dockets."); Pacilli v. Philips Appel & Walden, Inc., No. 90-0263, 1991 U.S. Dist. LEXIS 193507, at *11 (E.D. Pa. Sept. 24, 1991) ("[A]rbitration helps to 'ease congested court dockets.'") (quoting Tepper Realty Co. v. Mosaic Tile Co., 259 F. Supp. 688, 693 (S.D.N.Y. 1966)); Griffin v. Semperit of America, Inc., 414 F. Supp. 1384, (S.D. Tex. 1978) ("The second consideration which has influenced courts to embrace approvingly the resolution of disputes by arbitration is the desirability of '[easing] the congestion of the Court dockets.'") (quoting Sw. Indus. Imp. and Exp., Inc. v. Wilmod Co., 524 F.2d 468, 470 (5th Cir. 1975)).

320. *See supra* notes 17–19 and accompanying text.

321. *Misco*, 484 U.S. at 38. An example of a recent federal court of appeals decision applying this approach was that of the Ninth Circuit in Int'l All. of Theatrical Stage Emp. v. Insync Show Prods., Inc., 801 F.3d 1033, 1039 (9th Cir. 2015) ("We need not decide, however, whether the FAA applies in this case because we have jurisdiction to review the order compelling arbitration whether we apply the FAA, or the LMRA as interpreted by Goodall-Sanford. Even reviewing this case (and the district court's stay) as strictly a § 301 case, we properly could look to the FAA for guidance."). *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 41 n.9 (1987) ("[F]ederal courts have often looked to the [FAA] for guidance in labor arbitration cases, especially in the wake of the holding that § 301 . . . empowers the federal courts to fashion rules of federal common law."). The court affirmed district court order denying motion to dismiss and granting petition to compel arbitration. *Id.*

B. In Accord with Existing Federal Precedent, FAA Procedures that Are Not Inconsistent with the LMRA Should Be Available for Union Arbitration

While it would be a major mistake for courts to try to apply all FAA substantive rules to arbitration under collective bargaining agreements, it could be practicable to apply FAA procedures to such labor arbitration, if approaches to this already used by the Seventh and Tenth Circuits, and a few other federal courts, are followed.[322]

The U.S. Court of Appeals for the Seventh Circuit decision in *Smart v. International Brotherhood of Electrical Workers, Local 702*,[323] with an opinion by Judge Richard Posner, found it had jurisdiction both under LMRA Section 301 and the FAA to consider a federal district court's grant of summary judgment to the union on Smart's challenge to an arbitration decision ordering him to make previously unpaid fringe benefit contributions.[324] The court relied on and interpreted FAA Section 10(a)(4) to find that the arbitrator's decision was "final and appealable."[325] Also, as already discussed twice in this article, the court held that the FAA could be applied to labor arbitration unless the FAA would conflict with the existing rules and precedents under LMRA Section 301, in which instances Section 301 rules would prevail.[326]

The Wright, Miller & Cooper treatise on Federal Practice & Procedure categorized the Seventh Circuit's *Smart* decision as an example of a federal court asserting subject matter jurisdiction to fulfill Congressional intent and "fill the interstices of a pervasive federal framework."[327] In fact, the treatise identifies as "[p]erhaps the most famous example of this 'wholesale' interstitial judicial lawmaking" the U.S. Supreme Court's decision in *Textile Workers Union of America v. Lincoln Mills of Alabama*,[328] in which the Court reversed the Fifth Circuit Court of Appeals[329] and held that in LMRA Section 301 Congress gave federal courts jurisdiction to grant a union's request to order an employer to arbitrate a claim

322. *See* Smart v. Int'l Bhd. of Elec. Workers, Local 702, 315 F.3d 721, 724 (7th Cir. 2011); Int'l Bhd. of Elec. Workers, Local 111 v. Pub. Serv. Co. of Colo., 773 F.3d 1100, 1105–06 (10th Cir. 2014).

323. *See Smart*, 315 F.3d at 721.

324. *See id.* at 724.

325. *See id.* at 725–26.

326. *See id.* at 724–25; *see also supra* notes 35, 199–205 and accompanying text.

327. *See* 19 Charles Alan Wright, Arthur Miller & Edward H. Cooper et. al., *Federal Practice & Procedure* § 4516 n.5 (3d ed. 2019). Chapter 14, which includes §4516, was authored by Professor Miller. *Id.*

328. *Id.*; 353 U.S. 448 (1957).

329. *Textile Workers Union of America*, 353 U.S. at 449, 459.

under a collective bargaining agreement.[330] The Wright, Miller & Cooper Miller treatise explained with specific regard to the Seventh Circuit's *Smart* decision that it advanced Congressional intent because the "Taft Hartley Act [which includes Section 301] . . . creates federal judicial remedy for breach of collective bargaining agreements . . . [and directs] . . . courts to create federal common law of [those] agreements."[331]

As these treatise passages indicate, in labor arbitration cases under union-employer collective-bargaining agreements, the jurisdiction of federal courts is based on LMRA Section 301, especially because the FAA does not itself create an independent basis for federal courts to take jurisdiction in a case.[332] Consequently, it is appropriate for a court to ensure that there is no conflict with the law developed under Section 301, and the congressional intent the Supreme Court has recognized under that law, in applying the FAA to labor arbitration, as the Seventh Circuit held in *Smart* and the Wright, Miller & Cooper treatise acknowledged.[333] The U.S. Court of Appeals for the Tenth Circuit also followed this approach in its 2014 decision in *International Brotherhood of Electrical Workers, Local 111 v. Public Service of Colorado*.[334]

In that decision the court relied on FAA Section 16(a) to accept the union's interlocutory appeal of a federal district court's denial of the union's motion to stay the case and compel arbitration.[335] The court identified as the "final step" in its determination "whether the FAA's interlocutory-appeal provisions clash with anything in Section 185 [Section 301] or its attendant federal common law."[336] The court found there was no such conflict, agreeing with the Seventh Circuit that "whether a particular type of interlocutory order is immediately appealable . . . is a quintessentially procedural question to which the Federal Arbitration Act provides an answer that creates no tension with anything in either [Section 301] or

330. *See id.* at 455.

331. Wright, Miller & Cooper, *supra* note 314, at § 4516 n.5.

332. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.").

333. *See* Smart v. Int'l Bhd. of Elec. Workers, 315 F.3d 721, 724–25 (7th Cir. 2002); *see also* Wright, Miller & Cooper, *supra* note 314, at §4516 n.5.

334. *See* 773 F.3d 1100, 1107 (10th Cir. 2014).

335. *See id.* at 1105–07.

336. *Id.* at 1107.

the common law of collective bargaining agreements that has evolved under it . . . ."[337] Summing up its ruling on this procedural issue, the court stated:

> If (1) a collective-bargaining agreement contains a written arbitration provision covered by 9 U.S.C. § 2; (2) the agreement does not cover transportation workers engaged in foreign or interstate commerce; (3) a party to the agreement files a motion unmistakably seeking only an order staying the case and compelling the parties to arbitration; and (4) the district court denies the motion—then appellate jurisdiction exists under 9 U.S.C. § 16(a) to hear an interlocutory appeal from that order.[338]

After deciding it could consider this appeal, the court affirmed the lower court ruling denying the union's motion to compel arbitration, based on its finding that the collective-bargaining agreement's provisions governing scope of arbitration could not be interpreted to cover the dispute at issue.[339]

Under another line of federal appellate precedent, an order requiring an employer to arbitrate a union grievance is immediately appealable, even if the district court decides to stay the arbitration.[340] The line begins with the United States Supreme Court's decision in *Goodall–Sanford, Incorporated v. United Textile Workers of America*,[341] in which the Court held that a court order granting a union's suit for "specific performance" to require an employer to arbitrate a grievance was a "final decision" under the general appellate jurisdiction provision.[342] The Court reasoned that the right the union was seeking to enforce was "one arising under Section 301(a) of the Labor Management Relations Act" and that "[a]rbitration is not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought."[343] As the ruling provided the full relief sought, it was a "final decision."[344] This rule has continued to have been followed by the federal courts of appeal.[345]

337. *Id.* (quoting Pryner v. Tractor Supply Co., 109 F.3d 354, 359 (7th Cir. 1997)).

338. *Id.* (emphasis in original). The court's finding regarding exclusion of transportation employees was confirmed by the U.S. Supreme Court in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 542–43 (2019).

339. *See Int'l Bhd. of Elec. Workers, Local 111*, 773 F.3d at 1109–10.

340. *See Smart, supra* note 309.

341. *See* 353 U.S. 550, 550–53 (1957).

342. 28 U.S.C. § 1291; *see Goodall Sanford, Inc*., 353 U.S. at 551–52 (citing 28 U.S.C. § 1291).

343. *Goodall Sanford, Inc*., 353 U.S. at 551–52.

344. *See id.* at 551.

345. *See* United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Wise Alloys, LLC, 807 F.3d 1258, 1266–67 (11th Cir. 2015); Int'l All. of Theatrical Stage Emp. v. InSYNC Show Prods., Inc., 801 F.3d 1033, 1038–39 (9th

Some federal appellate courts have also found that after Congress added Section 16 of the FAA regarding appeals of FAA decisions,[346] whenever the lower court had a non-FAA basis for federal jurisdiction appeals courts have jurisdiction under FAA Section 16 to hear appeals of decisions granting or denying motions to compel arbitration.[347] As these rulings are obviously not in conflict with the similar rule under LMRA Section 301, unions should be able to rely on Section 301 or FAA Section 16 or both to appeal district court decisions ordering or refusing to order arbitration under a collective bargaining agreement.[348]

C. Labor Dispute Resolution Processes and Decisions Should Not be Subject to Challenge for the Decisionmaker(s) Arguably Not Being 100% Disinterested

The FAA does not define the term "arbitration," and the text of the LMRA does not even include the term.[349] So far, it is courts that have decided whether certain dispute-resolution procedures in labor-management relations are "arbitrations" for all purposes of the FAA.[350] The U.S. Court of Appeals for the Seventh Circuit has taken the position that a "joint committee" form of dispute resolution, one in which a panel of employer and union representatives decide on grievances, is not an "arbitration" covered by the FAA.[351] In *Merryman Excavation, Incorporated v. International Union of Operating Engineers, Local 150*,[352] the Seventh

Cir. 2015); Oil, Chem., & Atomic Workers Int'l Union v. Conoco, Inc., 241 F.3d 1299, 1302–03 (10th Cir. 2001); Coca–Cola Bottling Co., Inc. v. Soft Drink Workers Union, Local 812, 39 F.3d 408, 410 (2d Cir. 1994); Laborers' Int'l Union v. Foster Wheeler Corp., 26 F.3d 375, 385 (3d Cir. 1994); Int'l Union, United Auto. Aerospace & Agric. Implement Workers v. United Screw & Bolt Corp., 941 F.2d 466, 472 (6th Cir. 1991); Trustees of Chi. Truck Drivers v. Central Transp., Inc., 935 F.2d 114, 116–17 (7th Cir.1991).

346. *See* 9 U.S.C. § 16 (2018).

347. *See, e.g.,* Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc., 807 F.3d 553, 562 (4th Cir. 2015) (suggesting that when the lower court has expressly "denied" motions to compel that have a non-FAA basis, that is all that is necessary to grant appellate jurisdiction in the case); Microchip Tech. Inc. v. U.S. Philips Corp., 367 F.3d 1350, 1354–55 (Fed. Cir. 2004) (holding that FAA Section 16 grants appellate jurisdiction to federal appeals courts when the basis of the decision is non-FAA related denials of motions); Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 635 (4th Cir. 2002) (stating that FAA Section 16 expressly permits "an immediate appellate challenge to a district court's denial of a motion to compel arbitration").

348. *See*, *e.g.*, 9 U.S.C. § 16 (2018); *Microchip Tech. Inc*., 367 F.3d at 1355*; Lincoln Mills of Ala.*, 353 U.S. at 451–52.

349. Federal Arbitration Act, 9 U.S.C. §§ 1-14; 9 U.S.C. § 16 (2018) (lacking definition of the term 'arbitration').

350. *See* Merryman Excavation, Inc. v. Int'l Union of Operating Eng'r, Local 150, 639 F.3d 286, 290 (7th Cir. 2011).

351. *Id.* at 290, 292.

352. *Id.* at 286.

Circuit in an opinion by Judge Daniel Manion (and joined by Judges Frank Easterbrook and David Hamilton) stated, "[w]e wish to make clear that a joint committee is not a genuine arbitration subject to the [FAA] and the full requirements of impartiality that apply to genuine arbitration."[353] Similar to the Seventh Circuit's approach to labor arbitration generally, the court found the challenge to the joint committee was covered by the LMRA, reasoning, "[a] failure to comply with a joint committee award is a breach of a federal labor contract subject to section 301 jurisdiction—not an FAA action."[354]

Later in its decision the court explained that the plaintiff company had "agreed that disputes would be resolved in the first instance not by a neutral arbitrator but by a committee composed of an equal number of employer and union representatives"[355] and that the collective bargaining agreement the company had agreed to be bound by "does not require the representatives on the joint committee to act like detached magistrates or neutral arbitrators."[356] The court added that the FAA "impartiality" standard "would be patently unsuitable for joint committee members, who are 'representatives' specifically chosen because they are ostensibly partisans of one side to a collective bargaining agreement."[357]

Two years later, the Seventh Circuit again applied this rule, in *Lippert Tile Company, Incorporated v. International Union of Bricklayers and Allied Craftsmen, District Council of Wisconsin and Its Local 5*.[358] The court again applied LMRA Section 301, after observing that judicial review of labor arbitration under Section 301 "is different from the review of arbitration awards under the FAA, even if they resemble each other in some respects."[359] One of the differences, the court said, is that "[u]nlike in the FAA . . . 'evident partiality' is not inherently built into the Section 301 review mechanism."[360] The court then explained, "Section 301 review simply does not include a free-floating procedural fairness standard absent a showing that some provision of the [collective-bargaining agreement] was violated."[361]

The court next considered the plaintiff companies' specific argument that the Joint Arbitration Committee (JAC) was biased because the

353. *Id.* at 290.
354. *Id.*
355. *Merryman Excavation, Inc*., 639 F.3d at 292.
356. *Id.*
357. *Id.* at 294 n.4.
358. 724 F.3d 939, 948 (7th Cir. 2013).
359. *Id.*
360. *Id.*
361. *Id.*

union officer (a local union "director") who filed the grievance also served on the JAC.[362] The court accepted "that it might seem unusual (at least to those outside the world of labor arbitration) to allow the filer of the grievance to sit on the panel that adjudicates it."[363] However, the court found that this resulted from basic principles of contract law and relationships.[364] The court held that if one or more parties agreeing to arbitration under a collective-bargaining agreement want to bar any interested person's representative from the arbitral panel, "it is up to negotiating parties to make sure that a [collective-bargaining agreement] prohibits it."[365] The court next quoted an earlier Seventh Circuit ruling in a non-labor arbitration decision to observe:

> [S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.[366]

Based on this conclusion that the collective-bargaining agreement, like any contract, governs, the court rejected the plaintiffs' bias argument on the ground that the applicable agreement was not violated.[367] The court reasoned,

> [t]o the extent the [collective-bargaining agreement] sought to deal with potential bias, all it required was that the panel consist of three employer representatives and three union representatives.[368] So long as this equal representation requirement is met, nothing in the [agreement] prohibited the filer of a grievance from sitting on the JAC.[369]

As it was undisputed in this case that there were "three employer representatives and three union representatives" on the JAC, the court

362. *Id.* at 943.

363. *Lippert Tile Co*., 724 F.3d at 949.

364. *Id.*

365. *Id.*

366. *Id.* (quoting Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir.1994)). This opinion was by Chief Judge Richard Posner, who five years after this reference to "three monkeys" used a hypothetical in another labor case in which he stated the hypothetical employer could win by proving "it would never hire a penguin, because penguins can't weld." *See* Starcon, Inc. v. N.L.R.B., 176 F.3d 948, 951 (7th Cir. 1999). Another point of interest from the Seventh Circuit's 1994 *Baravati* decision is that it was argued, and won, by future President Barack Obama. *Baravati*, 28 F.3d at 704.

367. *Lippert Tile Co.,* 724 F.3d at 948.

368. *Id*.

369. *Id.*

found that resolved any claim based on the composition of the arbitral panel.[370]

The First Circuit Court of Appeals has also, in cases considered under LMRA Section 301, rejected arguments that arbitration decisions should be set aside based on alleged "bias" by arbitration panel members. In *JCI Communications, Incorporated v. International Brotherhood of Electrical Workers, Local 103*,[371] the First Circuit considered a plaintiff employer's argument that the arbitration panel provided for in the relevant union-employer agreement was biased because representatives of plaintiff's "competitors" served on that panel.[372] Just as the argument for "bias" was different than in the above discussed Seventh Circuit decisions, the First Circuit mentioned a reason not discussed by those decisions as one for rejecting the argument.[373] The court found that the relevant agreement "quite reasonably" required "arbitrators from relevant industries, whose expertise would be a considerable benefit."[374] The court then held that arbitration panel members from "the same industry," and even who are "business rivals of one party" are not sufficient proof of bias to justify setting aside the arbitration decision.[375]

The First Circuit, like the Seventh Circuit, also relied on the principle that parties who agree to "partisan" arbitrators must accept their decisions, citing Eighth and Ninth Circuit decisions in non-labor arbitration cases that had so found.[376] The court added that in this case the plaintiff had notice of risk of bias when it signed the contract and the plaintiff had chosen not to ask about the backgrounds of panel members,[377] and it would "undermine the arbitral process" to allow the plaintiff to "cry bias" after the decision.[378]

The Seventh and First Circuit in the decisions just discussed decided the cases under LMRA Section 301, which this article has consistently maintained is the correct approach for reviewing arbitrations based on employer-union agreements.[379] However, the employers' bias arguments in those cases could also have been rejected based on FAA precedents

370. *See id.* at 949.

371. 324 F.3d 42 (1st Cir. 2003).

372. *Id.* at 44.

373. *Id*. at 51.

374. *Id.*

375. *Id.* at 51–52.

376. *JCI Commc'ns, Inc*., 324 F.3 at 51 (citing Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821 (8th Cir. 2001)).

377. *Id.* at 52.

378. *Id.*

379. *Id*. at 47*; Lippert Tile Co*., 724 F.3d at 944.

that also hold that parties are bound to the arbitration processes to which they have agreed.[380]

In probably the most highly-publicized case—ever—applying this rule to reject an FAA Section 10(a)(2) argument for setting aside an arbitration decision, the U.S. Court of Appeals upheld the arbitration decision of NFL Commissioner/arbitrator Roger Goodell affirming the discipline of quarterback Tom Brady for deflating footballs prior to a playoff game.[381] Rejecting the Players Association's argument that Mr. Goodell was "partial" on key issues and should have recused himself, the court held that "arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen."[382] The Second Circuit stated that because the Players Association had agreed to the collective bargaining agreement provision giving the Commissioner "sole power of determining what constitutes 'conduct detrimental,'" the Association knew "that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to [that provision]."[383] The court therefore concluded that the union could not object to the Commissioner/arbitrator's possible partiality and that if it wanted to "restrict the Commissioner's authority," it could have with its management counterparty "fashioned a different agreement."[384]

Two years later the Second Circuit applied similar reasoning to set a more demanding standard to prove FAA Section 10(a)(2) claims,[385] in its non-labor arbitration decision in *Certain Underwriting Members of Lloyds of London v. Florida, Department of Financial Services*.[386] The case involved so-called "party-appointed" arbitrators in the reinsurance

380. *See, e.g.,* Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016) ("Brady II") ([A]rbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen."); Certain Underwriting Members of Lloyds of London v. Fla. Dep't of Fin. Servs., 892 F.3d 501, 508 (2d Cir. 2018) ("[A]rbitration is a creature of contract, and courts must hold parties to their bargain."); Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 824 (8th Cir. 2001) ("Because arbitration is a matter of contract, we neither endorse nor condemn this mode of proceeding . . . . We merely hold that, because AFC failed to demonstrate that arbitrator Stagg's conduct either misled the neutral arbitrators, prevented AFC from fairly presenting its case, or otherwise prejudices the outcome of the arbitrations, the awards must be confirmed.").

381. *Brady II*, 820 F.3d at 531–32.

382. *Id.* at 548.

383. *Id.*

384. *Id.*

385. *See* Jill Russell, *The Second Circuit's New Take on Overturning Awards under FAA Sec. 10*, 36 ALTERNATIVES TO HIGH COST LITIG. 138, 138 (2018).

386. 892 F.3d at 503–04.

industry.[387] The Second Circuit held that "arbitration is a creature of contract, and courts must hold parties to their bargain."[388] In the contract at issue, the court observed that the parties chose a tripartite panel with party-appointed arbitrators.[389] The court reasoned that '"[p]arties are free to choose for themselves to what lengths they will go in quest of impartiality,' including the various degrees of partiality that inhere in the party-appointment feature."[390] Based on this view, the court decided to apply a different standard for party-appointed arbitrators in the reinsurance industry "where an arbitrator's professional acuity is valued over stringent impartiality."[391] This court's reference to deferring to the parties desire for "professional acuity" is similar to the First Circuit's reasoning in the labor arbitration *JCI Communications* decision that unions and employers could choose arguably "partial" panels because of their "expertise in the industry."[392]

The Eighth Circuit Court of Appeals has also rejected FAA "partiality" challenges to arbitration decisions based on the challenger's agreement to "partisan" arbitrators.[393] In a non-labor arbitration case involving a dispute between a coal mine lessor and lessee, *Delta Mine Holding Company v. AFC Coal Properties., Incorporated*, the court rejected AFC Coal's claim under FAA Section 10(a)(2) that an arbitration panel's decision should be set aside because a mining engineer member of the panel had a long–time relationship with opposing party Delta Mine Holding and had even assisted Delta and its lawyers in preparing for this specific case.[394] The court found this panel member's presence as a decisionmaker consistent with "the parties' agreements to arbitrate" and held, "[g]enerally, partisan arbitrators are permissible."[395] The court quoted the lease agreements between the parties as showing that the arbitration

387. *Id*. at 504.

388. *Id.* at 508.

389. *Id*.

390. *Id.* (quoting Sphere Drake Ins. v. All Am. Life Ins., 307 F.3d 617, 620 (7th Cir. 2002)).

391. *Certain Underwriting Members of Lloyds of London*, 892 F.3d at 509. An additional issue in this case was one of the arbitration panel member's failure to disclose, even when asked, about his relationship with a party to the arbitration and its representatives, including a witness who testified. *See id.* at 504. In response to this issue the court remanded to the trial court to decide if the plaintiff had proved "by clear and convincing evidence that the failure to disclose by [the] party-appointed arbitrator . . . either violates the qualification of disinterestedness or had a prejudicial impact on the award." *See id.* at 511.

392. *See supra* notes 358–62 and accompanying text (discussing the *JCI Communications* decision).

393. Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 823 (8th Cir. 2001).

394. *See id.* at 819–20.

395. *Id.* at 821 (quoting ATSA of Cal., Inc. v. Continental Ins. Co., 754 F.2d 1394, 1395 (9th Cir.1985)).

agreements "expressly contemplated the selection of partial arbitrators—persons with substantial financial interests in and duties of loyalty to one party."[396] The Eighth Circuit therefore rejected AFC Coal's "partiality" challenge to the arbitration decision because "[t]he parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen."[397]

The U.S. Court of Appeals for the Ninth Circuit applied the same rule in two labor arbitration cases decided about a year apart.[398] First, in *Sheet Metal Workers International Association, Local 162 v. Jason Manufacturing, Incorporated*, the Ninth Circuit reserved on whether the FAA applied to collective bargaining agreements and instead held the employer's claims of "bias" by the arbitration panel, the National Joint Adjustment Board (NJAB), were without merit even if the FAA applied.[399] The court observed that when the employer signed the collective bargaining agreement it had agreed to arbitration by the NJAB and knew that panel included representatives of the union and some of its competitors.[400] The court held, "[w]hen the parties have agreed upon a particular method of dispute resolution, it should generally be presumed fair," and the employer had failed to overcome this presumption.[401]

Thirteen months later, in another decision involving a Sheet Metal Worker local union's arbitration process, the Ninth Circuit even more strongly rested its rejection of an employer's "partiality" argument on the ground that the employer had agreed to the challenged process.[402] The employer, Goss, challenged a Local Joint Adjustment Board decision as impermissibly "biased" because "the labor representatives on the board were Union agents and the management representatives were employed by businesses in competition with Goss."[403] The court found that "Goss's

396. *Id.*

397. *Id.* (quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir.) *cert. denied*, 464 U.S. 1009 (1983)); *see* ABF Freight System v. Int'l Bhd. of Teamsters, 728 F.3d 853, 859 (8th Cir. 2013) (in a decision involving transportation employees who'd now be recognized as covered by the FAA, Eighth Circuit relied on its *Delta Coal* decision in rejecting an employer's challenge to a decision by a "partisan" panel the employer contended was biased against it).

398. *See* Sheet Metal Workers Int'l Ass'n, Local 162 v. Jason Mfg., Inc., 900 F.2d 1392, 1398 (9th Cir. 1990); *see* Goss Golden W. Sheet Metal, Inc. v. Sheet Metal Workers Local 104, 933 F.2d 759, 765 (9th Cir. 1991).

399. 900 F.2d 1392, 1398 (9th Cir. 1990).

400. *See id.*

401. *See id.* (quoting Sheet Metal Workers Int'l Ass'n Local #420 v. Kinney Air Conditioning Co., 756 F.2d 742, 746 (9th Cir. 1985)).

402. *See Goss Golden W. Sheet Metal, Inc.*, 933 F.2d at 765.

403. *Id.*

argument is fundamentally flawed."[404] The court explained that the collective bargaining agreement Goss had entered into clearly stated that unresolved grievances would be arbitrated by representatives of the local union and of a local employers' association that was comprised of local sheet metal industry management representatives.[405] Therefore, the court concluded, "Goss received exactly what it bargained for."[406]

In 2014 the First Circuit Court of Appeals in an unpublished decision rejected an employer's claim under FAA Section 10(a)(2) that an arbitration panel's decision ordering it to make contributions to union benefit bunds should be set aside because trustees of those funds served on the panel.[407] Relying on decisions discussed above, the court observed that "parties can agree to have partisan arbitrators"[408] and that "once parties have agreed to a method of arbitration, they can demand no more impartiality than the degree inherent in that method."[409] The court found such agreement by the plaintiff employer because when that employer signed the collective bargaining agreement that resolved disputes through a joint labor-management arbitration Committee "she had notice that the Committee could, and indeed would, contain some trustees of the Funds."[410] The First Circuit therefore concluded that even "[a]ssuming, without deciding, that the trustees of the Funds on the Committee were subject to evident partiality," the plaintiff employer "consented to a process subject to this level of bias."[411]

Permissibility of so-called "partisan" arbitration under the FAA and FAA Section 10(a)(2) is also consistent with U.S. Supreme Court precedents on the FAA.[412] The Court has stated that "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this

404. *Id.*

405. *See id.*

406. *Id.*

407. *See* Gambino v. Alfonso, 566 F. App'x 9, 16 (1st Cir. 2014). This case was won by Ms. Indira Talwani, who is now a United States District Judge for the District of Massachusetts. *See Talwani, Indira*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/node/1394486 (last visited May 9, 2020).

408. *Gambino*, 566 F. App'x at 14 (citing Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821 (8th Cir. 2001)).

409. *Id.* (citing Sheet Metal Workers Int'l Ass'n, Local No. 162 v. Jason Mfg., Inc., 900 F.2d 1392, 1398 (9th Cir. 1990)).

410. *Id.* at 15.

411. *Id.* at 14–15.

412. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985).

principal objective when construing the statute."[413] Later in the same *Byrd* decision the Court declared, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate . . . ."[414] The Court picked up on this theme in *Volt Information Sciences, Incorporated v. Board of Trustees of Leland Stanford Junior University,* stating that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[415] More specifically the Court in that decision held that "parties are generally free to structure their arbitration agreements as they see fit" and "specify by contract the rules under which the arbitration will be conducted."[416] In 2010 in its *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation* decision, the Court reaffirmed these rules, stating "parties are 'generally free to structure their arbitration agreements as they see fit' . . . and may agree on rules under which any arbitration will proceed . . . [and] may choose who will resolve specific disputes."[417]

Regarding the parties' choosing who will be the arbitrator, the Court actually cited the part of *Alexander v. Gardner-Denver*[418] that discussed how in labor arbitration the "[p]arties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations"[419] and even noted that a "substantial proportion" of labor arbitrators are not lawyers.[420] The Court in *Stolt-Nielsen* next even quoted and relied on a Second Circuit court decision that had rejected an FAA Section 10(a)(2) claim against a member of an arbitration panel based on that member's dealings with others, and their lawyers, involved in the maritime dispute.[421] The Court quoted the Second Circuit's statement that the "most sought-after arbitrators are those

413. *Id.* As support for this, the Court quoted from the debates on the Federal Arbitration Act the statement that the proposed law "creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." *Id.*

414. *Id.*

415. Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 478 (1989) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)).

416. *Id.* at 479.

417. 559 U.S. 662, 683 (2010) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

418. *Id.* at 685.

419. Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

420. *Id.* at 57 n.18.

421. *Stolt-Nielsen S. A*., 559 U.S. at 683 (citing *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548 (2d Cir.), *cert. denied*, 451 U.S. 1017 (1981)).

who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose."[422] The Second Circuit immediately after that stated "[s]ince they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results," thus recognizing and accepting that parties are willing to risk some possibility of "partiality" to obtain expertise.[423]

The lower appellate courts that have rejected FAA Section 10(a)(2) challenges to "partisan" arbitrators have complied with these principles identified by the U.S. Supreme Court, to enforce what the parties have agreed to, and to allow parties to prefer industry and "shop" expertise to absolute disinterest.[424] In doing so they have fulfilled what the Supreme Court has identified as the primary purpose of the FAA.[425]

Moreover, federal courts requiring employers to accept the arbitration processes, and the consequences of those processes, to which they have agreed is treating them the same as courts have treated employees.[426] The U.S. Supreme Court and other federal courts have usually held employees bound to what they have agreed to and rejected employees' arguments for why they should not be.[427] For example, in the seminal *Gilmer* decision, the Court rejected the plaintiff employee's argument that the mandatory arbitration agreement should not be enforceable because of the "unequal bargaining power" between the employer and the employee, with the Court holding, "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[428] A second example is the Court's 2010 *Rent-a-Center, Incorporated v. Jackson* decision, which in effect required the employee to have an arbitrator decide if the arbitration agreement he was held bound to[429] was "unconscionable" under Nevada law and provided the employer with "unfair advantage" because, among other things, the employer did not have to

422. *Id.* (quoting *Int'l Produce*, *Inc.*, 638 F.2d at 552.)

423. *Int'l Produce*, *Inc.*, 638 F.2d at 552 (citing *Garfield & Co. v. Wiest*, 432 F.2d 849 (2d Cir. 1970)).

424. *Id*. at 551–52.

425. *Stolt-Nielsen S. A.*, 559 U.S. at 684 (first citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

426. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

427. *Id*.

428. *Gilmer*, 500 U.S. at 33.

429. 561 U.S. 63, 68 (2010).

arbitrate all its claims against employees while employees were required to arbitrate all claims against the employer.[430]

Lower federal courts have also rejected a variety of employee arguments why they should not be bound to agreements to arbitrate, including that acceptance was not voluntary but based only on continuing to work with the employer;[431] that the employee never signed the agreement;[432] that the arbitration agreement was an unconscionable "contract of adhesion" included as part of an employment application that had to be submitted to be considered for hire;[433] that the employee had no access to the agreement and was shown it only briefly with no time to read it;[434] that the agreement was one-sided and illusory because it bound the employee but could be unilaterally altered by the employer at any time;[435] that the agreement was one-sided and illusory because while employees were bound to arbitrate all their claims against the employer, the employer did not agree to arbitrate all claims against employees;[436] and more.[437] If future courts were to disregard above-discussed precedents and be more solicitous of employers and their agents who plead they should not be required to comply with agreements they consented to, that would be odd and, frankly, troubling.

CONCLUSION

The reference in this article's to "union arbitration" as "first," relative to the FAA, is not only based on the fact that arbitration of disputes between unions and employers, and even federal laws on it, began in the 19th century, decades prior to enactment of the FAA.[438] The "first" is also connected with the development of widely accepted and understood legal rules.[439] The contrast between the development of the legal rules for labor

430. *See id.* at 73.

431. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1374–76 (11th Cir. 2005).

432. Tinder v. Pinkerton Sec., 305 F.3d 728, 736 (7th Cir. 2002).

433. Adkins v. Labor Ready, Inc., 303 F.3d 496, 501–02 (4th Cir. 2002).

434. Abbott v. Lexford Apartment Servs., Inc., No. IP01-1243-C-B/S, 2002 U.S. Dist. LEXIS 14746, at *1 (S.D. Ind. Aug. 2, 2002).

435. Reynolds v. Halliburton Co., 217 F. Supp. 2d 756, 758 (E.D. Tex. 2002).

436. Oblix, Inc. v. Winiecki, 374 F.3d 488, 490–91 (7th Cir. 2004) (holding that "mutuality of obligation" was not necessary for consideration because the employer's paying the employee a salary met the consideration requirement).

437. *See* Stone & Colvin, *supra* note 169; Dr. William M. Howard, Annotation, *Enforceability Under Federal Arbitration Act of Arbitration Clause Not Within Collective Bargaining Agreement With Respect to Claims Under Federal Civil Rights Statutes*, 39 A.L.R. Fed. 2d 253 (2009).

438. *See* MORRIS, *supra* note 8, at 5.

439. *See supra* notes 1–34 and accompanying text.

arbitration and arbitration under the FAA is striking. The rules for labor arbitration have been developing for decades with most of the legal rules well-settled. Moreover, it is only the federal labor relations statute that creates FAA jurisdiction in cases involving parties from the same state, which suggests that making FAA rules binding in LMRA arbitration cases would be like the tail wagging the dog.[440] For these and perhaps other reasons, and as discussed earlier in Part III of this article, as of now federal courts are even divided as to whether the FAA rules should be applied at all to labor arbitration and, if they do, to what extent.

This article has answered that federal courts in labor arbitration cases should continue to consider the FAA only for guidance on any substantive issues, and apply FAA procedures only as long as they are consistent with the LMRA. In addition, and also consistent with existing federal court precedent, courts should either apply the LMRA precedents, or FAA precedents on so-called "partisan" decision-makers, to bar claims by any party who agreed to the dispute resolution procedures, including arbitration, that the party now seeks to challenge.

Even if the decades of precedents on labor arbitration issues—which include many U.S. Supreme Court decisions—are not accorded the weight they deserve, reasonable and judicious judges and agency decisionmakers should pause and consider carefully before making decisions that sweepingly supplant the more than sixty years of legal rules for labor arbitration, on an array of issues, with pronouncements that the FAA now applies to such cases. The consequences of any such broad rulings are at best unpredictable and would very likely be regrettable. The same is true of the Board's 2019 decision in *Anheuser-Busch*, which much of this article has been devoted to arguing is invalid. That decision has great potential to transform the law on labor arbitration, but the Board majority did not even discuss labor arbitration precedents in its decision, instead basing its holdings–as has become increasingly common in Republican[441] conservative circles—on an interpretation of the First Amendment that broadly restricts the government's authority to limit or regulate conduct of business enterprises.[442]

440. 9 U.S.C. § 4.

441. The two members of the Board who constituted the majority in *Anheuser-Busch*, Chair John Ring and Member William Emanuel, were appointed by Republican President Donald Trump. *See The Board,* NATIONAL LABOR RELATIONS BOARD, nlrb.gov/about-nlrb/who-we-are/the-board (last visited Feb. 14, 2020).

442. *See generally First Amendment*, THE FEDERALIST SOCIETY, https://fedsoc.org/topics/first-amendment (last visited Feb. 14, 2020) (discussing a variety of regulations, at all levels of government, the conservative Federalist Society has maintained should be invalidated under the First Amendment).

The Board in that decision invited courts to decide many new and open questions on when employers with agreements with unions can, without obtaining the union's consent, nonetheless require unionized employees to arbitrate their contractual and statutory claims.[443] The Board extended this invitation without providing any guidance on such issues as what the union's role—if any—would be in any resulting arbitrations, whether the employee's statutory claims and remedies should be augmented or in any way affected by the terms of the employee's union contract, and more.[444] The courts should decline the Board's invitation to take up and decide all these novel and challenging labor arbitration issues. And the Board also should in the future leave the law of labor arbitration alone unless it has something clear and constructive to contribute to it.

443. *Anheuser-Busch, LLC*, 367 N.L.R.B. at *6.
444. *Id*.