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Charles J. Coleman

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TOWARD A NEW PARADIGM OF LABOR ARBITRATION IN THE FEDERAL COURTS

Charles J. Coleman*
Gerald C. Coleman*

This article examines the changing relationship between labor arbitration and the federal courts. It emphasizes the divergent views of labor arbitration that have been expressed by the federal judiciary, the impact of the emerging case law on labor arbitration, and potential solutions to existing problems. We begin with a structural model of the federal law that surrounds labor arbitration. After examining the cases that have shaped both the law and the relationship between labor

* B.S., St. Joseph's University; M.S., Cornell University; M.B.A., State University of New York at Buffalo; Ph.D., State University of New York at Buffalo. Mr. Coleman is currently a professor of management at the Rutgers University, School of Business located in Camden, New Jersey.

* B.S., Villanova University; J.D., Georgetown University School of Law; M.A., Boston University; LL.M., Georgetown University; M.S., University of Southern California. The author is an Adjunct Professor of Business Law at the Rutgers University School of Business.
arbitration and the courts, we then discuss contemporary issues and
problems. Finally, we close with recommendations about the future.
Because we focus on the relationship between labor arbitration and the
federal courts, the analysis and recommendations center on fundamen-
tal problems and future directions rather than individual cases.1

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I. INTRODUCTION

Labor arbitration is one of the most enduring and successful social institutions of our time. There are approximately 165,000 collective bargaining agreements in force today, more than ninety-five percent of which provide for the arbitration of grievances. In the federal government, the majority of collective bargaining agreements are required to contain provisions allowing for the arbitration of employee grievances, yet the widespread acceptance of grievance arbitration is relatively recent. Employers traditionally resisted grievance arbitration because they did not want a third party fixing the terms and conditions of employment. Congress was ambivalent — supporting arbitration, for example, in the Railway Labor Act, but hardly mentioning it in the National Labor Relations Act and its amendments. Meanwhile, courts demonstrated hostility towards all non-judicial forums for the resolution of labor disputes. In the years that followed World War II, for example, state and federal courts often refused to enforce agreements to arbitrate unless the party seeking arbitration could produce evidence to establish the claim.

As stated in the New York Appellate Division’s decision in Cutler-Hammer, “If the meaning of the provision of the contract sought to be arbitrated is beyond dispute there cannot be

3. Id. at 1-2. See also J. Joseph Loewenberg, Structure of Grievance Procedures, 35 LAB. L.J. 44 (1985) (stating that approximately 89% of collective bargaining agreements contain provisions for arbitration of grievances); BASIC PATTERNS IN UNION CONTRACTS 37 (BNA) (13th ed. 1992).
6. Early Years, supra note 5, at 380.
7. Early Years, supra note 5, at 386.
8. Maturing Years, supra note 5, at 582.
10. Id.
anything to arbitrate and the contract cannot be said to provide for arbitration."\(^{12}\)

The United States Supreme Court began to chart a new course in the late 1950s. The Court was undoubtedly influenced by the fact that the arbitration of employee grievances had become a well established, generally accepted labor relations practice.\(^{13}\) It was probably influenced by the increasing involvement of the state courts in the interpretation of labor agreements evidenced by decisions such as Cutler-Hammer.\(^{14}\) In four cases decided between 1957 and 1960—Textile Workers Union v. Lincoln Mills,\(^{15}\) United Steelworkers v. American Manufacturing Co.,\(^{16}\) United Steelworkers v. Warrior and Gulf Navigation Co.,\(^{17}\) and United Steelworkers v. Enterprise Wheel & Car Corp.\(^{18}\)—the Supreme Court cast aside its reservations about arbitration and gave it unqualified support.\(^{19}\) This article examines those cases and their progeny. The accompanying “Genealogy of U.S. Federal Court Cases on Labor Arbitration” provides the outline for much of this study. This figure identifies those four cases that established the foundation for contemporary labor arbitration and four sets of cases that have defined, developed, and changed that foundation. We treat the cases within each set in chronological order.

This article focuses on federal court decisions because that is where the legal underpinnings of American labor arbitration have been established. The only exception lies in our treatment of the National Labor Relations Board’s (“NLRB” or “Board”) deferral policies, where Board decisions have formed the basic policies.\(^{20}\) Although state decisions and local regulations have had a profound influence on labor relations in state and local government,\(^{21}\) we have not discussed them because they do not constitute a uniform body of law and should be

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13. Maturing Years, supra note 5, at 571-78.
19. Maturing Years, supra note 5, at 590-91.
21. Such is the case with various state “right to work laws” which effectively trump so-called “union shop” agreements. For a summary discussion of state “right to work laws” see Archibald Cox et al., Labor Law Cases and Materials 1117-21 (11th ed. 1993).
considered only within their separate areas of authority.

II. THE FOUNDATION CASES AND THE MINIMALIST PARADIGM

Between 1957 and 1960, four Supreme Court cases established the legal foundation for labor arbitration in the United States. All four cases concerned Section 301 of the Labor Management Relations Act ("LMRA"), which provides that suits for contract violations between employers and labor organizations may be brought in federal district courts. In all four cases, the Court either ordered arbitration or enforced an award over the opposition of the employer or the lower courts. These decisions determined the enforceability of arbitration provisions in collective bargaining agreements and the roles of the courts and the arbitrator. The last three of these cases have become known as the Steelworkers Trilogy.  

A. Lincoln Mills: Arbitration as Quid Pro Quo for Promise Not to Strike

The issue in Lincoln Mills concerned the company's refusal to arbitrate several grievances concerning work load and work assignments. The union responded by filing suit in federal district court to compel arbitration. The district court ordered the employer to comply with the arbitration provision in the collective bargaining agreement, but

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22. See supra text accompanying notes 15-18.
24. 29 U.S.C. § 160(f) (1988); See Feller, supra note 9, at 4. The Union made a strategic decision to proceed under Section 301 of the NLRA rather than under the Federal Arbitration Act [hereinafter FAA]; Feller, supra note 9, at 3.
25. Feller, supra note 9, at 4-5.
26. The Steelworkers Trilogy consists of three Supreme Court decisions which are jointly cited for the proposition that a labor arbitration award may not be judicially vacated or reviewed if the award has its basis within the terms of the collective bargaining agreement under which the dispute was submitted. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 564 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
28. Id. at 449.
the court of appeals reversed in a divided vote. After reviewing legislative history, and noting the desire of Congress to promote "collective bargaining that ended with agreements not to strike," the U.S. Supreme Court concluded that "the agreement to arbitrate grievances is the quid pro quo for an agreement not to strike." Section 301 of the LMRA does more than confer jurisdiction. It expresses a policy that federal courts should enforce agreements to arbitrate because "it will thereby promote industrial peace." In contrast to other forms of arbitration, labor arbitration is not simply an alternative to litigation. It is an alternative to direct action by employees. This decision placed the enforcement power of the federal court system fully behind the arbitration process.

B. The Steelworkers Trilogy, Part I: Limiting the Role of the Courts

In the first two cases in the Steelworkers Trilogy, American Manufacturing and Warrior & Gulf, the Supreme Court defined the role of the arbitrator broadly while restricting the role of the courts. In American Manufacturing, the contract with the union contained an agreement calling for the arbitration of all grievances. When the company refused to restore the job of a partially disabled employee and refused to arbitrate the issue as well, the union filed suit. The lower courts dismissed the union petition, holding that the grievance was

30. Id. at 89 (Brown, J. dissenting). Judge Brown accepted the majority's approach on the jurisdictional issue that "under neither Alabama nor Federal law is there a right to enforce arbitration." Id. at 90.
31. Lincoln Mills, 353 U.S. at 452. The House considered making the failure to abide by a labor-management agreement an unfair labor practice, but the Conference Report stated that once the parties had made a collective bargaining contract, its enforcement "should be left to the usual processes of the law." Id. (citing H.R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947)). The court quoted the Senate report which stated that "the aggrieved party should have the right of action in the Federal Courts." Id. at 453.
32. Id. at 453.
33. Id. at 455.
34. Id.
35. Id.
37. Id. at 565 n.1.
38. Id. at 566. The employee had settled a workmen's compensation claim against the company on the basis of a permanent partial disability. Id. He maintained, however, that he was fit for work, and the company disputed his claim. Id. at 564.
39. Id. at 566.
However, the Supreme Court decided that both lower courts had erred when they attempted to weigh the merits of the employee’s claim. The arbitration clause in the contract called for submission of all grievances to arbitration, not just those a court considered worthy. The Court concluded:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator... When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting... bargaining agreements, it usurps a function which... is entrusted to the arbitration tribunal.

The second Trilogy case, Warrior & Gulf, centered on management rights. The collective bargaining agreement signed by the Company provided that, unless expressly excluded, all issues on which the parties disagreed must fall within the scope of the grievance and arbitration procedure. The employees sought to arbitrate a grievance over contracting out. When the employer resisted, the union filed suit. Although the lower courts concluded that the contract did not permit arbitration of the employer’s business judgment, the Supreme Court ordered the company to arbitrate. The Court stated that an order to arbitrate a grievance can be denied only if “it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute.” Because the topic of contracting out was not specifically excluded, the company was obliged to arbitrate the grievance.

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40. United Steelworkers v. American Mfg. Co., 264 F.2d 624, 628 (6th Cir. 1959), rev’d, 363 U.S. 564 (1960). The court found the claim “frivolous, a patently baseless one, not subject to arbitration...” Id.
42. Id. at 568.
43. Id. at 567-69.
45. Id. at 576.
46. Id. at 575-76.
47. Id. at 575. The bargaining unit had been reduced from 42 to 23 employees due, in part, to contracting out maintenance work. Id.
48. Id. at 577.
49. Id. at 585.
50. Id. at 582-83.
C. The Trilogy, Part II: Expanding and Limiting the Role of the Arbitrator

The Warrior & Gulf Court depicted the arbitrator as part of a system of industrial self-government. The collective bargaining agreement “is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.” A bargaining agreement is an effort to erect a system of industrial self-government with the grievance machinery at its heart. It “calls into being a new common law—the common law of a particular industry or a particular plant.” This “source of law” is not confined to the express provisions of the contract. The practices of the industry and the shop also are part of the agreement, notwithstanding the fact that those practices were not explicitly expressed in the contract. The parties choose the arbitrator because they have confidence that his judgment “will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity and morale, and ‘whether tensions will be heightened or diminished.”

After describing the arbitrator’s role so broadly in Warrior & Gulf, the Court limited it in the third Trilogy case, Enterprise Wheel. The issue in Enterprise Wheel was whether an arbitrator’s decision could call for reinstatement of a discharged employee with back pay for a period beyond the expiration date of the contract. The United States District Court for the District of West Virginia directed the company to comply, however the United States Court of Appeals for the Fourth Circuit held that the arbitrator had no authority to award post-contract

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51. Id. at 584-85.
52. Id. at 580.
53. Id. at 578.
54. Id. at 581.
55. Id. at 579.
56. Id. at 581-82.
57. Id. at 582.
58. Id.
60. Id. at 595-96. A group of employees walked off the job in response to the discharge of one of the workers. The next day they were discharged. Id. at 595.
expiration pay. The Supreme Court reversed the appellate court holding that it had exceeded its function. The Court found the arbitrator's opinion ambiguous, however, because it also found that the decision appeared to be based on the contract, it ruled that the arbitrator's award should be enforced. The Court then moved to a consideration of the arbitrator's function, formulating what has become known as the "Essence Test."

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. Nevertheless, an arbitrator does not sit to dispense his own brand of industrial justice. He may, of course, look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts must refuse enforcement of the award.

D. Establishing the Minimalist Paradigm

*Lincoln Mills, American Manufacturing, Warrior & Gulf,* and *Enterprise Wheel* established a new foundation for labor arbitration in the United States. These cases have led to a system whereby collective bargaining agreements have become more than an alternative to litigation; they have become an alternative to a strike. While courts may determine whether there is a duty to arbitrate, they will provide for a broad presumption of arbitrability unless the contract clearly excludes the dispute from arbitration. Although arbitrators are not to administer their own brand of industrial justice, they are not limited to the words of the contract. As long as the award draws its essence from the bargaining agreement, arbitrators may consider past practice and other items that make up "the common law of the shop." Provided that the award is based on the contract, a court should enforce it without examining its merits.

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64. *Id.* at 597.
65. *Id.* at 598.
66. *Id.* at 597.
67. *Id.*
68. *Warrior & Gulf*, 363 U.S. at 582.
These cases lay out a model of arbitration that we call the *minimalist paradigm*.\(^6\) It places the courts in a “hands-off” position. The parties have exchanged a promise: the union has promised not to strike during the term of the contract,\(^7\) and management has promised in return, that it will arbitrate all grievances and abide by the arbitrator’s award. Under this model, the courts will enforce the agreement to arbitrate and uphold the award provided that: (1) the arbitrator does not exceed the powers that have been granted by the collective agreement; (2) the award draws its essence from the agreement; and (3) the award does not sanction or command an illegal act.\(^7\)

III. THE MINIMALIST PARADIGM AND THE AGREEMENT TO ARBITRATE

In 1962, the United States Supreme Court heard three cases on the enforcement of the duty to arbitrate — *Teamsters Local 174 v. Lucas Flour*,\(^7\) *Drake Bakeries, Inc. v. American Bakery & Confectionery Workers International Local 50*,\(^7\) and *Sinclair Refining Co. v. Atkinson*.\(^7\) Each case involved strikes during the term of the contract over grievances that the union refused to arbitrate. In *Lucas* and *Drake*, the Court enforced the duty to arbitrate,\(^7\) holding that a no-strike clause would be inferred if the contract contained an agreement to arbitrate grievances\(^6\) and that arbitration clauses “are meant to survive breaches of contract . . . even total breach[es].”\(^7\) However, before the year had ended, the Court reversed itself. In *Sinclair*, the Court refused to grant an employer’s plea for injunctive relief when confronted with a strike in violation of the contract.\(^7\) The Court concluded that the anti-injunction

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69. This is a term of art coined for this article.
70. *See* *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970) (holding that the courts may enjoin a strike during the contract term where the collective bargaining agreement contains a no strike clause and the parties have agreed to arbitrate disputes).
71. *See* *Maturing Years*, supra note 5, at 595-96.
72. 369 U.S. 95 (1962).
73. 370 U.S. 254 (1962).
76. *Lucas*, 369 U.S. at 105-06.
77. *Drake*, 370 U.S. at 262.
78. *Sinclair*, 370 U.S. at 214-15. In a second case involving the same parties, the Court also held that the officers of the union which struck in violation of a no-strike clause could not be held liable when the union was liable. *Id.* at 238. Nineteen years later the Supreme Court held that individual employees could not be sued for damages arising out of a wildcat strike. *Complete Auto*
provisions of the Norris-LaGuardia Act took precedence over the arbitration provision in the collective bargaining agreement.

The *Sinclair* decision stood for eight years until the foundation for contemporary law on the enforcement of the agreement to arbitrate was laid down in *Boys Markets, Inc. v. Retail Clerks Local 770*. In *Boys Markets*, the bargaining agreement contained a no-strike clause and a provision for binding arbitration. In spite of these provisions, the union struck rather than arbitrate a grievance over supervisors performing the work of bargaining unit personnel. Despite the *Sinclair* doctrine, the district court granted the employer’s request for injunctive relief and ordered arbitration. The United States Court of Appeals for the Ninth Circuit felt bound by *Sinclair* and reversed the district court’s decision. On further appeal, however, the Supreme Court reconsidered the issue and reversed *Sinclair*. Focusing on how the *Sinclair* decision “seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes,” the Court held that the anti-injunction provisions of the Norris-LaGuardia Act did not preclude a federal court from enjoining a strike in breach of a no-strike obligation where the contract provided for binding arbitration of the grievance that led to the strike.

This basic principle was reinforced six years later in *Buffalo Forge v. United Steelworkers*. In *Buffalo Forge*, the employer’s office and clerical-technical employees went on strike and picketed the plants. When the production and maintenance employees honored the picket lines, the employer filed suit, claiming that the work stoppage violated the no-strike clause contained within the labor-management agreement. The United States District Court for the Western District of New York held that the Norris-LaGuardia Act prohibited it from issuing an

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82. *Id.* at 238-39.
83. *Id.* at 239. The work the supervisors performed was stocking frozen food shelves. *Id.*
84. *Id.* at 238. The case was initially filed in California Superior Court. The state court issued a temporary restraining order, and the union removed the case to federal district court. *Id.* at 239-40.
85. *Id.* at 238.
86. *Id.* at 252.
87. *Id.* at 253.
89. *Id.* at 400.
90. *Id.* at 401-02.
91. *Id.* at 401.
injunction because the arbitration clause in the collective bargaining agreement did not extend to sympathy strikes.\footnote{Id. at 402-03.} Both the Court of Appeals and the Supreme Court affirmed the decision.\footnote{Id. at 403-04.} The difference between this case and \emph{Boys Markets} was the cause of the strike. The arbitration provision was enforced in \emph{Boys Markets} because the strike took place over an arbitrable grievance.\footnote{Id. at 402-03.} In comparison, the matter that prompted the Buffalo Forge strike was not arbitrable and, as a result, the Norris-LaGuardia anti-injunction provisions prevailed.

\section{The Successor Employer's Duty to Arbitrate}

Does the duty to arbitrate survive a change in ownership? This principle was decided in \emph{John Wiley & Sons, Inc. v. Livingston}.

In \emph{Wiley}, the union had a bargaining agreement with Interscience Publishers that did not contain an express provision that would make the contract binding on successor companies.\footnote{Id. at 544.} During the term of this contract, Interscience merged with Wiley & Sons and ceased doing business.\footnote{Id. at 544-45.} When Wiley & Sons refused to recognize the union or to accede to its claims on behalf of the Interscience employees, the union brought suit to compel arbitration under the agreement with Interscience.\footnote{Id. at 545-46.} This suit was denied in the lower courts,\footnote{Livingston v. John Wiley & Sons, Inc., 313 F.2d 52, 54 (2d Cir. 1963).} but the Supreme Court, extensively citing the \emph{Trilogy},\footnote{See supra note 26 and accompanying text.} ordered arbitration under the Interscience bargaining agreement.\footnote{Livingston v. John Wiley & Sons, Inc., 313 F.2d 52 (2d Cir. 1963), rev'd, 203 F. Supp. 171 (S.D.N.Y. 1962), aff'd, 376 U.S. 543 (1964).}

\footnote{Wiley, 376 U.S. at 548.}
A successor employer is not required to adopt the substantive terms of the predecessor's bargaining agreement, but it inherits the contractual duty to bargain and to arbitrate as long as there is "substantial continuity" between the old and the new companies.\textsuperscript{103} The Court found this continuity because the Interscience work-force remained virtually unchanged after the merger.\textsuperscript{104}

The Court refined this doctrine ten years later in \textit{Howard Johnson Co. v. Detroit Local Joint Executive Board}.\textsuperscript{105} The Grissom family operated a restaurant and motor lodge under franchise from Howard Johnson.\textsuperscript{106} Howard Johnson purchased the operation under an agreement which provided that the successors did not assume any of the seller's obligations, including the existing contract with the union.\textsuperscript{107} When the company refused to honor the predecessor's bargaining agreement, the union brought suit to compel arbitration. Despite the fact that Howard Johnson had hired forty-five new employees while retaining only nine of the former personnel,\textsuperscript{108} both the district and the appellate courts concluded that the company was required to arbitrate.\textsuperscript{109} However, the Supreme Court did not agree.\textsuperscript{110} The Court distinguished this case from \textit{Wiley} on the basis of the substantial changes in the work force.\textsuperscript{111}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 551.
\item \textsuperscript{104} \textit{Id.} at 551. The Interscience bargaining unit had contained 40 employees. All "except a few" continued in Wiley's employ. \textit{Id.} at 545. The \textit{Wiley} case also held that matters of substantive arbitrability are for the court to decide while matters of procedural arbitrability may be decided by the arbitrator. However, if a substantive challenge to arbitration is raised and the court determines that the matter is arbitrable, the arbitrator decides the merits. \textit{Id.} at 556-58.
\item \textsuperscript{105} 417 U.S. 249 (1974).
\item \textsuperscript{106} \textit{Id.} at 250-51.
\item \textsuperscript{107} \textit{Id.} at 251-52.
\item \textsuperscript{108} \textit{Id.} at 252.
\item \textsuperscript{110} See \textit{Howard Johnson Co. v. Detroit Local Joint Executive Bd.}, 417 U.S. 249 (1974).
\item \textsuperscript{111} \textit{Id.} at 258-59 (finding that Howard Johnson terminated all of the Grissom employees and included only nine of the former employees of the company in its new work-force); cf. NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272 (1972) (holding that where the bargaining unit remained unchanged and a majority of the employees hired by the new employer were represented by the predecessor's union, the employer was obligated to bargain with that union); see also Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27 (1987) (holding that the "substantial and representative complement" rule is to be used when determining the composition of the successor's work force).
\end{itemize}
\end{footnotesize}
B. The Duty to Arbitrate after Contract Expiration

Does the duty to arbitrate survive the expiration of the contract? In *Nolde Bros. v. Bakery & Confectionery Workers Local 358*, the employer entered into an agreement which provided severance pay for employees upon termination. When negotiations failed, the company notified the union that it was closing the plant. The company paid accrued wages but refused to grant the union’s demand for severance pay. The company also declined to arbitrate the claim for severance pay on the grounds that its obligation to do so terminated with the expiration of the bargaining agreement.

The union filed suit in the U.S. District Court for the Eastern District of Virginia to compel the company to arbitrate the severance pay issue. The court rejected the union’s petition, holding that the employees’ right to severance pay and its obligation to arbitrate grievances expired with the agreement. The United States Court of Appeals for the Fourth Circuit reversed, concluding that the duty to arbitrate claims arising under the bargaining agreement survived the expiration of the contract.

The Supreme Court affirmed this ruling and found that a presumption favoring arbitration must be negated expressly or by clear implication and that an arbitration clause may survive the termination of the contract.

The Supreme Court limited this determination fourteen years later in *Litton Financial Printing Division v. NLRB*. *Litton* involved an expired bargaining agreement, a company decision to lay off a number of workers, a refusal to arbitrate the layoffs, and an NLRB decision that this post-expiration abandonment of the contractual grievance procedure violated the National Labor Relations Act (“NLRA” or “Act”).

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113. *Id.* at 245.
114. *Id.* at 247.
115. *Id.*
116. *Id.*
118. *Id.* at 1357.
122. *Id.* at 194-95.
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Board ordered Litton Financial to bargain with the union over the layoffs, but it did not order the layoff disputes to be arbitrated because they did not arise under the expired contract.\textsuperscript{123} The United States Court of Appeals for the Ninth Circuit enforced the Board’s order to bargain, but it also determined that the layoff disputes originated under the agreement, and therefore, were arbitrable.\textsuperscript{124} The Supreme Court disagreed.\textsuperscript{125} Its decision limited the \textit{Nolde} holding on post-expiration disputes to cases where the grievance was based upon facts and events that occurred before the contract expired; the action infringed upon a right that accrued under the agreement; or where, under the normal principles of contract interpretation, the disputed contractual right survived expiration of the remainder of the agreement.\textsuperscript{126}

In 1994, the United States Court of Appeals for the Third Circuit attempted to reconcile \textit{Nolde} and \textit{Litton}, ruling that agreements can be “implied in fact” when an employer continues to operate the enterprise with the unionized employees after the expiration of the agreement despite the employer’s formal “termination” of the agreement.\textsuperscript{127} Disputes that arise under this implied-in-fact agreement are arbitrable. This decision provides a remarkably strong statement in support of arbitration.\textsuperscript{128}

C. General Arbitrability Revisited: \textit{A.T. & T. Technologies}

In 1986, the Supreme Court revisited the general topic of arbitrability in \textit{A.T. & T. Technologies v. Communications Workers of America}.\textsuperscript{129} While affirming its earlier stand on the enforcement of the agreement to arbitrate, the \textit{A.T. & T. Technologies} Court introduced another dimension. The A.T. & T. labor contract contained an arbitration clause, a management functions clause,\textsuperscript{130} and a clause prescribing the

\begin{footnotesize}
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\item \textsuperscript{124} NLRB v. Litton Financial Printing Div., 893 F.2d 1128, 1138-39 (9th Cir. 1990).
\item \textsuperscript{125} Litton, 501 U.S. at 206.
\item \textsuperscript{126} Litton, 501 U.S. at 206; see also Reginald H. Alleyn, \textit{Actions to Stay and Compel Arbitration}, in \textit{LABOR AND EMPLOYMENT ARBITRATION} § 50.04[5] (Tim Bornstein & Ann Gosline eds., 1995). When “grievance-prompting events take place after the expiration of the collective bargaining agreement, the grievance is generally not arbitrable.” \textit{Id.} § 50.04.
\item \textsuperscript{127} Luden’s Inc. v. Local 6, Bakery Workers, 28 F.3d 347, 355 (3d Cir. 1994).
\item \textsuperscript{128} \textit{Id.; see also} Roger I. Abrams, \textit{NATIONAL ACADEMY OF ARBITRATORS L. & LEG. COM. 1994-1995 REP.}, at 1, 7.
\item \textsuperscript{129} 475 U.S. 643 (1986).
\item \textsuperscript{130} \textit{See generally} NLRB v. American Nat’l Ins. Co., 343 U.S. 395 (1952) (discussing and defining management functions clauses in the context of collective bargaining).
\end{itemize}
\end{footnotesize}
order in which employees were to be laid off. However, when the company decided to lay off a number of employees, it refused to submit their grievance to arbitration because the management functions clause made the layoffs non-arbitrable. On appeal by the union, both the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit ordered the layoff issue arbitrated. However, on further appeal the Supreme Court remanded the case to the lower courts for additional proceedings.

Even though it reiterated the arbitrability tests it had enunciated in Warrior & Gulf, the Court called attention to the evidence that might defeat the presumption of arbitrability. In particular, Justice Brennan's concurring opinion focused on the parties' previous bargaining history as a possible source of evidence needed to overcome an agreement to arbitrate. It has been argued that this case "portends more active litigation in an attempt to defeat the presumption of arbitrability." This decision also reiterated an important idea that was first put forth in Wiley. Both Wiley and A.T. & T. Technologies distinguished between substantive and procedural arbitrability. Matters pertaining to the first topic, such as whether the arbitration clause

132. Id. at 646. Seventy-nine installers at the Chicago location were laid off. Id.
136. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). The Warrior and Gulf tests are: (1) does the contract provide for the arbitration of grievances and if so, (2) does it arguably extend to the topic under consideration? Id. at 582-83.
138. Id. at 652; see also Harvey A. Nathan & Sara M. Green, Challenges to Arbitrability, in LABOR AND EMPLOYMENT ARBITRATION § 13-3 (Tim Borstein and Ann Gosline eds., 1995).
139. Nathan & Green, supra note 138, §§ 13-3 to -4. See also Alleyne, supra note 126, at § 50-6. The A.T. & T. Technologies decision does not seem to have changed the general presumption in favor of arbitrability. See Local 106, Serv. Employees Int'l Union v. Evergreen Cemetery, 708 F. Supp. 917 (N.D. Ill. 1989). The court addressed the issue of arbitrability. The disputes concerned job assignments and filling positions. The employer contended that the arbitration provision did not cover these disputes. Since the bargaining agreement defined a grievance as "a claim or dispute concerning rates of pay, hours, or working conditions, or the interpretation or an application of the terms of the agreement," the court found for the union. See Bechtel Construction, Inc. v. Laborers Int'l Union, 812 F.2d 750 (1st Cir. 1987); Borden Inc. v. American Arbitration Ass'n, 677 F. Supp. 248 (D. Del. 1988).
141. Id. at 545; A.T. & T. Technologies, 475 U.S. at 651.

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covered the dispute, were to be determined by the courts. However, procedural matters, such as whether there was compliance with the grievance procedure, were to remain in the hands of the arbitrator.

IV. THE INTRODUCTION OF THE EXPANSIONIST PARADIGM: ENFORCEMENT OF THE ARBITRATION AWARD

In United Steel Workers v. Warrior & Gulf Navigation Co., the Supreme Court created an "almost unrebuttable presumption of arbitrability." If the contract provided for arbitration and the topic was not specifically excluded, the grievance was arbitrable. Only the most forceful evidence to exclude a claim from arbitration could prevail. This idea reflects what we have called the "minimalist paradigm." By 1970, the federal courts had determined that this

143. Orion Pictures Corp. v. Writers Guild of Am., Inc., 946 F.2d 722 (9th Cir. 1991). This case adds another dimension to the determination of arbitrability. The Writers Guild of America, which represented script writers, had negotiated a collective bargaining agreement which contained a clause that permitted the Guild to institute an arbitration proceeding against a non-signtary. Id. at 723. Orion pictures was a non-signtary and refused to pay the Guild members the contractually defined royalties. Id. The Guild moved for arbitration and a hearing was held in which both participants appeared before the arbitrator. Id. At that hearing, Orion filed a motion with the arbitrator to dismiss or to stay the case until the company could get a judicial determination. Id. at 724. The arbitrator ruled that he had the authority to decide whether the company was bound to arbitrate the case, but instead chose to suspend the proceedings to allow Orion to secure a judicial determination on arbitrability. Id. at 724. The district court vacated the arbitrator's ruling, but the appellate court found that once the question of arbitrability is submitted to arbitration, the federal court must await the arbitrator's ruling on arbitrability and enforce it if it represents a plausible interpretation of the collective bargaining agreement. Id. at 725.
144. 363 U.S. 574 (1960).
145. Nathan & Green, supra note 138, § 13-3; Warrior & Gulf, 363 U.S. at 584-85.
146. Warrior & Gulf, 363 U.S. 584-85.
147. Id. at 585.
148. Id. In 1992 the United States Court of Appeals for the Third Circuit determined that management cannot refuse to arbitrate a discharge even though the employees waived their grievance and arbitration rights under a last chance agreement. Steelworkers v. Lukens Steel Co., 969 F.2d 1468, 1478 (3d Cir. 1992). That same year, the United States Court of Appeals for the Fifth Circuit held that the duty to arbitrate extended to matters where the parties had reached an impasse. Steelworkers v. Asarco, Inc., 970 F.2d 1448 (5th Cir. 1992). In Asarco, the parties had failed to agree upon a drug testing policy. Id. at 1449. When the employer unilaterally instituted one, the employees grieved and the court held that the grievances were arbitrable under contract language which requires that the employer make "reasonable" accommodations for employee health and safety. Id. at 1450-52.
149. See supra note 69 and accompanying text.
obligation to arbitrate can supersede the anti-injunction provisions of the Norris-LaGuardia Act, and it has been extended to successor employers, to periods of times beyond that specified in the collective agreement and, on occasion, beyond the boundaries of the bargaining unit.

In this section we move away from the obligation to arbitrate and address the issue of enforcing the arbitration award. The cases illustrate the tendency of the federal courts to forsake their allegiance to the minimalist paradigm and turn to what we call the "expansionist paradigm." This model implies a broader standard of review and a greater willingness to set aside arbitration awards that courts found to be displeasing. The cases will further show that while the Supreme Court adopted a limited expansionist model, the lower courts have embraced a much broader model.

A federal court will set aside an arbitration award for usually one of two reasons. The first is arbitrator error — the court concludes that the arbitrator's fact-finding was incorrect, the arbitrator exceeded the authority specified in the collective bargaining agreement or, most frequently, the award failed to draw its essence from the contract, as required in Enterprise Wheel. The eight cases discussed in this section have been chosen to illustrate this facet of the enforcement controversy. The two cases from the 1960s depict its historical roots; the four cases decided between 1986 and 1992 portray its lingering nature; and the remaining two cases demonstrate its

152. Orion Pictures Corp. v. Writers Guild of Am., Inc., 946 F.2d 722 (9th Cir. 1991).
153. The term "expansionist paradigm" was created for this article.
156. These cases certainly do not exhaust the topic. Over 1,000 decisions were issued by federal district courts involving appeals from labor arbitration awards between 1961 and 1988, and over 400 were issued by the circuit courts of appeal. Feuille & LeRoy, supra note 154, at 39. Arbitrator error is listed as the most frequently cited basis of these appeals, particularly faulty fact-finding, exceeding arbitral authority, and failing the "essence test." Feuille & LeRoy, supra note 154, at 43.
158. American Postal Workers Union v. United States Postal Serv., 784 F.2d 1 (D.C. Cir. 1986); Hill v. Norfolk & Western Ry., 814 F.2d 1192 (7th Cir. 1987); Delta Queen Steamboat Co. v. District 2 Marine Eng'r Beneficial Ass'n, 889 F.2d 599 (5th Cir. 1989); Polk Bros. v. Chicago Truck Drivers, 973 F.2d 593 (7th Cir. 1992).
application in the federal sector. A second common reason for setting aside an arbitration award comes about in cases that involve an intermingling of contractual issues and public policy. Section V of this article will show that until 1974, the Supreme Court by and large remained faithful to the minimalist position that it had enunciated in the Trilogy. However, after 1974, the Supreme Court adopted a less deferential standard, and the circuit courts further expanded the judicial review of labor arbitration awards.

A. Origins of the Enforcement Controversy

The enforcement controversy may be dated to Textile Workers Union of America v. American Thread. This decision was rendered by the same Circuit that the Supreme Court had reversed one year earlier in Enterprise Wheel. In American Thread, the arbitration dealt with an employee who had been discharged for allowing a cotton lap to run through a carding machine. Despite the fact that this was his third offense and the arbitrator found him guilty, the arbitrator reduced the discharge to a one week suspension without pay. When the company refused to abide by the arbitrator’s decision, the union commenced suit in the District Court for the Western District of South Carolina to compel compliance.

Five years later, the Torrington decision stimulated the first round of challenge to the arbitration process. The district court refused to enforce the arbitrator’s decision. On appeal, the Fourth Circuit concluded that the arbitration decision did violence to the “clear, plain, exact and unambiguous terms of the submission and the contract,” far exceeding the boundaries laid down by Enterprise Wheel.

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160. See infra Section V for a detailed discussion of setting aside arbitration awards in cases that involve an intermingling of contractual issues and public policy.
163. Id.
164. Id.
165. Id.
166. Id.
167. Id. at 899. The dissenting judge charged that the majority had simply substituted its judgment for that of the arbitrator and the decision violated the ruling of the Supreme Court in Enterprise Wheel. Id. at 905 (Sobeloff, J., dissenting). See also William P. Murphy, Judicial Review of Rewards, in LABOR AND EMPLOYMENT ARBITRATION 51-1, 51-8 to 51-11 (Tim Bornstein & Ann Gosline eds., 1995) (discussing Enterprise Wheel and Torrington).
168. American Thread, 291 F.2d at 905 (Sobeloff, J., dissenting).
The dispute involved the discontinuation of a twenty year past practice in which workers had been given one hour off duty in order to vote. The arbitrator found the past practice binding on the company and held that it could be changed only by mutual agreement. The U.S. District Court for the District of Connecticut set aside the arbitrator’s decision. The United States Court of Appeals for the Second Circuit affirmed, based upon the belief that the arbitrator had exceeded his authority. While many commentators disagreed with the arbitrator’s decision, they also stated that the court decision deeply undercut the law; that the exhaustiveness of the court review was far in excess of that envisioned by Enterprise Wheel; and that, despite its rhetoric, the Torrington court simply disagreed with the arbitrator’s conclusion and substituted its judgment for his.

B. Later Cases: Awards Upheld

American Postal Workers Union v. United States Postal Service, which was decided two decades after Torrington, involved an employee who had been removed from his position under the charge of wrongful conversion of funds. Although the employee had implicated himself through statements given to the Postal Inspection Service, he was acquitted in a criminal trial because the investigator failed to give the required Miranda warnings prior to the interrogation. The dis-

169. Torrington Co. v. Metal Products Workers Local 1645, 362 F.2d 677 (2d Cir. 1966). For a discussion of the “essence test” see supra notes 66-67 and accompanying text.
170. Torrington, 362 F.2d at 678.
171. Id. at 679.
172. Id.
173. Id. at 680.
176. Murphy, supra note 167, at 51-9. See also Thomas G. S. Christensen, Judicial Review: As Arbitrators See It, in NATIONAL ACADEMY OF ARBITRATORS 99, 107 (Barbara D. Dennis et al. eds., 1972).
177. 789 F.2d 1 (D.C. Cir. 1986).
178. Id. at 2.
179. Miranda v. Arizona, 384 U.S. 436 (1966) (explaining that the privilege against self-incrimination guarantees an individual the right to remain silent unless he chooses to speak in the unfettered exercise of his own will during a period of custodial interrogation or other official investigations).
180. American Postal Workers, 789 F.2d at 3.
missal issue went to arbitration. The arbitrator ruled that the Post Office did not have just cause for dismissal but that some discipline was necessary because the employee failed to follow postal regulations. After the arbitrator reduced the discharge to a disciplinary suspension, the union brought an action in the U.S. District Court for the District of Columbia to enforce the award. The district court denied the union’s motion, but on appeal the Court of Appeals for the D.C. Circuit upheld the arbitrator’s decision because it drew its essence from the collective agreement. The court found that an alleged mistake of law (misapplication of the Miranda warnings) does not alter the standard of review; that the Postal Service’s alternative reading of the contract was without merit; and that there was no violation of public policy in reinstating this postal worker.

A similar decision was handed down the following year in Hill v. Norfolk and Western Railway Co. Mr. Hill was a railroad brakeman who had been fired for possession of marijuana. He took the matter to arbitration alleging a violation of the collective bargaining agreement. When his claim was rejected, Mr. Hill brought suit in the U.S. District Court for the Northern District of Louisiana. The court ruled against him, and the United States Court of Appeals for the Seventh Circuit affirmed the ruling. The court held that when a federal court is asked to set aside an arbitration award, the question is not whether the arbitrator erred in interpreting the contract, but whether the arbitrator interpreted the contract. If the arbitrator interpreted the contract, the interpretation is conclusive. By agreeing to an arbitration clause, the Seventh Circuit reasoned that the parties agreed to be

181. Id.
182. Id. at 4.
184. Id. at 2474.
185. American Postal Workers, 789 F.2d at 5.
186. Id. at 6.
187. Id. at 7.
188. Id. at 8.
189. 814 F.2d 1192 (7th Cir. 1987).
190. Id. at 1194.
191. Id.
192. Id.
193. Id. at 1194-95.
194. Id. at 1195.
195. Id.
bound by the arbitrator’s interpretation. 196

C. Later Cases: Awards Set Aside

The discharge of a river boat captain was the focus of the *Delta Queen* case. 197 The captain of the *Mississippi Queen* was discharged after a near collision between his vessel and a tow of river barges. 198 The union filed a grievance, and the matter proceeded to arbitration. 199 The union contract specifically listed carelessness as a basis for discharge, and the arbitrator found the captain to be “grossly careless.” 200 However, because the arbitrator also concluded that the Captain was the victim of disparate company discipline, he ordered him reinstated, but as a pilot. 201 The company appealed the decision to the district court, challenging the contractual authority of the arbitrator to order reinstatement after finding gross carelessness. 202 The court vacated the arbitrator’s order. 203 On appeal, the Fifth Circuit, after citing the essence standard from *Enterprise Wheel*, 204 concluded that once the captain was found to be grossly careless, the arbitrator had no authority to order reinstatement. 205 The court reasoned that when arbitrators exceed the limitations of their contractual mandate, judicial deference to their decisions ends. 206

The issue in the *Polk Brothers v. Chicago Truck Drivers* 207 case arose from the layoff of 163 employees following a fire which destroyed a large portion of a warehouse. 208 The union filed a grievance, claiming that the decision violated the terms of three union-management contracts. 209 These contracts had expired on March 31, 1988, and the

196. *Id.* The court also sanctioned Mr. Hill’s counsel for filing an appeal on frivolous grounds. *Id.* at 1200.
197. Delta Queen Steamboat Co. v. District 2 Marine Eng’r Beneficial Ass’n, 889 F.2d 599 (5th Cir. 1989).
198. *Id.* at 600.
199. *Id.* at 601.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
205. *Delta Queen*, 889 F.2d at 604.
206. *Id.*
207. 973 F.2d 593 (7th Cir. 1992).
208. *Id.* at 594. The fire caused the company to subcontract its warehousing and delivery services. *Id.* at 595.
209. *Id.*
The following month, an arbitrator issued an award which reinstated the employees with back pay. The Company challenged the back pay remedy for the time beyond the expiration of the contracts. The district court found that the "arbitrator exceeded his authority" in awarding post-contract expiration pay, and the Seventh Circuit affirmed this ruling. Citing the essence test, the court stated that if the arbitrator's words manifest infidelity to the collective bargaining agreement, the courts must decline to enforce the award.

D. Enforcement of Arbitration Awards in the Federal Sector

The federal courts have jurisdiction over labor matters that arise in the federal government, including arbitration decisions. The bargaining law that applies to federal employees is Title VII of the Civil Service Reform Act of 1978. This statute, which requires that grievance procedures provide for binding arbitration, also provides for the review of such decisions by the Federal Labor Relations Authority ("FLRA"). As the Devine v. Pastore and Cornelius v. Nutt cases below will show, the federal courts exercise sweeping powers of review in cases involving federal employees.

The Devine case focused on a customs inspector who had been removed from his position for theft after he was seen taking a shirt from a cargo area and placing it in his car. The union filed for arbitration, and the arbitrator found that the grievant had indeed placed the shirt

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210. Id.
211. Id. at 596.
212. Id.
213. Id. at 598-99.
214. Id. at 597.
217. 5 U.S.C. § 7122(a) (1988). Section 7122(a) provides that either party to arbitration may file an exception to any arbitrator's award with the FLRA. If the FLRA finds that the award is deficient because (1) it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by federal courts in the private sector, then the award may be set aside or modified. Id. Between 1979 and 1988, 45% of the 1,516 exceptions to the awards of labor arbitrators filed with the FLRA were modified. See James M. Harkless, FLRA Review of Arbitration Awards, 42 NATIONAL ACADEMY OF ARBITRATORS 204 (1990). For further discussion, see Charles J. Coleman, Federal Sector Labor Relations: A Reevaluation of Policies, 16 J. COLLECT. NEGOTIATIONS PUB. SECTOR 37 (1987).
220. Devine, 732 F.2d at 214.
within his car.\textsuperscript{221} However, the arbitrator also found that removing the Inspector was inconsistent with the policies of progressive discipline contained in the bargaining agreement, and therefore reduced the discipline to a thirty-one day suspension.\textsuperscript{222} Not surprisingly, the Office of Personnel Management sought judicial review before the Court of Appeals for the District of Columbia Circuit.\textsuperscript{223} The appellate court concluded that the arbitrator erred by substituting his idea of an 'appropriate penalty for that of the agency.'\textsuperscript{224} The court also found that he may have committed further error by considering only those factors set forth in the agreement, while excluding other disciplinary factors proscribed by federal personnel law.\textsuperscript{225} The case was remanded to the arbitrator.\textsuperscript{226}

In \textit{Cornelius v. Nutt},\textsuperscript{227} two bargaining unit employees of the General Services Administration ("GSA") were discharged from their jobs for falsifying records.\textsuperscript{228} The employees challenged their removal under their contract's grievance procedure.\textsuperscript{229} The arbitrator concluded that the wrongdoing would normally justify removal but also found that the GSA had committed a number of procedural errors (including failing to provide union representation during interrogation).\textsuperscript{230} After balancing the mistakes of both sides, the arbitrator decided that management had failed to establish just cause for the discharges and reduced the penalties to two week suspensions without pay.\textsuperscript{231}

The court of appeals affirmed the award,\textsuperscript{232} but the Supreme Court reversed.\textsuperscript{233} The Court held that a represented federal employee could challenge disciplinary action either by appealing to the Merit Systems Protection Board ("MSPB") or through the contractual grievance

\begin{thebibliography}{9}
\bibitem{}\textsuperscript{221} \textit{Id}.
\bibitem{}\textsuperscript{222} \textit{Id. at} 214-15.
\bibitem{}\textsuperscript{223} \textit{Id. at} 215. The Court of Appeals for the Federal Circuit now has exclusive jurisdiction over these appeals. See 5 U.S.C. §7703(b)(1)(d) (1988).
\bibitem{}\textsuperscript{224} \textit{Devine}, 732 F.2d at 217.
\bibitem{}\textsuperscript{225} \textit{Id. at} 218.
\bibitem{}\textsuperscript{226} \textit{Id}.
\bibitem{}\textsuperscript{227} \textit{472 U.S. 648 (1985)}.
\bibitem{}\textsuperscript{228} \textit{Id. at} 654.
\bibitem{}\textsuperscript{229} \textit{Id.} The collective bargaining agreement between GSA and the employees union provided for binding arbitration. \textit{Id}.
\bibitem{}\textsuperscript{230} \textit{Id. at} 655. It is important to note that the arbitrator did not find that the procedural errors prejudiced the case. \textit{Id}.
\bibitem{}\textsuperscript{231} \textit{Id}.
\bibitem{}\textsuperscript{233} \textit{Cornelius}, \textit{472 U.S. at} 665. The Court based its decision on the necessity for consistency between the arbitration award and the MSPB on questions of law. \textit{Id. at} 660-61.
\end{thebibliography}
procedure.\textsuperscript{234} However, the Court also held that arbitrators must use the same interpretation as the MSPB in reviewing an agency's disciplinary action.\textsuperscript{235} In other words, grievants must show that the procedural errors in question caused substantial prejudice to their rights and affected the agency's decision.\textsuperscript{236}

E. Enforcement of the Award and the Expansionist Paradigm

These eight cases—American Thread, Torrington, Postal Workers, Hill, Delta Queen, Polk Brothers, Devine, and Cornelius—provide only a small sample of those brought to the courts in an attempt to set aside an arbitration award on the basis of arbitrator error. However, they show that despite the Supreme Court's admonition to ascertain only "whether the party seeking arbitration is making a claim which on its face is governed by the contract,"\textsuperscript{237} some of the lower courts may be willing, perhaps even eager to take on the job of contract interpretation. A court that holds that an arbitrator cannot reinstate a grievant found to be grossly careless, as was the case in Delta Queen, has interpreted the bargaining agreement.\textsuperscript{238} A court that finds that an arbitrator exceeded his or her authority in awarding benefits that accrued after the termination of the contract, as was the case in Polk Brothers,\textsuperscript{239} has also interpreted the contract.\textsuperscript{240} These cases imply, more generally, that the lower courts have some reluctance about accepting the limited, minimalist role envisioned for the courts in the Trilogy.

V. DEVELOPING THE EXPANSIONIST PARADIGM: PUBLIC POLICY CASES

An arbitration award is supposed to be the last word on a subject. Enterprise Wheel reinforced this idea when it held that the "plenary

\textsuperscript{234} Id. at 652. Under the Civil Service Reform Act of 1978, the grievant has a choice of remedies. See supra note 216 and accompanying text.
\textsuperscript{235} Cornelius, 472 U.S. at 661.
\textsuperscript{236} See id. at 657-65.
\textsuperscript{238} Delta Queen Steamboat Co. v. District 2 Marine Eng'r Beneficial Ass'n, 889 F.2d 599 (5th Cir. 1989). In addition, this case limited the arbitrator's ability to consider such "law of the shop" factors as past practice. See id.
\textsuperscript{239} Polk Bros. v. Chicago Truck Drivers, 973 F.2d 593 (7th Cir. 1992).
\textsuperscript{240} Id. at 597-98. It has also reached a different result on the same issue that the Supreme Court decided in United Steelworkers of America v. Enterprise Wheel & Car Corp. 363 U.S. 593 (1960).
review by a court of the merits" of an arbitration award would destroy the award's finality.\textsuperscript{241} However, arbitrators often deal with cases that involve some combination of contractual rights and public policy.\textsuperscript{242} Under the minimalist paradigm, an arbitration award should be immune from judicial review on public policy grounds as long as it does not call for the violation of a clear statutory principle or a widely acknowledged principle of common law.\textsuperscript{243} The cases discussed in this section will show that the minimalist approach has repeatedly prevailed in cases pertaining to NLRB decisions to defer to an arbitrator's award, but that in other areas, a more expansionist approach has taken hold. Beginning in about 1974, the Supreme Court established a line of decisions which broadened its standard of review in public policy cases and encouraged the lower courts to adopt an even broader standard.\textsuperscript{244}

A. Supporting the Minimalist Paradigm: NLRB Deferral Policies

The NLRB handles many cases in which matters of contract interpretation are mingled with charges of unfair labor practices.\textsuperscript{245} For

\textsuperscript{241} Enterprise Wheel, 363 U.S. at 599.

\textsuperscript{242} This is the case in such areas as equal employment opportunity, occupational safety and health, and others.


\textsuperscript{245} See generally Textron Lycoming, 310 N.L.R.B. 1209 (1993) (holding where an employer and union voluntarily elect to resolve disputes through final and binding arbitration, the Board will not intervene prior to an honest attempt by the parties to resolve their disputes with arbitration); Environmental Consultants, 310 N.L.R.B. 184 (1993) (finding that the respondent company engaged in an unfair labor practice when it tried to change the terms of the contract unilaterally); August A. Busch & Co., 309 N.L.R.B. 714 (1992) (holding that although a contract does not obligate either party to resort to grievance arbitration, where arbitration is available, the Board will hold the unfair labor practice in abeyance, pending arbitration); Interstate Material Corp., 290 N.L.R.B. 362 (1988).
example, an employer may violate the contract and commit an unfair labor practice when it unilaterally changes working conditions or where it disciplines a union officer more severely than other employees. The NLRB has followed two policies of restraint when an employee's grievance overlaps an unfair labor practice charge. The first policy concerns arbitration awards that have already been rendered (post-arbitration deferral) and the second involves cases which have not yet been arbitrated (pre-arbitration deferral). The effect of each policy was to give the arbitrator the ability to resolve both the statutory matter and the grievance. The courts have consistently supported the NLRB's deferral policies.

Post-Arbitration Deferral: Spielberg. — The Spielberg case, decided five years before the Trilogy, concerned a company's refusal to reinstate four strikers. The union had taken the dispute to arbitration, and the arbitrator sustained the discharges on the basis of strike misconduct. The union then took the case to the NLRB as a violation of the anti-discrimination policy of Section 8(a)(3) of the NLRA. The Board dismissed the complaint, and in the process established its first formal deferral policy. It announced that it would defer to an arbitrator's resolution of an unfair labor practice claim if (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound by the award; and (3) the award was not clearly

(finding that the collective bargaining agreement signed by the company and the first union did not expire, and therefore, the company violated sections 8(a)(1) and (2) when it recognized and entered into a contract with a second union).

246. See generally ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 496-531 (1976).

247. Id. at 326-39.


251. Id. at 1081.

252. Id.

253. Id. at 1080. Section 8(a)(3) of the National Labor Relations Act makes discrimination against an employee with regard to hire or tenure of employment in order to discourage or encourage union membership an unfair labor practice. See 29 U.S.C. § 158(a)(3) (1988).

254. Spielberg, 112 N.L.R.B. at 1082.
repugnant to the purposes and policies of the NLRA. In 1964, the Raytheon case added a fourth consideration: that the unfair labor practice issue was presented to and considered by the arbitrator.

The doctrine of post-arbitration deferral went through expansion and contraction over the years, arriving at its current state in 1984 with the Board’s decision in Olin Corp. Olin returned to the Spielberg standards but it added to them in three ways. First, the Board determined that the arbitrator will have considered the unfair labor practice issue adequately if the contractual issue is factually parallel to the statutory issue, and the arbitrator was presented with the facts about the statutory violation. Second, the Board will defer to an arbitrator’s decision unless it is “palpably wrong,” that is, not susceptible to an interpretation inconsistent with the Act. Finally, the NLRB shifted the burden of proof; the party arguing against deferral now bears the burden of showing that the arbitration process was defective. Although the courts have periodically questioned the Board’s policies in this area, or indicated a desire for some specific change, they generally have supported the Board’s policies.

The rationale for the Board’s deferral policy was laid out in Darr v. NLRB — a case that involved back pay following reinstatement from a discharge. As stated by the court, the deferral policy rested on four concepts:

255. Id.
256. Raytheon Co., 140 N.L.R.B. 883, set aside on other grounds, 326 F.2d 471 (1st Cir. 1964).
257. Id. at 884-87.
258. It expanded in Electronic Reprod. Serv., 213 N.L.R.B. 758 (1974) (where the Board decided to defer to the award although the complainant failed to present evidence relevant to the unfair labor practice). The doctrine was contracted in Suburban Motor Freight, 247 N.L.R.B. 14 (1980) (holding that deferral would not be granted unless the award demonstrated that the arbitrator ruled on the statutory issue). See Henkel & Kelly, supra note 248, at 40-43.
260. Id. at 574. Embedded appears to be a better word than parallel. Conceptually, the same facts gave rise to both the grievance and the unfair labor practice claim.
261. Id. In a sense this signals a return to the 1962 International Harvester policy, in which the Board reaffirmed the Spielberg criteria and announced that it would defer to an arbitrator’s decision unless it was “palpably wrong” or the arbitration itself appeared to be tainted by fraud, collusion, unfairness, or serious procedural irregularities. See International Harvester, 138 N.L.R.B. 923, 929 (1962).
263. See, e.g., Taylor v. NLRB, 786 F.2d 1516, 1521 (11th Cir. 1986) (expressing that the Olin standard was inadequate to protect employee’s statutory rights).
264. 801 F.2d 1404 (D.C. Cir. 1986).
265. Id. Darr was a low level union official who alleged that she had been discharged for union activity. She was reinstated but without back pay. Id. at 1405-06.
The first is a collateral estoppel theory — the notion that the NLRA issue is sufficiently close to the contract question as to have been fully litigated; the second is that the Board applies a limited scope of review as if it were an appellate body reviewing an arbitrator’s application of the NLRA (presumably as incorporated in the [labor] agreement); the third involves deference to a contract interpretation upon which the application of the NLRA depends; and the fourth is the theory that the parties to a collective bargaining agreement have waived the statutory rights that the Board is empowered to enforce and instead rely on a different body of contract law.  

Pre-Arbitration Deferral: Collyer. — This 1971 case occurred after an employer made a number of unilateral changes in pay rates and job assignments during the term of the bargaining agreement. The employer offered to arbitrate the complaints, but the union chose to bring the issue to the Board as an unfair labor practice case. The Board used this case to state its policy on cases that had not yet been arbitrated. It announced that it would require exhaustion of the grievance procedure, including arbitration, before it would consider unfair labor practice claims provided that: (1) there was a long standing bargaining relationship; (2) there was no enmity by the employer toward the employees; (3) the employer was willing to arbitrate; (4) the arbitration clause covered the dispute; and (5) the contract and its meaning were at the center of the dispute. Where the contract:

[C]learly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is . . . based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should

266. Id. at 1408. The NLRB cases that frame the Board’s deferral policy are set forth in footnote six of Darr. Judge Harry T. Edwards of the D.C. Circuit argued that the parties to collective bargaining agreements are free to modify or alter many statutory rights “subject always to the duty of fair representation, the requirement that the union in no way impair the employees’ right to choose their own bargaining agent, and the obligation of the parties to adhere to certain mandatory provisions of the Act.” See Edwards, supra, at 37. See also Douglas E. Ray, Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal, 28 B.C. L. REV. 1 (1986).


268. Id.

269. Id.

270. Id. at 842.
defer to the arbitration clause...  

_Collyer_ developed in the same winding way as _Spielberg_. It was extended to other unfair labor practice areas in _National Radio Co._, which was overruled in _General American Transportation Corp._ and was later reversed in _United Technologies._ In _United Technologies_, the Board decided that companies and unions should use their negotiated grievance and arbitration procedures before appealing to the Board. An example of judicial enforcement of the _Collyer/United Technologies_ policy can be found in _Hammontree v. NLRB._ Mr. Hammontree challenged an NLRB order that required him to exhaust his grievance remedies before the Board would consider his unfair labor practice complaint. He contended that this requirement was inconsistent with the NLRB’s statutory authority. The United States Court of Appeals for the District of Columbia found that the NLRB could require an employee to exhaust his grievance remedies before filing an unfair practice charge. Hammontree’s petition for review was denied.

For more than forty years, the NLRB has followed a policy of deferring to arbitration awards when statutory unfair labor practice claims are mingled with contractual grievances. The Board has ordered arbitration under the _Collyer_ doctrine, and it has bowed to existing arbitration awards under _Spielberg_. The Board has deferred in a broad range of matters, including cases on the refusal to bargain and cases that addressed such individual rights as freedom from interference, restraint, coercion, and discrimination. The Board has deferred to...
arbitration with great frequency, and the courts have generally supported the Board’s decisions.

B. Judicial Review when there is a Breach in the Duty of Fair Representation (“DFR”)

DFR is a judicially created obligation that requires the union to represent all employees in the bargaining unit fairly. It was established against the backdrop of racial discrimination cases during the 1940s. From an arbitration/public policy perspective, the important question centers on whether this obligation poses a threat to the finality of awards.

The courts have concluded that a proven breach in the DFR may justify setting aside an award. When several employees of the Anchor Motor Freight Company were fired for filing false expense vouchers, the union claimed that they were innocent and submitted the matter to arbitration. The arbitration committee upheld the discharges, but when subsequent information indicated that the charges might have been false, the grievants brought a wrongful-discharge suit against the employer and the union under Section 301 of the LMRA. They claimed that the falsity of the charges could have been discovered with very little investigation, and the union failed in its duty of fair representation because it made no effort to ascertain the truth.

The district court granted summary judgment for the union, but

285. Olin Corp., 268 N.L.R.B. 573, 581 (1984), (Zimmerman, dissenting). In Zimmerman’s dissent, agency statistics were cited to demonstrate that between October 1, 1981 and December, 1983, more than 3,800 cases had been deferred under the rules governing pre- and post-arbitral deferral. Id.

286. Problems arose ascertaining whether the arbitrator actually heard and decided the unfair labor practice portions of the case. See, e.g., Taylor v. NLRB, 786 F.2d 1516, 1521-22 (11th Cir. 1986) (rejecting Olin standards because they created the presumption that all arbitral proceedings confront and resolve each unfair practice, unless proven otherwise). The court concluded that this presumption “cannot be reconciled with the need to protect statutory rights.” Id at 1522. See also Kittle-Kamp, supra note 248, at 446.


290. Id. at 577.

291. Id. at 558; see also 29 U.S.C. § 185 (1988).


the U.S. Court of Appeals for the Sixth Circuit concluded that there were sufficient facts to infer bad faith or arbitrary conduct on the union's part. The Sixth Circuit reversed the district court's decision in favor of the union, but upheld the judgment as to the employer because there was no showing of misconduct by the employer or of a conspiracy between the employer and the union. The United States Supreme Court reversed the Sixth Circuit's decision, holding that it was improper to dismiss the suit against the employer.

A breach of the DFR relieves the employee of any requirement that disputes be settled through contractual procedures. Furthermore, if it is proven that this breach tainted the arbitrator's decision, the award is not final and the complainant is entitled to a remedy from both the employer and the union. However, if a breach of the DFR is not proven, the arbitration award is final.

297. See 29 U.S.C. § 185 (a) (1988) ("Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . .").
298. See Bowen v. United States Postal Serv., 459 U.S. 212, 223 (1983). Bowen was discharged as a result of an altercation with another employee. Id. at 214. He filed a grievance and when the union declined to take the case to arbitration, he sued both the Postal Service and the union in the United States district court. Id. The court held that the discharge had been without just cause and that the union had handled his grievance in an arbitrary manner. Id at 216. The damages were divided between the Postal Service and the union. Id. at 216-17. The Fourth Circuit affirmed except for the award of damages against the union. Id. at 217. The Supreme Court held that where an employee proves that his employer violated a collective bargaining agreement and the union breached its duty of fair representation, liability is to be apportioned between the employer and the union according to the damages caused by the fault of each. Id. at 222-23.
299. See generally Alford v. General Motors Corp., 926 F.2d 528 (6th Cir. 1991). Plaintiffs were temporary employees who were members of the security guards bargaining unit. Id. at 529. When General Motors refused to offer them permanent positions, they filed a grievance. Id. When no settlement was reached, they sued the company for its failure to offer them permanent positions and the union on DFR grounds. Id. at 530. The U.S. district court dismissed the suits, and the plaintiffs appealed. Id. The Sixth Circuit affirmed the decision. Id. at 531. The claimants were unable to show a breach of the DFR, and thus the Sixth Circuit held that the grievance procedures in the bargaining agreement were final and exclusive. Id. Once the union was let out of the litigation on the DFR grounds, the employees could not maintain a direct breach of contract action against General Motors. Id.
C. Establishing the Expansionist Paradigm in Public Policy Cases: 

_Gardner Denver, 1974_

Soon after the passage of the Civil Rights Act of 1964, it became apparent that there was a potential conflict between the rights guaranteed under this statute and those secured by the arbitration clause of a collective bargaining agreement. In practice, some arbitrators have tried to avoid the conflict by focusing on the law, while other arbitrators have concentrated on the contract. In the 1974 case of _Alexander v. Gardner-Denver Co._, the contractual agreement to arbitrate needed to be reconciled with Title VII of the Civil Rights Act. The U.S. Supreme Court addressed the conflict in this case, establishing a line of thought that would persist into the 1990s.

Mr. Alexander was an African-American employee. He had been employed as a drill operator trainee and was terminated for producing too many defective and unusable parts. After Mr. Alexander was discharged from his position, he filed a grievance under the non-discrimination clause in the collective bargaining agreement. Before the grievance could reach arbitration, he filed a racial discrimination complaint under Title VII of the Civil Rights Act with the Colorado Civil Rights Commission which referred the complaint to the EEOC. He lost in both venues: the arbitrator found just cause for the discharge and the EEOC determined that there was no basis for believing that a violation of Title VII had occurred. Then, he brought an action in


304. See generally id.
305. Id. at 38.
306. Id.
307. Id. at 39.
309. _Gardner-Denver_, 415 U.S. at 42.
310. Id. at 42-43.
U.S. district court claiming that his termination was due to a racially discriminatory employment practice. The court held that the petitioner was bound by the arbitration and had no right to sue under Title VII. The Court of Appeals affirmed the lower court’s decision.

However, the Supreme Court reversed this decision and established two principles in the process. The first pertains to an employee’s statutory right to trial de novo under Title VII. Does the existence of an arbitration provision in a collective bargaining agreement bar access to statutory remedies? The Court determined that this right is not foreclosed by prior submission of the claim to arbitration. There are different tracks for different rights. Statutory or Constitutional rights are to be enforced in the courts and contractual rights through arbitration.

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence and certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

The second principle concerned the status of arbitration awards in public policy cases. Although the lower courts held that the Trilogy cases limited the extent of court review, the Gardner-Denver Court concluded that when matters of public policy are at issue, the employee’s claim should be reviewed de novo, the arbitration award may be reviewed in its entirety, and the weight given to the arbitrator’s decision

311. Id. at 43.
314. Gardner-Denver, 415 U.S. at 60.
315. Id. at 38.
316. Id. at 49.
317. Id. at 49-50.
318. Id.
319. Id. at 56-58.
320. Id. at 45-46.
is within the court’s discretion.  

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court’s discretion with regard to the facts and circumstances of each case .... Where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight. This is especially true where the issue is one solely of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress ... thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

D. Delineating the Boundary in Public Policy Cases: W. R. Grace and Misco

Having established a broad principle pertaining to court review in public policy cases, in W. R. Grace & Co. v. Local 759, International Union of Rubber Workers, the United States Supreme Court determined that it would only apply that principle on a narrow basis. This case began with a conciliation agreement that the employer had signed with the EEOC. The agreement provided that certain seniority provisions of the collective bargaining agreement would be superseded by a gender-based quota system. The union did not participate in the conciliation agreement and when the employer attempted to enforce it, the union objected and demanded arbitration. The employer responded by filing suit in the United States District Court for the Northern District of Mississippi to enjoin the arbitration of grievances over the layoff. The district court held that the conciliation agreement should prevail, but on appeal from the union, the Court of Appeals for the Fifth Circuit

321. Id. at 59-60.
322. Id. at 60 n.21.
326. Id. at 759.
327. Id. at 760.
328. Id. at 759-60.
329. Id. at 760. See also Southbridge Plastics Div. v. Local 759, Int'l Union of Rubber Workers, 403 F. Supp. 1183 (N.D. Miss. 1975), rev'd, 565 F.2d 913 (5th Cir. 1978).
determined that the seniority provision should control, and it ordered reinstatement and back pay for the laid-off employees.\textsuperscript{330}

The back pay issue arose before the Supreme Court.\textsuperscript{331} There had been two arbitrations on grievances for back pay.\textsuperscript{332} The first arbitrator denied back pay because it would be unfair to penalize the employer for complying with the order of a district court.\textsuperscript{333} The second arbitrator rejected the employer’s argument that the first decision was binding.\textsuperscript{334} This arbitrator awarded back pay because the collective bargaining agreement made no exceptions for good-faith violations of the contract, even if they were based upon a court order.\textsuperscript{335} The employer brought suit to vacate the second arbitration award.\textsuperscript{336} The district court granted summary judgment in favor of the employer,\textsuperscript{337} but the Fifth Circuit held that the second arbitrator was not bound by the first decision and ordered that his award be enforced.\textsuperscript{338}

The Supreme Court affirmed this decision,\textsuperscript{339} and in the process made two points which tie into the themes of this article. First, in accordance with the minimalist concepts advanced by the Trilogy, the Court concluded that a federal court may not overturn an arbitrator’s decision simply because it believes that its own interpretation of the bargaining agreement is better.\textsuperscript{340} The second arbitrator’s award drew its essence from the contract.\textsuperscript{341} The second contribution ties into the current discussion of the relationship between arbitration and public policy. The employer argued that upholding the second arbitrator’s award would compromise the public policy that mandates obedience to a court order.\textsuperscript{342} The Court disagreed\textsuperscript{343} and went on to provide more

\begin{itemize}
  \item \textsuperscript{330} See Southbridge Plastics, 565 F.2d at 917.
  \item \textsuperscript{331} W. R. Grace, 461 U.S. at 759.
  \item \textsuperscript{332} \textit{Id.} at 762.
  \item \textsuperscript{333} \textit{Id.}
  \item \textsuperscript{334} \textit{Id.} at 763.
  \item \textsuperscript{335} \textit{Id.} at 763-64.
  \item \textsuperscript{337} \textit{Id.} at 1251 (citing Southbridge Plastics Div. v. Local 759, Int’l Union of Rubber Workers, 403 F. Supp. 1183 (N.D. Miss. 1975), \textit{af{}f’d}, 461 U.S. 757 (1983)).
  \item \textsuperscript{338} \textit{Id.} at 1257-58.
  \item \textsuperscript{339} W. R. Grace, 461 U.S. at 764. The circuit court also concluded that the first arbitrator had exceeded his authority and had based his decision on equitable considerations rather than contractual ones. W. R. Grace, 652 F.2d at 1255, 1257.
  \item \textsuperscript{340} W. R. Grace, 461 U.S. at 764.
  \item \textsuperscript{341} \textit{Id.} at 765-66.
  \item \textsuperscript{342} \textit{See id.} at 766.
  \item \textsuperscript{343} \textit{Id.} at 767.
\end{itemize}
specific guidance as to the kind of public policy that could lead to the plenary review mentioned in *Gardner-Denver.* \(^{344}\) This kind of public policy "is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"\(^ {345}\) The public policy must be "well defined and dominant."\(^ {346}\)

The definition of public policy surfaced again in the 1987 decision of *United Paperworkers International Union v. Misco, Inc.*\(^ {347}\) *Misco* did not establish new law but it reinforced *W. R. Grace* and reaffirmed the power of arbitral fact-finding.\(^ {348}\) One of the Misco work rules listed the possession or use of controlled substances on company property as cause for discharge.\(^ {349}\) Isaiah Cooper was apprehended by police in the back seat of another person’s car on the company’s parking lot.\(^ {350}\) The smell of marijuana was in the air and a lit marijuana cigarette was found in the front seat ashtray.\(^ {351}\) Cooper did not own the car, and two other Misco employees were seen leaving it shortly before his arrest.\(^ {352}\) After being discharged for violating the company’s controlled substances rules, he promptly filed a grievance.\(^ {353}\)

The case was submitted to arbitration, where the arbitrator reversed the discharge and ordered reinstatement.\(^ {354}\) He concluded that the presence of marijuana in the front seat ashtray of another person’s car did not prove that it belonged to Cooper who was in the back seat or that Cooper was smoking it.\(^ {355}\) The company tried to introduce evidence about discovering marijuana gleanings in the grievant’s car, but the arbitrator disallowed it because the company was not aware of this evidence when it discharged him.\(^ {356}\) On appeal from the company, the district court vacated the award.\(^ {357}\) The Fifth Circuit, adopting the reasoning of the district court, affirmed the decision holding that

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346. *Id.*
348. *Id.* at 43-45.
349. *Id.* at 32.
350. *Id.* at 33.
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.* at 34.
355. *Id.*
356. *Id.* The arbitrator stated that the company had to have "proof in hand" before taking action. *Id.* at n.6.
reinstatement would violate the public policy against the operation of
dangerous machinery by persons under the influence of drugs.\textsuperscript{358} The
court also held that the arbitrator erred when he refused to hear the
evidence about the marijuana residue in the employee's car.\textsuperscript{359}

The Supreme Court reversed,\textsuperscript{360} holding that the Fifth Circuit's
review exceeded its limited authority.\textsuperscript{361} The Supreme Court concluded
that the Fifth Circuit erred in second-guessing the arbitrator's evidentiary
ruling.\textsuperscript{362} Absent fraud by the parties or an arbitrator's misconduct, the
courts are not authorized to reconsider the merits of an arbitrator's
award,\textsuperscript{363} and the arbitrator's finding of facts is conclusive.\textsuperscript{364} A
court's refusal to enforce an arbitrator's interpretation of a bargaining
agreement on public policy grounds is limited to the situations outlined
in \textit{W. R. Grace}.\textsuperscript{365} The policy is to be "explicit," "well-defined,"
"dominant," and "to be ascertained 'by reference to the laws and legal
precedents and not from general considerations of supposed public
interest.'"\textsuperscript{366}

E. The Supreme Court's Extension of the Expansionist Paradigm to
New Areas

\textit{The Fair Labor Standards Act ("FLSA")}.\textsuperscript{367}—Seven years after
\textit{Gardner-Denver}, the Supreme Court began the process of extending its
principles to other areas of public policy. \textit{Barrentine v. Arkansas-Best
Freight System, Inc.},\textsuperscript{368} focused on the FLSA.\textsuperscript{369} The employees
claimed that they were entitled to payment for time spent inspecting and
transporting vehicles to a repair facility.\textsuperscript{370} The claims were submitted
to a joint grievance committee, which rejected them without explana-

\begin{itemize}
  \item \textsuperscript{358} Id. at 743.
  \item \textsuperscript{359} Id.
  \item \textsuperscript{360} United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).
  \item \textsuperscript{361} Id. at 36-38.
  \item \textsuperscript{362} Id. at 39.
  \item \textsuperscript{363} Id. at 38.
  \item \textsuperscript{364} Id. "To resolve disputes about the application of a collective-bargaining agreement, an
  arbitrator must find facts and a court may not reject those findings simply because it disagrees with
  them." Id.
  \item \textsuperscript{365} Id. at 43.
  \item \textsuperscript{366} Id. (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).
  \item \textsuperscript{368} 450 U.S. 728 (1981).
  \item \textsuperscript{369} Id. at 729-30.
  \item \textsuperscript{370} Id. at 730-31.
\end{itemize}
tion. The petitioners filed an action in district court alleging that the claims were compensable under the FLSA.

On appeal, the United States Court of Appeals for the Eighth Circuit concluded that the petitioners’ voluntary submission of grievances to arbitration barred them from asserting their statutory claims in a subsequent court action. However, the Supreme Court, following Gardner-Denver, reversed this ruling. It held that FLSA rights are independent of the collective bargaining process. Such rights belong to the petitioners as individual workers, not as members of a union, and cannot be waived. Courts should defer to an arbitrator’s decision where the employee’s claim is based on rights arising out of a bargaining agreement, but different considerations apply when the claim is based on rights arising from a law that provides substantive guarantees to individual workers.

The Civil Rights Act of 1871—The next significant Supreme Court decision on the public policy exception is tied into the portion of Gardner-Denver, where the Court stated that arbitral fact-finding would not be given res judicata or collateral estoppel effect in a Title VII suit. The case of McDonald v. West Branch clarified the court’s position on this issue. McDonald was discharged from his job on...
the city police force because of alleged political activity.  He challenging the discharge, he went to arbitration under the just cause provision of the bargaining agreement.  He lost at arbitration, but instead of appealing the decision, he filed an action in district court in which he claimed a violation of his rights under the Civil Rights Act of 1871.  The jury returned a verdict against the Chief of Police but the Court of Appeals reversed the verdict.  The Sixth Circuit reasoned that McDonald's claims were barred because they had been resolved in arbitration.  The Supreme Court later reversed the appellate decision, limiting the res judicata or collateral estoppel effect of an arbitration award under a collective bargaining agreement.  Where the claim is based on an independent statutory right, the Court held that the claimant may proceed to perfect such right through judicial channels.

Workers' Compensation.—During the 1980's, the Supreme Court also dealt with the relationship between state law and the LMRA. The case of Lingle v. Norge Division of Magic Chef, Inc. involved the discharge of a worker for filing a false workers' compensation claim. The union grieved and, while arbitration was proceeding, the employee

382. Id. at 285-86.
383. Id. at 286.
384. Id.
385. Id.
386. Id.
387. Id. at 286-87.
388. Id. at 287. The Court gave four reasons for refusing to give preclusive effect to the arbitration award: (1) the arbitrator's expertise was in the law of the shop rather than the law of the land; (2) arbitrators may lack authority to enforce statutes because their authority is derived only from the contract; (3) the union may sacrifice the individual's statutory rights in the interests of the bargaining unit as a whole; and (4) limitations in arbitral fact-finding. Id. at 284. See also Craig Dow Patton, NLRB Deferral to Arbitration: Placing Individual Employees' Statutory Rights Upon the Sacrificial Altar of Olin to Promote a National Labor Policy Favoring Private Dispute Resolution, 21 J. MARSHALL L. REV. 323 (1988). Other authors have indicated that inadequate remedies available at arbitration might pose an additional shortcoming. See, e.g., James I. Briggs, Jr., The National Labor Relations Board's Policy of Deferring to Arbitration, 13 FLA. ST. U. L. REV. 1141, 1165 (1986).
389. See Barrentine, 450 U.S. at 737; see also Harding v. United States Postal Serv., 802 F.2d. 766 (4th Cir. 1986). In Harding, the appellants were former postal service employees who had been discharged for filing false injury compensation claims. Id. at 767. The second appellant was also discharged for failing to meet the physical requirements of his position. Id. After their discharges were upheld in arbitration, they filed suit alleging lack of due process. Id. The district court dismissed their claims concluding that such a Constitutional remedy was not available as they had other procedures available for redress. Id. The Fourth Circuit affirmed, holding that the grievants could not seek a private cause of action against the postal service for the alleged Constitutional violations. Id. at 768.
391. Id. at 401.
filed a retaliatory discharge action in state court.\textsuperscript{392} The employer removed the suit to the district court on the basis of diversity of citizenship and filed a motion to dismiss arguing that the case was preempted by Section 301 of the LMRA.\textsuperscript{393} The district court dismissed the complaint because it was arbitrable under the collective bargaining agreement.\textsuperscript{394}

The United States Court of Appeals for the Seventh Circuit affirmed the decision,\textsuperscript{395} but the Supreme Court held that the application of the employee's state tort remedy was not preempted by the LMRA.\textsuperscript{396} The application of state law is preempted by Section 301 only if it requires the interpretation of a collective bargaining agreement.\textsuperscript{397} Under Illinois law, in cases of retaliatory discharge for workers' compensation abuse, the employee must show that the discharge or the threat of discharge was prompted by a desire to deter the employee from exercising rights under the Workers Compensation Act.\textsuperscript{398} Because these elements do not require interpretation of the union-management contract, the retaliatory discharge claim is independent of the agreement.\textsuperscript{399} "The interpretation of collective bargaining agreements remains firmly in the arbitral realm"\textsuperscript{400} and judges may only determine questions of state law that involve labor-management relations if such questions do not require construction of those agreements.\textsuperscript{401}

\section*{F. The Expansionist Paradigm in the Circuit Courts: Public and Employee Safety}

The next five cases — \textit{Northwest Airlines},\textsuperscript{402} \textit{Delta Air Lines},\textsuperscript{403} \textit{Iowa Electric},\textsuperscript{404} \textit{Stead Motors},\textsuperscript{405} and \textit{United States Postal Ser-
vice — involve circuit court of appeals decisions on arbitration awards in cases where contractual matters and public or employee safety are commingled. The first two cases to be discussed involve a mixture of public policy with alcohol, public safety, and airline pilots. They surfaced in the circuit courts around the time of the Misco decision. The petitioners in both cases were airline employers. In each case, a pilot was discharged for flying while under the influence of alcohol. The blood alcohol level of the pilots was 0.13 percent in each case, where the state law had established 0.10 percent as creating a presumption of intoxication.

In Northwest Airlines, the grievant was a co-pilot who was second in command of the aircraft. The arbitration board’s ruling was tied into the grievant’s status as a recovering alcoholic. The arbitration board ruled that he should be offered reinstatement without back pay or benefits upon certification by the Federal Air Surgeon that he had recovered from his alcoholism. The pilot completed the program and when he was recertified for flight status by the Federal Aeronautics Agency, the airline filed a complaint in the district court seeking to set aside the reinstatement order. The court found for the employer on the grounds that the Board’s award was inconsistent with public policy. However, the District of Columbia Circuit Court of Appeals

405. Stead Motors v. Automotive Machinists Lodge No. 1173, 843 F.2d 357 (9th Cir. 1988), reh'g en banc, 886 F.2d 1200 (9th Cir. 1989), and cert. denied, 495 U.S. 946 (1990).
407. Northwest Airlines, 808 F.2d at 77-80; Delta Air Lines, 861 F.2d at 669; Iowa Elec. Light & Power, 834 F.2d at 1425, 1427; Stead Motors, 843 F.2d at 357; United States Postal Serv., 839 F.2d at 146, 149.
410. Northwest Airlines, 808 F.2d at 78; Delta Air Lines, 861 F.2d at 665-66.
411. The relevant union contracts contained provisions prohibiting pilots from drinking alcohol within 24 hours of resuming duties in the cockpit. In Northwest Airlines the grievant admitted to drinking during a 30 hour stopover between flights. Northwest Airlines, 808 F.2d at 78. The pilot in Delta Airlines had been observed drinking the evening before taking a morning flight and was described as “glassy eyed” and “disoriented” at the time of the flight. Delta Airlines, 861 F.2d at 667.
412. Northwest Airlines, 808 F.2d at 78; Delta Air Lines, 861 F.2d at 667.
413. Northwest Airlines, 808 F.2d at 78.
414. Id. at 77-78. He had asked to be replaced prior to taking the scheduled flight. Id. at 78.
415. Id. at 78. One requirement was proof of total abstinence for two years. Id.
416. Id. The pilot enrolled in the program immediately after his discharge. Id.
417. Id. at 80. The district court held that the remedy impinged on Northwest’s duty to ensure air safety. Id.
reversed, holding that the lower court had no valid basis for setting aside an award which drew its essence from the collective bargaining agreement.418

The United States Court of Appeals for the Eleventh Circuit reached a different result in the second airline case, Delta Air Lines.419 In contrast to Northwest Airlines, the Delta pilot was a pilot-in-command rather than a co-pilot and he flew the aircraft over the entire trip.420 Upon finding no just cause for the discharge, the board of arbitration ordered reinstatement and required that the pilot be offered an opportunity to rehabilitate himself, with the costs borne by the airline.421 The district court overturned the award422 and the appellate court agreed.423 While upholding the portion of the award requiring the airline to pay for the pilot's rehabilitation, the court held that the board's decision violated clearly established public policy and could not be enforced.424

Shortly after the Miscro decision was issued, public policy toward public safety was also addressed in Iowa Electric Light & Power Co. v. Local 204, IBEW.425 The company appealed an arbitrator's award ordering reinstatement of a nuclear power plant machinist who had been discharged for violating federally-mandated safety regulations.426 In order to get to the lunchroom expeditiously, the employee, who had a cast on his leg, defied the control room engineer and circumvented the plant's interlock system by opening a secured door.427

418. Id. at 82, 84. The court also indicated that the district court's decision was not consistent with the decision of the D.C. Circuit in U.S. Postal Service. Id. at 83.
420. Id. at 666-67.
421. Id. at 668.
422. Id. at 669-70.
423. Id. at 671.
424. Id. at 674. The court found that "[t]he existence of public policy denouncing the operation of any aircraft . . . while intoxicated is 'explicit,' 'well-defined, and dominant,' and 'ascertained by reference to legal precedents.'" Id. at 674. The specific public policies concerned state and federal laws that prohibit flying while intoxicated. Id. at 673. In a similar manner, in Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244 (5th Cir. 1993), the court sustained the decision of the lower court that had overturned an arbitration award reinstating an employee who tested positive for cocaine. Id. at 246. The Fifth Circuit held that the reinstatement violated public policy and that the arbitrator should not have relied on the employee's post-discharge behavior. Id.
425. 834 F.2d 1424 (8th Cir. 1987). The Eighth Circuit took pains to identify the "strict regulatory scheme devised by Congress for the protection of the public from the hazards of nuclear radiation." Id. at 1428; see Parker supra note 243, at 683.
426. Iowa Electric, 834 F.2d at 1426. The problem concerned the spread of radiation. The discharge was approved by the Nuclear Regulatory Agency. Id.
The arbitration turned on the issue of just cause.428 The arbitrator found that the employee's act was "deliberate, improper, foolish, and thoughtless,"429 but he concluded that termination was "too severe."430 On appeal, the district court concluded that the employee had knowingly and willfully violated a well-defined public policy pertaining to safety in nuclear generating plants, and it vacated the award on those grounds.431 On appeal by the union, the United States Court of Appeals for the Eighth Circuit held that public policy precluded enforcement of the arbitrator's award.432 Citing W. R. Grace, the court stated that if a bargaining agreement, as interpreted by the arbitrator, violates some explicit public policy, the court must not enforce the award.433 Once the public policy issue is raised, the court must take the facts as found by the arbitrator but, it must review the conclusions on a de novo basis.434 Specifically rejecting the minimalist position set forth earlier in this article,435 the court also held that it is "not required to find that the award itself is illegal" before overturning the arbitrator's decision on public policy grounds.436

Stead Motors v. Automotive Machinists' Lodge No. 1173437 also addressed public safety.438 One of the company's auto mechanics had been given a written warning for improperly tightening lug bolts while installing a wheel.439 A year later, he was discharged after a customer complaint led management to discover loose and missing lug bolts on some of the wheels he had replaced.440 The union filed a grievance on behalf of the employee that resulted in arbitration.441 The arbitrator found that the employee had been reckless, but he reduced the penalty...
to a 120-day suspension because he felt that discharge was too severe. The employer moved to vacate the award, and the district court voided the reinstatement on the grounds that it was against public policy. On appeal, a panel of the United States Court of Appeals for the Ninth Circuit sustained the district court’s ruling. However, on rehearing, the court held that the award did not violate explicit, well-defined, and dominant California public policy and, therefore, upheld the award.

A criminal act was the focus of United States Postal Service v. National Association of Letter Carriers. An arbitrator reinstated a postal worker who had fired gunshots at his Postmaster’s empty parked car. The arbitrator weighed the single offense against the employee’s entire record and determined that the bargaining agreement required a lesser penalty. On appeal, the district court reasoned that the arbitrator’s award contravened an indisputable public policy against permitting an employee to direct physical violence at a superior. However, the United States Court of Appeals for the Third Circuit reversed, citing the Misco standard of review. It concluded that the district court had exceeded the scope of its reviewing authority. “Because the parties have contracted to have disputes settled by an arbitrator . . . it is the arbitrator’s view of the facts and the meaning of the contract that they have agreed to accept.”

442. Id.
443. Id. The district court order did not contain any analysis of the arbitrator’s award, nor a discussion of the legal standard applied, and it did not specify the particular public policy that was violated by the employee’s reinstatement. Stead Motors v. Automotive Machinists’ Lodge No. 1173, 886 F.2d 1200, 1204 n.5 (9th Cir. 1989).
444. Stead Motors, 843 F.2d at 359. Commenting on the original Circuit Court decision, William B. Gould has argued that this was one of several cases that “clearly put the circuit courts on the side of . . . establishing broad judicial review of arbitration awards.” William B. Gould, IV, Judicial Review of Labor Arbitration Awards — Thirty Years of the Steelworkers Trilogy: The Aftermath of A.T.& T. and Misco, 64 NOTRE DAME L. REV. 464, 488 (1989).
445. See Stead Motors, 886 F.2d at 1217.
446. 839 F.2d 146 (3d Cir. 1988).
447. Id. at 147.
448. Id. The arbitrator considered the worker’s 13 years of service, his prior law-abiding history, his frustration over being repeatedly passed over for promotion, and the “supercharged emotional atmosphere.” Id.
450. United States Postal Serv., 839 F.2d at 150.
451. Id. at 149.
452. Id. at 150. The court also dismissed the idea that the public sector nature of the Postal Service created a basis for enlarging the reviewing authority of the court. Id.
G. The Expansionist Paradigm in the Circuit Courts:
   Sexual Harassment

Although Title VII of the Civil Rights Act does not explicitly identify sexual harassment as a form of sex discrimination, a number of courts have held that sexual harassment is a form of discrimination protected under the Equal Employment Opportunity ("EEO") laws.\textsuperscript{453} The issue has presented itself in the national consciousness in the wake of the charges that Professor Anita Hill voiced at the Clarence Thomas Supreme Court confirmation hearings.\textsuperscript{454} However, once again the courts offer conflicting guidance, as is illustrated by the following three cases.

\textit{Newsday, Inc. v. Long Island Typographical Union}\textsuperscript{455} involved an employer's attempt to vacate an arbitration award that ordered the reinstatement of an employee who was discharged for sexually harassing female co-workers.\textsuperscript{456} The employer sought \textit{vacatur} on three grounds: "the award offended the well-defined public policy against sexual harassment in the work place; it exceeded the limits of the arbitrator's authority; and it failed to draw its essence from the ... collective bargaining agreement."\textsuperscript{457} The district court granted Newsday's motion.\textsuperscript{458} On appeal, the United States Court of Appeals for the Second Circuit concluded that the district court had "properly vacated the award as violating the explicit, well-defined, and dominant public policy against sexual harassment in the work place."\textsuperscript{459}

Unwanted physical contact was at the root of \textit{Chrysler Motors Corp. v. International Union, Allied Industrial Workers}.\textsuperscript{460} A male fork lift

\textsuperscript{453.} See, \textit{e.g.}, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986) (equal protection clause claim); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (Title VII claim).

\textsuperscript{454.} See Donald J. Peterson & Douglas P. Massengill, \textit{Sexual Harassment Cases Five Years After Meritor Savings Bank v. Vinson, 18 EMPLOYEE RELATIONS L.J. 489} (1992). A national study of over 13,000 workers found that 42% of the women and 14% of the men had experienced some form of sexual harassment in a three year period, although only 5% chose to report it. \textit{Id.} at 489.


\textsuperscript{456.} \textit{Id.} at 841. The discharged male employee had engaged in "offensive and unauthorized contact" with several female employees. \textit{Id.} at 842.

\textsuperscript{457.} \textit{Id.} at 841.

\textsuperscript{458.} \textit{Id.}

\textsuperscript{459.} \textit{Id.}

\textsuperscript{460.} 959 F.2d 685 (7th Cir. 1992). Chrysler also presented evidence that the employee "had committed four other incidents in which he intentionally grabbed and/or pinched female co-workers." \textit{Id.} at 686.
truck operator was discharged by Chrysler after he sexually assaulted a female co-worker.\textsuperscript{461} The union filed a grievance which Chrysler denied and the matter proceeded to arbitration.\textsuperscript{462} The arbitrator rejected evidence acquired after the employee’s discharge, which suggested that he had harassed females in the past,\textsuperscript{463} and determined that the evidence did not indicate that the grievant was beyond rehabilitation.\textsuperscript{464} Instead of discharge, the arbitrator concluded that severe discipline would be adequate to deter the employee from future misbehavior and that it would also demonstrate the company’s opposition to sexual harassment.\textsuperscript{465} On this basis, the arbitrator determined that the worker was not discharged for “good cause,” reduced the penalty to suspension of thirty days, and directed Chrysler to reinstate the worker with back pay.\textsuperscript{466}

Both the employer and the union sought summary judgment in the district court, where the award was affirmed and enforced.\textsuperscript{467} On appeal, the United States Court of Appeals for the Seventh Circuit also affirmed, holding that the arbitrator’s decision was within the purview of the bargaining agreement and public policy.\textsuperscript{468} While recognizing the policy against sexual harassment in the work place, the Court cited \textit{Misco} for the proposition that “where it is contemplated that the arbitrator will determine remedies for contract violations . . . courts have no authority to disagree with his honest judgment in that respect.”\textsuperscript{469}

However, in \textit{Stroehmann Bakeries v. International Brotherhood of Teamsters},\textsuperscript{470} the United States Court of Appeals for the Third Circuit favored public policy over an arbitration award.\textsuperscript{471} The bakery discharged a worker for “immoral conduct” after a customer alleged that the worker engaged in sexual harassment.\textsuperscript{472} The case progressed to

\begin{itemize}
\item \textsuperscript{461} \textit{Id.} at 686. He allegedly approached her from the rear, grabbed her breasts, and announced, “\textit{Yup they’re real.}” \textit{Id.} at 686 n.1.
\item \textsuperscript{462} \textit{Id.} at 686.
\item \textsuperscript{463} \textit{Id.}
\item \textsuperscript{464} \textit{Id.}
\item \textsuperscript{465} \textit{Id.}
\item \textsuperscript{466} \textit{Id.}
\item \textsuperscript{467} \textit{Id.} at 686-87. The company sought to set the arbitration award aside and the union sought back pay for the employee and attorney’s fees. \textit{Id.}
\item \textsuperscript{468} \textit{Id.} at 689.
\item \textsuperscript{469} \textit{Id.} at 688 (quoting \textit{Misco}, 484 U.S. at 38).
\item \textsuperscript{470} 969 F.2d 1436 (3d Cir. 1992), \textit{cert. denied}, 113 S. Ct 660 (1992).
\item \textsuperscript{471} See \textit{id.} at 1446.
\item \textsuperscript{472} \textit{Id.} at 1438. The employee was accused of touching the breast of a female employee working at a store where Stroehmann’s employee delivered bread. He also was accused of pushing himself against her and making sexually explicit remarks that were offensive to her. \textit{Id.}
\end{itemize}
arbitration, where the arbitrator reinstated the worker with back pay. The employer challenged the reinstatement at the district court level. The court concluded that the arbitrator’s award violated public policy against sexual harassment. It vacated the award and remanded the matter to a different arbitrator. The United States Court of Appeals for the Third Circuit affirmed this ruling, holding that an arbitrator’s award reinstating an employee accused of sexual harassment, without a determination regarding the merits of the allegation, violates well-established and dominant public policies.

H. The Expansionist Paradigm and the Courts

In its 1974 Gardner-Denver decision, the Supreme Court staked out an expansionist position in matters where arbitrators are called upon to deal with public policy. Perhaps because this decision created doubts about the finality of arbitration, in later years the Supreme Court made it clear that the public policy exception was to be narrow. The Court did not intend to provide a hunting license on arbitration awards.

However, the cases discussed in this part of the article indicate that the circuit courts of appeal often appear reluctant to accept the guidelines offered by the Supreme Court. Their decisions are often inconsistent with one another, as is illustrated by the conflicting approaches that different appellate courts have taken to alcoholic airline pilots and

473. *Id.* at 1440. The arbitrator based his decision on procedural grounds because the employer had not sufficiently investigated the incident. *Id.*


475. *Id.* at 1189.

476. *Id.* at 1190.

477. *Stroehmann Bakeries, Inc.*, 969 F.2d at 1446-47.

478. *Id.* at 1444; see also New York City Transit Auth. v. Transport Workers Local 100, 606 N.Y.S.2d 510, 513 (Sup. Ct. 1993) (citing *Stroehmann* for the proposition that the arbitrator can reduce the penalty of discharge and still follow federal public policy).


sexual harassment. In addition, their interpretation of the public policy exception generally seems to be broader than that of the Supreme Court. The classic case in this area is the first decision in Stead Motors in which a panel of the United States Court of Appeals for the Ninth Circuit turned a garden variety discharge case into a matter of public policy before being corrected through an en banc decision of the court.

VI. THE NEW PARADIGM: UNBOUNDED MINIMALISM

As we have seen throughout the discussion of the Gardner-Denver line of cases, the federal courts made it abundantly clear that they would not permit the decision of a labor arbitrator operating under a collective bargaining agreement to bar an individual's statutory claim. Then in Gilmer v. Interstate/Johnson Lane Corp., a case involving the Age Discrimination in Employment Act ("ADEA"), the Supreme Court limited the trend by ordering the arbitration of the statutory claim. Gilmer seems to have replaced the expansionary tendencies triggered by Gardner-Denver with a broad policy of deferral to arbitration, reminiscent of the Collyer doctrine adopted by the NLRB in 1971.

There are three important distinctions between Gilmer and the other public policy cases that have been discussed. First, Gilmer does not involve a unionized employee working under a collective bargaining agreement. Robert Gilmer was a highly compensated, well educated manager of a branch of a brokerage firm. The Gilmer case, thus, falls into the category of non-union employment arbitration rather than
labor arbitration.\textsuperscript{492} Second, the \textit{Gilmer} case does not involve an employment contract. In order to qualify for employment, Mr. Gilmer was required to register with various stock exchanges.\textsuperscript{493} One of the registrations that he signed required him to arbitrate any dispute under the rules of the New York Stock Exchange ("NYSE").\textsuperscript{494} These rules, in turn, compelled arbitration of "any controversy . . . arising out of the employment or termination of employment of such registered representative."\textsuperscript{495}

Finally, this case was decided pursuant to the Federal Arbitration Act ("FAA").\textsuperscript{496} This 1925 law applies to arbitration agreements in maritime transactions and commerce.\textsuperscript{497} The statute excludes contracts of employment of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."\textsuperscript{498} Because the case centered on Mr. Gilmer's NYSE registration agreement, the Court concluded that this Section One exclusion did not apply,\textsuperscript{499} even though the case involved the ADEA.\textsuperscript{500}

The facts revealed that after six years of service as a senior vice president with a Charlotte-based brokerage firm, Mr. Gilmer was dismissed from his position in 1987, at age sixty-two.\textsuperscript{501} He filed suit in the district court under the ADEA.\textsuperscript{502} He later said that he avoided arbitration because he did not think that he would be treated fairly in that.

\textsuperscript{492} The reasoning in \textit{Gilmer} is distinguishable from the public policy cases previously discussed because it deals with a discrete set of facts regarding non-union employment arbitration rather than union labor arbitration.

\textsuperscript{493} \textit{Gilmer}, 500 U.S. at 23.

\textsuperscript{494} \textit{Id}.

\textsuperscript{495} \textit{Id}.


\textsuperscript{497} \textit{Id.} § 2.

\textsuperscript{498} \textit{Id.} § 1.

\textsuperscript{499} \textit{Gilmer}, 500 U.S. at 25 n.2. The federal courts have remained divided on the kinds of employees excluded and \textit{Gilmer} did not clarify the matter. The dispute over the interpretation of the exclusionary clause is at least four decades old. \textit{See}, e.g., Tenney Engineering v. United Elec., Radio, & Machine Workers, 207 F.2d 450 (3d Cir. 1953); United Elec., Radio & Machine Workers v. Miller Metal Products, 215 F.2d 221 (4th Cir. 1954). \textit{See Early Years}, supra note 5, at 416 (discussing the divided circuit court decisions regarding the exclusion of collective bargaining agreements).

\textsuperscript{500} \textit{Gilmer}, 500 U.S. at 35. This question was raised in several of the \textit{amicus} briefs but the Court saw no need to resolve that question because the agreement to arbitrate was contained in the registration agreement rather than an employment contract. \textit{Id.} at 25 n.2.


His employer moved to compel arbitration because of the agreement in the registration application. The district court denied this motion and based its decision on the *Gardner-Denver* case. The United States Court of Appeals for the Fourth Circuit reversed the ruling. Then, in a 7-2 vote, the Supreme Court held that statutory claims under the ADEA may be subject to the arbitration agreement, enforceable pursuant to the FAA. Since neither the text nor the legislative history of the ADEA explicitly precluded arbitration, the Court determined that Gilmer was bound by his agreement to arbitrate unless he could show an inherent conflict between arbitration and the ADEA's underlying purposes. The Court decided that the NYSE arbitration procedures were sufficient to protect Mr. Gilmer's rights. Contrary to the reasoning in *Gardner-Denver*, the Court held that the goals and the social policies of the ADEA could be achieved through private suits, EEOC actions, or arbitration. In a strongly-worded footnote, the Court expressly disavowed the mistrust of arbitration that it expressed in *Gardner-Denver*. "That 'mistrust of the arbitral process,' however, has been

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503. Peter T. Kilborn, *Age Bias Case Could Limit Right to Sue*, N.Y. TIMES, Mar. 25, 1991, at A1, A15. Mr. Gilmer said that the arbitration panels were composed of industry members and that he believed that they were biased in favor of industry employers. *Id.* Gilmer's statement about the composition of the panel was not entirely correct. Under the rules of the NYSE, a provision is made for both industry and non-industry arbitrators. 2 N.Y.S.E. Guide (CCH) ¶ 2607, at 4314 (Rule 607) (1991). The NYSE screens, compiles, and supplies the list of arbitrators to prospective clients. *Id.* at 2608. In cases involving claims that exceed $10,000, the Director of Arbitration is empowered to appoint an arbitration panel with no less than three arbitrators. *Id.* at 2607. At least a majority shall not be from the securities industry. *Id.* The industry is defined to include people currently associated with members, brokers, dealers, government securities brokers or dealers, municipal securities dealers, or registered investment advisors; people who have occupied such positions in the past five years or who have retired from such positions in the past ten years; attorneys, accountants, or other professionals who devoted 20% or more of their work to securities clients in the last two years; or people who are registered under the Commodity Exchange Act or a registered futures association. *Id.* The Director of Arbitration informs the parties of the names and employment histories of the arbitrators for the past ten years. *Id.* at 2608. Each party may request further information on the background of the arbitrators and it may issue one peremptory challenge and unlimited challenges for cause. *Id.* at 2609.

504. Kilborn, supra note 503, at A15.
505. See Gilmer, 500 U.S at 24.
506. *Id.*
507. *Id.* at 26.
508. *Id.*
509. *Id.*
510. See id. at 30-31.
511. *Id.* at 27.
undermined by our recent arbitration decisions." The Court added that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

The Court dismissed any reliance on the Gardner-Denver line of cases for three reasons. First, those cases decided whether the arbitration of claims that were based upon a collective bargaining agreement precluded the resolution of statutory claims by the courts. In Gilmer, the plaintiff had voluntarily signed an individual agreement to arbitrate his statutory claim and the focus was on whether such an agreement could be enforced. Second, sometimes unions will sacrifice an individual's claim in order to protect the interests of the entire bargaining unit. This tension between a union's obligations to its membership and its obligations to the individual did not exist in the Gilmer case. Finally, there was a difference in the statutory underpinnings: the Gardner-Denver line was decided under the NLRA, while Gilmer was decided under the FAA.

**A. The Impact of Gilmer**

Since 1991, the Gilmer case has provided a new paradigm depicting the relationship between arbitration and the federal courts. Under this model, the courts simply ignore the Gardner-Denver line of cases and order arbitration. Between 1991 and 1994, the Gilmer case was cited seventy-eight times. The overwhelming majority of the cases were lodged in the federal district courts as attempts to avoid arbitration and the defendants prevailed more than seventy percent of the time. Through these cases, the waiver of judicial remedies in favor of

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512. Id. (quoting Shearson/American Express v. McMahon, 482 U.S. 220, 231-32 (1987)).
514. Gilmer, 500 U.S. at 34-35.
515. Id. at 33.
516. Id. at 34-35.
517. Id. at 35.
518. Id.
521. Id.
arbitration has been extended to the Civil Rights Act of 1991, the Fair Labor Standards Act, ERISA, RICO, the Employee Polygraph Protection Act, and pendent state claims. More than half of the cases are outside the securities industry and roughly one-quarter involved employment agreements.

These cases have forced the lower courts to interpret the exclusory aspects of Section One of the FAA. Ninety-two percent of the time, they interpreted the employment contract exclusions narrowly. In essence they said that only workers in the transportation industry were excluded from the coverage of the FAA, thereby requiring arbitration of the vast majority of employee claims. What has developed is a new form of minimalism—one that has been extensively applied but its limits undefined. We call this "unbounded minimalism."
VII. ANALYSIS, PART I: MINIMALIST AND EXPANSIONIST PARADIGMS

The case law leads to two conclusions. First, the policies adopted by the federal courts toward the arbitration of disputes that involve employees have changed greatly over time. This has been amply demonstrated by the swings between the minimalist and expansionist paradigms reported throughout this article. The second conclusion pertains to matters of public policy. Today we have divergent, contradictory policies. One set applies to employees covered by collective bargaining agreements and the other set, to the rest of the work-force. For example, the courts willingly accept sexual harassment cases when submitted by employees covered by arbitration provisions in a collective bargaining agreement,\textsuperscript{534} while dismissing the harassment cases filed by non-union employees who have signed individual agreements to arbitrate disputes in the employment relationship.\textsuperscript{535} We will examine the divergence in policies in the following section.

A. The Minimalist Paradigm

According to the minimalist paradigm, the courts should enforce an arbitration award without looking into its merits as long as the arbitrator remains within the limits of contractual authority, the award arguably construes the contract, and it does not command an act which violates a statute or a clearly-defined precedent.\textsuperscript{536} The Supreme Court adopted this model in the Trilogy and, while it moved away from it in Gardner Denver, that model returned to influence \textit{W. R. Grace} and \textit{Misco}.\textsuperscript{537}

\textsuperscript{534} \textit{See} Shearer, \textit{supra} note 525, at 479.
\textsuperscript{535} \textit{Weisel, supra} note 501, at 20. In Hirras v. National R.R. Passenger Corp., 10 F.3d 1142 (5th Cir. 1994), the plaintiff was a railroad ticket taker who sued her employer for intentional infliction of emotional distress because of the employer's unresponsiveness to her complaints about a work environment oppressive to women. \textit{Id.} at 1145. The district court found that her suit was arbitrable and dismissed it. \textit{Id.} at 1149. A unanimous panel for the Fifth Circuit, citing \textit{Gilmer}, agreed. \textit{Id.} This case was heard under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1988). The arbitration provisions of the Act, also preempted her claim. \textit{Hirras}, 10 F.3d at 1145.
\textsuperscript{536} The definitions of the minimalist paradigm, the expansionist paradigm and unbounded minimalism all assume that the process itself satisfies common statutory requirements — that, \textit{inter alia}, there was an absence of fraud and corruption, there was arbitral disclosure of potential conflicts of interest, that the hearing was procedurally correct, and that the decision was without bias.
\textsuperscript{537} In \textit{Misco}, however, the Court specifically refused to address the minimalist position. \textit{Misco}, 484 U.S. at 45 n.12 (1987).
The principal justifications of the minimalist paradigm are preventing excessive judicial interference in collective bargaining; providing to the parties that for which they bargained; and preserving the elements that made arbitration attractive — informality, speed, cost, and finality. It is further argued that arbitrators can deal with external law adequately in public policy cases, as they have been doing in such areas as ERISA, bankruptcy, Social Security, disability cases, workers' compensation, police and firefighter heart and lung laws, and others.

But the Supreme Court has not fully embraced this standard in recent years. In Misco, the paperworkers argued that an award should not be set aside unless it commanded an illegal act. The Court specifically withheld its judgment on that position. In addition, there are still doubts about the ability of the arbitration process to protect the statutory rights of individuals and the public interest, and the reality taught by the case law is that the minimalist paradigm thus far has represented an unattainable ideal. The lower courts simply have not been willing to accept the limitations that a minimalist model places on their authority.

B. The Expansionist Paradigm

Under an expansionist model, the judiciary is more willing to review the merits of an arbitration award and more prone to set aside awards that it finds displeasing. Its proponents focus on the importance of protecting individual rights and the public interest; inadequacies of the arbitration forum; and arbitral excess. They argue that the principles that justify judicial deference do not apply when public policies or the public welfare are at stake. Courts cannot abdicate their role as final...
arbiter of statutory rights, for that is their area of responsibility as well as expertise.\textsuperscript{547} And when an arbitration award endangers the interests of individuals who were not party to the contract, there is a strong argument for heightened judicial review.\textsuperscript{548} Furthermore, the broader standard of review protects the parties against the arbitrator's "occasional appetite to gobble up the very agreement which had granted him his authority."\textsuperscript{549}

Critics of the expansionist model have assembled a "parade of horribles" to justify their position.\textsuperscript{550} They argue that this approach would open the floodgates of judicial review and destroy the finality of arbitration awards,\textsuperscript{551} but the defenders maintain that this parade has never marched.\textsuperscript{552} The record shows that very few arbitration awards are appealed to the courts for review and that the courts rarely set these awards aside.\textsuperscript{553} After examining all of the appeals of arbitration awards to the federal courts from 1960 to 1988, Feuille and LeRoy concluded that far less than one percent were appealed,\textsuperscript{554} and the courts upheld the arbitration award seventy three percent of the time.\textsuperscript{555}

However, from our perspective, the expansionist paradigm ignores Supreme Court decisions from the Trilogy through Misco. The Supreme Court has made it eminently clear that it does not want the lower courts

\begin{footnotes}
\footnotetext[547]{See Deanna J. Mouser, \textit{Analysis of the Public Policy Exception After Paperworkers v. Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator}, 12 \textit{Indus. Rel. L.J.} 89, 95 (1990).}
\footnotetext[548]{Fox & Gruhn, supra note 546, at 864.}
\footnotetext[551]{Fox & Gruhn, supra note 546, at 864.}
\footnotetext[553]{\textit{Id.} at 42. Between 1961 and 1965 six-tenths of one percent of arbitration awards were appealed. Between 1981 and 1985 it was about eight-tenths of one percent. \textit{Id.} at 42. The authors probably overestimate the percentage appealed for two reasons. First, they only considered published decisions. Inclusion of unpublished court decisions would reduce the percentage of appeals further. Second, they only considered awards issued under the auspices of the American Arbitration Association and the Federal Mediation and Conciliation Service. \textit{Id.} at 41. Data that was not available to them at the time of their study has shown that these two agencies only administer about 40\% of the arbitrations that take place in the United States. \textit{Labor Arbitration in America: The Profession and Practice} 95 (Michael F. Bognanno & Charles J. Coleman eds., 1992).}
\footnotetext[554]{The district courts confirmed the arbitration award in its entirety 73\% of the time (698 out of 962 times) and circuit courts did so 71\% of the time (274 times in 388 cases). Feuille & LeRoy, supra note 553, at 44. Decisions other than confirmation or vacatur have been eliminated. Feuille & LeRoy, supra note 553, at 44.}
\end{footnotes}
interpreting collective bargaining agreements, and that it craves a narrow standard of review. The expansionist model not only conflicts with public policies that call for arbitration as a means of settling disputes, but it injects the courts into the collective bargaining process. It violates the bargain that the parties made when the union relinquished its right to strike in return for the right to take grievances to final and binding arbitration. This approach also leads to double punishment in the case of criminal law violations—employees may lose their jobs as well as their court case. Finally, the expansionist approach limits the ability of the arbitrator to apply mitigating factors in determining just cause and it creates a dilemma concerning how to protect precious individual, organizational, and societal rights without destroying the arbitration system.

C. A Sampler of Alternative Approaches to Judicial Review

Due to the fact that so much controversy has surrounded the minimalist and the expansionist paradigms, a number of writers have made recommendations on the subject of judicial review of labor arbitration awards. Some propose a formula of words. Clyde W. Summers, for example, endorses the position that “the court[s] should vacate an award only if no arbitrator or group of arbitrators could conceivably have made such a ruling.” "The arbitrator was chosen to be a judge. That judge has spoken. There it ends." Focusing on the essence standard, Thomas G.S. Christensen argues that while the standard is imprecise, it "clearly adjures the courts to reverse arbitral judgment only when it poses an adjudication that the parties have prohibited."

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557. Fox & Gruhn, supra note 546, at 864 n.6.
559. Summers, supra note 558, at 1046.
560. Safeway Stores v. American Bakery & Confectionery Workers Int'l Union Local 111, 390 F.2d 79, 84 (5th Cir. 1968).
Perhaps the standard of review announced by the Supreme Court as applicable to the determinations of arbitral review boards under the Railway Labor Act that they are reversible only if wholly baseless and completely without reason is too 'giant' a step to track under Section 301. A somewhat more acceptable bench mark may well be that adopted by the Third Circuit in Ludwig Honold - that an award be vacated only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop.\textsuperscript{562}

Amanda J. Berlowe proposes to limit the scope of judicial review.\textsuperscript{563} She is concerned with protecting the finality of labor arbitration awards while "vindicating clear expressions of public policy regarding acceptable workplace behavior."\textsuperscript{564} She proposes that the courts restrict the application of the public policy exception in employee reinstatement disputes to those instances that are covered in statutes and regulations "clearly directed at deterring specific forms of behavior in the workplace."\textsuperscript{565} She adds that "[s]tatutes and regulations that expressly regulate clearly defined behaviors in the workplace are the only forms of positive law that embody a 'well defined and dominant' expression of public interest with regard to reinstatement disputes."\textsuperscript{566} The key words are \textit{specific} and \textit{workplace}. For example, the criminal statutes usually would not qualify because they lack a clear connection to the workplace;\textsuperscript{567} nor would such general statements about the desirability of reliability and efficiency as expressed in the Postal Reorganization Act.\textsuperscript{568}

John Dunsford argues that the Supreme Court adopted a broad definition of public policy in \textit{W. R. Grace}.\textsuperscript{569} Because the Court

\textsuperscript{562} Id.
\textsuperscript{564} Id. at 798.
\textsuperscript{565} Id.
\textsuperscript{566} Id. at 799.
\textsuperscript{567} Id.
\textsuperscript{568} Id. at 801.
\textsuperscript{569} John E. Dunsford, \textit{The Judicial Doctrine of Public Policy: Misco Reviewed}, 4 LAB. LAW. 669, 674-75 (1988). Public policy has been defined as
\textit{[C]ommunity common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the}
rejected the invitation to equate public policy with simple illegality, he defines the public policy exception with a test.\textsuperscript{570} He proposes that “the Court might announce a rule that an arbitrator’s award should not be set aside as a violation of public policy unless [it] can declare that any agreement between a company and union embodying the same result . . . would not be enforceable if sued on by either party.”\textsuperscript{571} Thus, in \textit{Northwest Airlines}, the court could only set aside the award if there was a well defined and dominant public policy expressed in law or legal precedent prohibiting the reemployment of pilots who are reformed alcoholics.\textsuperscript{572}

Timothy J. Heinsz offers a methodology. He has coined a set of “devolution principles” for cases where public policy rights and contract issues are intertwined and the parties agree to let the arbitrator decide the public policy issue.\textsuperscript{573} He proposes that deference be given to an arbitrator’s award “if the parties inform and jointly submit the public policy issue to the arbitrator in determining the contractual dispute, if the forum of arbitration is adequate to handle the issue, and if the arbitrator considers the issue and applies a proper legal standard.”\textsuperscript{574}

D. Recommendations

We believe that any solution to the problem of judicial review has to be based upon an analysis of many factors, particularly the historical and institutional context within which the courts and the arbitrators operate, the participants in the process, the encompassing law, and the arbitration decisions themselves. We contend that an analysis of these characteristics and their relationships leads to the conclusion that labor arbitration awards should have a high degree of immunity from judicial review. The central questions concern the precise degree of immunity

\begin{itemize}
\item \textsuperscript{570} Dunsford, \textit{supra} note 569, at 681.
\item \textsuperscript{571} Dunsford, \textit{supra} note 569, at 681.
\item \textsuperscript{572} Dunsford, \textit{supra} note 569, at 681-82.
\item \textsuperscript{574} Id.
\end{itemize}
and how it is to be secured.575

*The Historical and Institutional Context:*—The most significant contextual considerations tie into the maturity of the field of labor arbitration and the surrounding institution of collective bargaining. Labor arbitration has been the dominant form of resolving disputes over employee grievances for some sixty years.576 In the public sector it also plays a significant role in resolving contract disputes.577 As the field has matured, a professional society (the National Academy of Arbitrators) has flourished, a code of ethics has developed,578 programs have become available at universities and professional institutions,579 and texts and hornbooks have appeared as has an extensive bibliography.580 Furthermore, the agreements that the arbitrators construe have been evolving for several decades and provide a great deal of specific guidance. The contract usually spells out the terms and conditions of employment in great detail, along with the requirements of just cause, and the boundaries of arbitral discretion.

*The Participants:*—The advocates that typically appear in arbitration have reached a high level of sophistication. The parties should know what they are getting when they select an arbitrator because information is available through the appointing agencies, from colleagues, from the arbitrator's published decisions, and from tracking services.581 Furthermore, a method by which an arbitrator's credentials can be ascertained may aid in the selection process. Admission to the National Academy of Arbitrators requires demonstration of long term acceptability to a wide variety of parties.582

The arbitrators themselves are usually well-qualified, decision-makers. The typical labor arbitrator has advanced academic degrees — normally a J.D. or a Ph. D., is over fifty years of age, has more than
twenty years of experience in labor arbitration on top of a previous
career in the labor-management arena, and has decided several hundred
cases. Their neutrality is encouraged by the joint selection pro-
cess.

The Encompassing Law.—This article has shown that the law which
surrounds labor arbitration is generally clear, well-established and
comprehensive. The most significant remaining questions pertain to the
"essence test" and the finality of a labor arbitrator’s award in cases
that involve public policy.

The Decisions Themselves.—One of the most compelling features
of labor arbitration is its predictability. Although experienced
advocates may be surprised by a single decision, they can usually predict
the outcome of most cases in advance. More importantly, experi-
enced advocates understand the process and know what will happen if
they lose. They know, for example, that the proceedings will be
informal; that the arbitrator will probably give them much more
freedom than would be given in a court of law; that contractual time
limits will be rigidly enforced; that arbitrators will apply less
stringent rules of evidence than would be applied by a court; that the
burden of proof will seldom reach the criminal standard and that if
a discharge is found to be meritless, the grievant will be reinstated with
back pay (less offsets that they also understand).

Conclusions.—The interaction of all of these variables — the
context, participants, the decision, and the law — suggests that the
Supreme Court was wise in establishing a policy of deference to the

583. Bognanno & Coleman, supra note 554, at 39, 45, 47, 54, 68-69. The data also show that
arbitrators are overwhelmingly white and male, which leaves them vulnerable to criticism in cases
involving gender-based discrimination or harassment. Bognanno & Coleman, supra note 554, at 44-
46.

584. For example, in labor cases the American Arbitration Association’s process calls for the
submission of nine names of arbitrators to the parties who have filed for arbitration along with
biographical sketches. If the parties cannot reach agreement from that list, they are entitled to a
second list of nine and a third list of three.

585. See supra text accompanying note 67.


587. Id. at 295.


589. See id.

590. See id. at 193.

591. See id. at 252-53.

592. See id. at 277-79.

593. See id. at 648.
labor arbitration process. This analysis shows that labor arbitration is a mature institution. The field is well defined and the law is relatively clear. The underlying collective bargaining agreements are well developed and comprehensive. The parties who negotiate these agreements have chosen arbitration as the best available way to provide a clear and final resolution to problems that have developed under their agreement. Using St. Antoine's metaphor: "[t]he arbitrator's award is not so much an interpretation of the collective bargaining agreement as an organic extension, a fulfillment, a flowering of the seed it planted." We argue that as long as the award stays within the boundaries specified by the agreement, the arbitrator has fulfilled the commission of the parties and the award deserves the support of the courts.

And what are those boundaries?—The parties have asked the arbitrator to dispense a form of justice that is bounded by the contract as it is informed by the practices of the industry and the shop in consideration of relevant mitigating circumstances. This is what they bargained for and this is what they should get. The courts should enforce any award based upon these factors unless it (1) conflicts with express terms of the agreement; (2) imposes additional requirements not expressly provided in the agreement; or (3) is not rationally supported or derived from the agreement. If these conditions are met, the award will have remained within the boundaries.

Some aspect of the complex, overlapping, contradictory melange of employment laws is sure to enter into many arbitrations. Sometimes it is impossible to ignore external law because the parties ask the arbitrator to rule on it, the contract tracks it, or a potential violation is at the core of the case. The arbitrator is often faced with the dilemma of ignoring the law and facing reversal for doing so or basing the decision upon the law and, similarly, facing reversal for doing so.

However, the arbitrator's job is the interpretation of the labor

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598. See id.
599. A.C. Knowlton, Address on sexual harassment at the Education Meetings of the NATIONAL ACADEMY OF ARBITRATORS, in Boston (Fall 1994) [hereinafter Knowlton].
agreement: "It's a contract, stupid," and the arbitrator's task is to interpret it. Arbitrators are not to determine whether a grievant's statutory rights have been violated. They cannot ignore the law, but they must ultimately determine whether there is just cause under the contract to take action against the grievant. If a grievant claims that her discharge resulted from gender discrimination, for example, her first entitlement is to a decision made on the basis of the words of the contract, the practices in the industry and the shop, and the consideration of mitigating circumstances. The grievant is also entitled to a process which we think should be drawn from the deferral policies of the NLRB. These policies begin with the assumption, now ratified in Gilmer, that the arbitration forum provides an adequate basis for the resolution of statutory issues. The core requirements for deferral to arbitration when statutory rights are involved would be as follows:

(1) That there be fair and regular proceedings. Determination of a fair and regular proceeding would focus on the selection process and the hearing. The key questions in the selection process are whether the parties were presented with a choice among people with the characteristics of neutrality and whether they were given sufficient information about the potential arbitrators. Questions about the fairness of the hearing would usually be answered in the arbitrator's award.

(2) That there be presentation of facts. The facts relating to the public policy issue must be presented to the arbitrator and the issue considered and decided by the arbitrator.

(3) That the arbitrator's decision be consistent with public policy. The final test is whether the award is repugnant to the policy. An arbitrator's decision should receive deference unless it is susceptible to an interpretation inconsistent with the policy that lies at the crux of the case. The opinion, furthermore, should detail the relationship between the contractual and the policy issues to show that they are

600. Summers, supra note 558, at 1042.
601. Summers, supra note 558, at 1041-42.
603. See Summers, supra note 558, at 1049.
604. See supra notes 487-533 and accompanying text.
605. See ELKOURI & ELKOURI, supra note 588, at 87-89. In employment arbitration cases, another question would be "who made the selection decision?" In the case of the NYSE, while the participants have the right to challenge candidates for arbitration, the Director of Arbitration makes the decision. 2 N.Y.S.E. Guide (CCH) ¶ 2608, at 4315 (Rule 608) (1991).
606. See Gould, supra note 444, at 490-91.
607. See Gould, supra note 444, at 489.
parallel and that the award does not undermine public policy.\textsuperscript{608}

(4) The arbitrator's role as finder of fact or as an expert on the contract and the law of the shop should not be challenged. The questions that the court should address should be restricted to the public policy. If the court concludes that the arbitrator has not adequately considered the public policy issue, perhaps the remedy should be to remand the case to the arbitrator for further consideration of this issue.\textsuperscript{609}

VIII. ANALYSIS, PART II: UNBOUNDED MINIMALISM

The \textit{Gilmer} decision may have resulted from a pragmatic desire to control the burgeoning dockets of the U.S. courts. When \textit{Gilmer} was decided in 1991 there were 33,428 civil cases pending in the U.S. Court of Appeals and 226,439 cases pending in the U.S. district courts.\textsuperscript{610} The rise in the number of employment discrimination suits has been particularly severe. The number of discrimination cases increased by 2,166\% between 1970 and 1989 as compared to 125\% for all other litigation.\textsuperscript{611} Whatever the basis for the decision, however, \textit{Gilmer} has been embraced by the lower courts and there is a strong possibility that it may have ended the influence of the \textit{Gardner-Denver} line of cases.

Many, however, are opposed to the decision, particularly attorneys who represent the plaintiffs in employment disputes.\textsuperscript{612} The outcry from the plaintiff's bar has led to class action suits filed against the American Arbitration Association (for unfairly weighting its arbitration panels in favor of employers) and to movements for legislation in both houses of Congress.\textsuperscript{613}

Civil Rights lawyers say that companies that require binding arbitration for discrimination complaints are thwarting the will of Congress, which

\textsuperscript{608} See Gould, \textit{supra} note 444, at 492. Among other things these recommendations were built around the proviso in the \textit{Gardner-Denver} decision which said:
\[\text{where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.}\]
\textit{Gardner-Denver}, 415 U.S. at 60 n.21.

\textsuperscript{609} See Gould, \textit{supra} note 444, at 491-92.

\textsuperscript{610} 1992 \textsc{Director of the Admin. of the U.S. Cts. Ann. Rep.} 130.


\textsuperscript{612} Telephone Interview with Cliff Palevski, of McGuinn, Hillsman, & Palevski, who is associated with the National Employment Lawyers Association in San Francisco (Aug.:1995).

\textsuperscript{613} Olson v. American Arbitration Ass'n, 876 F. Supp 850 (N.D. Tex. 1995).
in 1991 voted to allow jury trials and larger damage awards in cases involving bias on the basis of sex, religion or disability. Before the passage of the Civil Rights Act of 1991, cases were heard by Federal judges, and awards were limited to back pay and lawyer fees.\footnote{614}

However, the \textit{Gilmer} decision probably represents the leading edge of a broader movement to promote non-judicial dispute settlement. The Administrative Dispute Resolution Act of 1990\footnote{615} permits agencies to use dispute resolution procedures if the parties agree.\footnote{616} The Civil Rights Act of 1991\footnote{617} and the Americans With Disabilities Act (1990)\footnote{618} also encourage Alternative Dispute Resolution ("ADR"). Encouraged by its backlog of almost 100,000 complaints,\footnote{619} the EEOC has sponsored pilot programs in Houston, Philadelphia, New Orleans, and Washington.\footnote{620} The Department of Labor has a regional ADR approach in place for civil and criminal cases and New York State amended its Human Rights Law in 1991 to permit voluntary arbitration of complaints.\footnote{621} By 1994, such large corporations as I.T.T., Hughes, Rockwell International, National Case Register, Blue Cross/Blue Shield of Michigan, Brown and Root, and Travelers had adopted policies requiring the arbitration of discrimination claims.\footnote{622} Other companies such as General Mills, M.C.I., and Conoco were considering putting similar policies into effect.\footnote{623} In the face of these developments, is the field of employment arbitration ready for this expansion? Using the analytical scheme introduced above, certain topics must be considered.

\textit{The Historical and Institutional Context.}—While labor arbitration has a well documented history and there is voluminous literature on the topic, the arbitration of other employment disputes has not been a significant part of the practice of labor arbitration\footnote{624} and the literature

\footnote{614. Steven A. Holmes, \textit{Some Employees Lose Right to Sue for Bias at Work}, \textit{N.Y. TIMES}, Mar. 18, 1994, at A1.}
\footnote{616. Id. § 572(e).}
\footnote{618. 42 U.S.C. §§ 12101-12213 (Supp. V 1994).}
\footnote{621. Walter J. Gershenfeld, \textit{New Roles For Labor Arbitrators: Will Arbitrators' Work Really Be Different?}, \textit{47th Annual Meeting of the NATIONAL ACADEMY OF ARBITRATORS} 275, 279 (1994).}
\footnote{622. Holmes, \textit{supra} note 614, at A1.}
\footnote{623. Holmes, \textit{supra} note 614, at A1.}
\footnote{624. Bognanno & Coleman, \textit{supra} note 554, at 92. Non-union arbitration cases amounted to roughly two and one half percent of the cases handled by U.S. arbitrators in 1986. Bognanno &
is comparatively slim. When the Supreme Court decided *Gilmer*, it was dealing with an institution far less developed than labor arbitration.

**The Participants.**—The *Gilmer* decision has probably opened the arbitration of employment disputes to a new cadre of advocates and arbitrators. In the field of labor arbitration there is a well established process of joint decision-making that enhances the probability that the grievant’s case will be decided by a qualified arbitrator. However, the selection processes in other fields vary. Although more firms are apparently using arbitrators from the employment panels of such traditionally neutral sources as the American Arbitration Association or the Judicial Arbitration and Mediation Services, the NYSE, however, establishes and maintains its own list of arbitrators. A report of the General Accounting Office was sharply critical of securities arbitration in employment discrimination cases. Particularly harsh criticism has been leveled at the almost all male composition of the arbitration panel in this industry.

**The Encompassing Law.**—The *Gilmer* decision has raised many fundamental questions that are beyond the scope of this article. Pragmatically, however, the decision has failed to answer a number of the following significant operational questions.

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Coleman, *supra* note 554, at 92.

625. Coleman & Haynes, *supra* note 538, at 35-227. There are 1,336 citations on arbitration of employment issues. Only 41 of these (three percent) pertain to non-union employees and wrongful discharge. Coleman & Haynes, *supra* note 538, at 35-227.


630. A number of scholars have asserted that there are strong arguments that the FAA was never intended to apply to employment situations and that the *Gilmer* decision does not reflect the original intent of Congress. They argue that the original law was narrowly designed to help resolve commercial disputes quickly, inexpensively, and equitably. They further argue that employment issues were broadly excluded from the coverage of the Act. See generally Michael J. Gallagher, *Statutory Rights and Predispute Agreements to Arbitrate in Contracts of Employment*, 66 ST JOHN'S L. REV. 1067 (1992); Carol-Tiegue J. Thomas, Comment, *Gilmer v. Interstate* v. Johnson Lane Corporation: *When is an Employee's Right to a Judicial Forum Precluded by an Arbitration Agreement*, 27 NEW ENG. L. REV. 791 (1993); Maria C. Whitaker, *Gilmer v. Interstate: Liberal Policy Favoring Arbitration Trammels Policy Against Employment Discrimination*, 56 ALB. L. REV. 273 (1992).
A. The Collective Bargaining Question

There is no question that the reach of the FAA is extensive. Still, the FAA excludes most contracts of employment and the Gilmer Court failed to determine the boundaries of this exclusion because the arbitration clause being enforced was part of a securities registration agreement, rather than an employment contract. The modern holdings of the federal courts indicate that collective bargaining agreements are contracts of employment, and therefore, are excluded from the coverage of the FAA. This position was urged long ago in Justice Frankfurter's dissent in Lincoln Mills. By failing to define the boundaries of the exclusionary clause in the FAA, the Gilmer Court has reopened this question.

Gilmer has already been extended to at least one collective bargaining case. In Austin v. Owens-Brockway Glass Container, Inc., the district court refused to hear a claim of discrimination under the ADA because the claimant had not exhausted her remedies under the contractual grievance procedure. The claimant lost her job after she had "become disabled as a result of an on-the-job injury." Her request for a light duty assignment was denied and the company claimed that her position had been eliminated. When the only other employee in that position, a male, was later offered reassignment to another job, she filed a sex discrimination suit under Title VII of the

632. Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20 (1991). In his dissent, Justice Stevens (joined by Justice Marshall) indicated that he was displeased with the way that the decision skirted "the antecedent question [of] whether the coverage of the Act even extends to arbitration clauses contained in employment contracts" Id. at 36. He suggested that the decision conflicted with "the Congressional purpose animating the ADEA." Id. at 41.
633. Id. at 23-24.
635. Lincoln Mills v. Textile Workers Union, 353 U.S. 448 (1957). Justice Frankfurter argued unsuccessfully that the silent treatment given the FAA in Lincoln Mills implied that it was not available for use in collective bargaining agreements and he urged that the rejection of the FAA be made explicit. Id. at 466.
637. Id. at 1107.
638. Id. at 1104.
639. Id.
Civil Rights Act and a disability discrimination action under ADA. Despite the fact that the plaintiff was covered by a collective bargaining agreement, the Court cited Gilmer as evidence that ADA claims must first be submitted to arbitration. The post-Gilmer status of agreements to arbitrate under collective bargaining agreements needs clarification.

B. Does Gilmer Effectively Terminate the Gardner-Denver Line?

Gilmer created a policy of pre-arbitration deferral — it ordered the enforcement of an agreement to arbitrate in much the way the NLRB orders arbitration under its Collyer doctrine. On a before-the-fact basis, Gilmer held that arbitration can protect a person’s statutory rights. But, does submission to arbitration preclude an after-the-fact review as to whether those rights have been adequately protected?

The Gardner-Denver decision called attention to the “distinctly separate nature of these contractual and statutory rights” and that “no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.” When the Gilmer Court concluded that the goals and the social policies of the ADEA could be achieved through private suits, EEOC actions, or arbitration, it contradicted this notion. Let us suppose that a case has been arbitrated under a Gilmer order and the grievant is not satisfied with the result. Does the grievant’s right to court review terminate because of the Gilmer doctrine or does that grievant retain the right to a day in court on the claim that statutory rights were not adequately protected in the arbitration process? Whether Gilmer established a policy of post-arbitration deferral as well as pre-arbitration deferral remains open.

640. Id.
641. Id. at 1107. The decision did not mention Gardner-Denver or any of the cases decided under that line.
642. Citing Gilmer, the court denied the grievant access to statutory remedies and then denied the grievance because the proper channel of mandatory arbitration, under the collective bargaining agreement, was not followed and because the cause of the grievance stemmed from an event which occurred after she had become disabled and was no longer in the employ of the company. Austin, 844 F. Supp. at 1106.
643. Gilmer, 500 U.S. at 27.
644. See supra notes 267-86 and accompanying text.
647. Id.
C. What About the Arbitrator's Remedial Powers?

The traditional arbitration award in a discharge case under a collective bargaining agreement is limited to a make-whole remedy.649 However, punitive damages can be awarded in wrongful discharge actions raised in the courts,650 in cases brought to the courts under the ADA651 and under the 1991 amendments to Title VII of the Civil Rights Act.652 Is the arbitrator limited to the traditional remedy in these cases? The *Gilmer* decision noted that "[a]rbitrators do have the power to fashion equitable relief,"653 and that the rules of the NYSE provided for "damages and/or other relief."654 Does this mean that arbitrators have the power to award punitive damages in *Gilmer* type cases? And, if so, might they have the power to award similar damages in public policy cases raised under collective bargaining agreements or even among garden variety discharge cases?

IX. SUMMARY AND CONCLUSIONS

Section 173(d) of the Labor Management Relations Act655 provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."656 For almost half-a-century, the public policy of the United States has favored arbitration as the mechanism for settling disputes between employers and their organized employees.657 This article has reviewed the resultant body of case law, illustrating that three different paradigms of the arbitration/judiciary relationship have developed during this time.658

The first to develop was a *minimalist* model. Under this mode the courts would routinely enforce the agreement to arbitrate and uphold the

650. *See*, e.g., Woodson v. AMP Leisorland Centers, Inc., 842 F.2d 699 (3d Cir. 1988).
651. *See*, e.g., EEOC v. AIC See. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995).
652. *See*, e.g., Hughes v. Matthews, 986 F.2d 1168, 1169 (8th Cir. 1992).
653. *Gilmer*, 500 U.S. at 32.
654. *Id*.
658. These different paradigms include what we have termed the Minimalist Model, the Expansionist Model, and the Unbounded Minimalist Model.
resultant awards. However, it was not long before an expansionist paradigm began to appear. Under the expansionist model, courts periodically reviewed arbitration awards and set aside those that it found flawed. Furthermore, in arbitration cases that involved public policies, the courts guaranteed the parties a right to a trial *de novo* if they were displeased with the results of an arbitration decision. In recent years, we have seen the development of a narrow version of the expansionist model of labor arbitration in the Supreme Court, a more aggressive expansionist approach in the lower courts, and the emergence of a third model, which we have called *unbounded minimalism*, in non-union employment cases. Under this doctrine, the courts have routinely enforced agreements to arbitrate disputes that have been signed by individual employees, even when statutory rights are involved. We close with three thoughts.

_Empirical Research Needed._—The first thought pertains to the need for empirical research on the fruits of the *Gilmer* decision. The Supreme Court formulated a significant new public policy in that decision. The correctness of that policy, however, depends to a large degree on the results in the arbitration process. We need more information on the processes employed to select arbitrators in “Gilmerized” cases and the characteristics of the arbitrators getting the cases. Was Mr. Gilmer right when he questioned the neutrality of the process? Empirical research is also needed on the decisions themselves. What are the plaintiffs’ “batting averages” and when they win, what kinds of awards do they receive? In particular, do these awards follow the “make whole” remedy of labor arbitration or the “punitive damages” model in many court decisions.

_Deference to Arbitration Urged in Labor Cases._—In Section VII of this article we indicated our support for the minimalist paradigm. We argued that the courts should enforce arbitration awards as long as they do not conflict with express terms of the agreement, impose requirements not contained within the agreement, or were not rationally supported by the agreement. In matters of public policy, we urged

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659. See supra notes 36-51 and accompanying text discussing the Trilogy.
660. See supra notes 161-76 and accompanying text discussing the origins of the enforcement controversy in the judicial review of labor arbitration awards.
661. See Gould, supra note 444, at 490-92; see also Elkouri & Elkouri, supra note 588, at 4.
662. See supra notes 486-533 and accompanying text discussing unbounded minimalism.
663. See supra part VII.
664. See supra part VII.
a broad application of NLRB post-arbitration deferral policies.\textsuperscript{665} We think that the support given by the Supreme Court to arbitration in Gilmer upholds the concept of deference. But we urge deference mostly because the record suggests that the problem of judicial review of labor arbitration awards is important and that it is growing.

Although the number of appeals from arbitration awards is small,\textsuperscript{666} the absolute number of appeals is large and the issues are substantial.\textsuperscript{567} Most appeals involve job loss,\textsuperscript{668} rightly described as the "extreme industrial penalty."\textsuperscript{669} Between 1960 and 1988, over 1,000 labor arbitration awards were appealed to the federal district courts and 438 to the circuit courts of appeal.\textsuperscript{670} The number of appeals rose from about thirty-three cases per year in the 1970s to seventy-one per year between 1981 and 1988.\textsuperscript{671} This problem is exacerbated by delay. Even if the employee wins, it takes almost sixteen months for a district court decision,\textsuperscript{672} thirteen more months to decide cases appealed to the circuits,\textsuperscript{673} and another fourteen months for resolution by the Supreme Court.\textsuperscript{674} Delay brings with it the kind of anger and frustration that sours a labor-management relationship.

Furthermore, when a court makes it known that it may undertake a full-scale review of an arbitration award, it undermines not only the award, but the bargaining process as a whole.\textsuperscript{675} The arbitration award is what the parties bargained for and that is what they should get. If they get an award that they do not like, they have their own ways of protecting themselves. They can refuse to have arbitrators who have given unpalatable decisions from selection lists, and, while it can be costly to do so, they can renegotiate undesirable arbitration awards when

\textsuperscript{665} See supra part VII.
\textsuperscript{666} Feuille & LeRoy, supra note 553, at 38.
\textsuperscript{667} Feuille & LeRoy, supra note 553, at 42.
\textsuperscript{668} In the 24 cases on arbitrator error and public policy featured in this article beginning with American Thread and ending with Stroehmann, 19 involved employee discharge and two were prompted by layoff.
\textsuperscript{669} ELKOIM & ELKOIM, supra note 588, at 661.
\textsuperscript{670} Feuille & LeRoy, supra note 553, at 43-44.
\textsuperscript{671} Feuille & LeRoy, supra note 553, at 41 (data from the 1960s was not reported here because the study reported only FMCS cases during those years. After 1970 the data base included both FMCS and AAA cases).
\textsuperscript{673} Id.
\textsuperscript{674} Id.
\textsuperscript{675} See Joan Parker, supra note 551, at 708-11.
the contract is renewed.

Needed: A Clarification of Gilmer.—In Section VIII we indicated our belief that, while the Gilmer decision may have reached the correct result, it is a decision in need of clarification. The Gilmer decision has become the law of the land but it should be clarified in ways that (1) encourage the creation of mechanisms to assure that a qualified stream of neutral arbitrators is made available for these cases and that the selection of the arbitrator remains within the control of the parties; (2) the reach of the FAA be appropriately defined, including its application or non-application in cases involving collective bargaining agreements; (3) the plaintiff’s right to appeal an arbitration decision is defined; and (4) the arbitrator’s remedial powers are defined such that the process is not reduced to an inexpensive way of protecting organizations from litigation.

We feel that the playing field today is not level. Procedural safeguards should be built into the employment arbitration area to improve the chances of selecting neutral arbitrators from a neutral pool and to promote a neutral process. We suspect the neutrality of such industry-sponsored panels such as that found the NYSE. We also think that the playing field would be made more level if joint funding of the arbitration process became a term or condition of employment in those companies that adopt employment arbitration. One of the difficulties in this form of arbitration comes from the fact that the employer is usually better able to afford the process.676 The problem is not solved when the employer bears the entire cost because arbitrators have repeatedly expressed discomfort with employer-supported systems. Employers who decide to establish arbitration systems might consider giving all of their employees a small raise — perhaps one or two dollars a week — which would then be deducted from their paycheck, matched by the employer, and placed in a fund to pay for the costs of subsequent arbitration.

676. See supra part VIII.