2000

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Recommended Citation

Feller, David E. (2000) "Putting Gilmer Where it Belongs: The FAA's Labor Exemption," *Hofstra Labor and Employment Law Journal*: Vol. 18: Iss. 1, Article 4.

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PUTTING *GILMER* WHERE IT BELONGS: THE FAA'S LABOR EXEMPTION

David E. Feller*

I. INTRODUCTION

Since the 1991 decision of the Supreme Court in *Gilmer v. Interstate/Johnson-Lane Corp.*¹ it has become common for employers to require, as a condition of employment, that their employees agree to arbitrate rather than sue on claims of violation of federal and state anti-discrimination statutes. The number of employees who so agree is impossible to know. Estimates are that approximately 8 to 10% of the United States workforce is covered by such agreements.² The vast majority of these agreements, estimated to be 85%, have been instituted since the *Gilmer* decision.³ Enforcement of such provisions has been regarded by almost all students of industrial relations as undesirable and unfair.⁴ Legislation to prevent it is supported by labor civil rights

* John H. Boalt Professor of Law Emeritus, University of California School of Law at Berkeley, A.B. Harvard College, 1938, LL.B 1941 Harvard Law School. The editors of the Hofstra Labor & Employment Law Journal have updated and augmented the footnotes. Professor Feller has filed a brief *amicus curiae* for the National Academy of Arbitrators in the Supreme Court in support of the respondent in the *Circuit City Stores* case described in the text. The views expressed in the article, however, do not represent the views of the Academy.

1. 500 U.S. 20 (1991).

2. See Katherine V. W. Stone, *Employment Arbitration under the Federal Arbitration Act*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 27, 27 (Adrienne E. Eaton & Jeffrey H. Keefe eds. 1999) [hereinafter Stone, *Employment Arbitration*] (reporting various surveys). The GAO reported in 1995 that 9.9 percent of employers provided for arbitration and that roughly half of them required it as a condition of employment. See United States General Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution* 7 (GAO/HEHS-95-150, July 5, 1995). In 1997 it raised the percent of employers providing for arbitration to 19. See United States General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace* 2 (GAO/GGD-97-157, Aug. 12, 1997).

3. See Stone, *Employment Arbitration*, *supra* note 2, at 27, 57 n.6.

4. See, e.g., Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment*

organizations.⁵ The EEOC,⁶ the Dunlop Commission⁷ and the National Academy of Arbitrators⁸ have opposed it. At least some of the lower courts have struggled to avoid or limit such enforcement. The Ninth Circuit has concluded that *Gilmer* does not apply to claims of violation of the 1964 Civil Rights Act as amended in 1991.⁹ Other courts, like the D.C. and the Tenth Circuits, have held that such provisions are unenforceable if the complainant must share in the payment of the arbitrator's fees.¹⁰ And still other courts have found that such provisions are contracts of adhesion which should not be enforced if any element of unfairness can be found or the plaintiff was not given adequate notice of the terms of the arbitration agreement.¹¹ Where the defense against suit is

Rights: The Yellow Dog Contract of the 1990s, 73 DENV. U. L. REV. 1017, 1019-20 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 38 (1997); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Arnold M. Zack, *Agreements to Arbitrate and the Waiver of Rights under Employment Law*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS 67, 67 (Adrienne E. Eaton & Jeffrey H. Keefe eds. 1999). But see Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1344 (1997).

5. Senator Feingold, a Democrat from Wisconsin, sponsored S.121 which would amend the FAA to specifically exempt from the FAA claims of unlawful discrimination based on race, color, religion, sex, age or disability. See Susan J. McGolrick, *Senate Subcommittee Hears Testimony on Arbitration of Employment Bias Disputes*, 42 Daily Lab. Rep. (BNA), at A-10 (Mar. 2, 2000). At hearings before the Judiciary Subcommittee on Administrative Oversight and the Courts it was supported by 13 civil rights, labor, women's rights and employee rights organizations. See *id.*

6. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, Notice 915.002, § 603 (EEOC Compliance Manual 1997). For a full discussion of the EEOC position see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 2-3 (1999).

7. See COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 26-27 (Dec. 1994).

8. See *Arbitration 1997: The Next Fifty Years*, PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING, NAT'L ACAD. OF ARBITRATORS 312 (1998).

9. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1185 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998). *Contra* *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999).

10. See *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997); see also *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (U.S. Apr. 3, 2000) (No. 99-1235).

11. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-40 (4th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 21 (1st Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129, 1131 (7th Cir. 1997); *Diaz v. Arapahoe (Burt) Ford, Inc.*, 80 Fair Empl. Prac. Cas. (BNA) 1856, 1856 (D. Col. 1999); *Gonzalez v. Hughes Aircraft Employees Fed. Credit Union*, 83 Cal. Rptr. 2d 763, 765-66 (Ct. App. 1999); *Ramirez v. Circuit City Stores, Inc.*, 5 Wages-Hours Cas.2d (BNA) 1360, 1362-64 (Cal. Ct. App. 1999). Other cases

based on the arbitration provisions of a collective bargaining agreement the Supreme Court itself has reversed the usual presumption of arbitrability.¹² And in the very industry in which the *Gilmer* case arose, the requirement that every employee enter into an arbitration agreement as a condition of working as a broker has been abandoned.¹³

These are all symptoms of dissatisfaction with the wide application of the principle announced in *Gilmer*. But, rather than nibbling at the fringes, a remedy is readily at hand, a remedy consistent with the *Gilmer* decision, but which will confine the application of that case to the kind of individual employee that the Court apparently had in mind when it decided the case. That remedy is the exemption contained in section 1 of the Federal Arbitration Act when properly construed.¹⁴

The enforceability of agreements requiring arbitration of, and waiving the right to sue on, claims of violation of federal and state anti-discrimination statutes rests on the Federal Arbitration Act. That Act, in section 2, makes irrevocable and enforceable “[a] written provision in . . . a contract evidencing a transaction involving commerce. . . .”¹⁵ But it also contains an exemption in section 1: “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹⁶ Despite the exemption, the Court in *Gilmer* held that the FAA required a broker who had agreed to arbitrate disputes with his employer to arbitrate his claim of violation of the Age Discrimination in Employment Act.¹⁷ The Court said that it would not decide but “leave for another day” the question of whether the exemption applied because the issue had not been raised in the court below and the promise to arbitrate was not contained in a contract of employment but in the plaintiff’s registration statement with the New York Stock Exchange.¹⁸

Since *Gilmer*, the exemption has had little effect on the broad application of the FAA in employment disputes because the lower courts

are reviewed in Michael Delikat & Rene’ Kathawala, *Arbitration of Employment Discrimination Claims Under Pre-Dispute Agreements: Will Gilmer Survive?*, 16 HOFSTRA LAB. & EMPL. L.J. 83, 92-107 (1998).

12. See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79 (1998).

13. See Self-Regulatory Organizations; National Association of Securities Dealers, Inc., Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35,299, 35,303 (June 22, 1998).

14. See 9 U.S.C. § 1 (1994).

15. 9 U.S.C. § 2 (1994).

16. 9 U.S.C. § 1.

17. See *Gilmer*, 500 U.S. at 23-24, 35.

18. See *id.* at 25 n.2.

have almost unanimously construed the exemption to apply only if the employees' work involved or directly related to the actual movement of goods in interstate transportation.¹⁹ The Court of Appeals for the Ninth Circuit has now challenged that interpretation of the exemption's commerce requirement in three cases, at least one of which will be reviewed by the Supreme Court.²⁰ If the Ninth Circuit's view is sustained by the Court, as I will argue it should be, the way will be open to use the exemption to confine *Gilmer* to where it belongs and, at the same time, to end the remaining difference between section 301 of the Labor Management Relations Act of 1947 and the Federal Arbitration Act in the treatment of arbitration under collective bargaining agreements.

II. THE THREE CASES

The three Ninth Circuit cases challenging the exemption's former interpretation are *Craft v. Campbell Soup Co.*,²¹ *Circuit City Stores, Inc. v. Adams*,²² and *Circuit City Stores, Inc. v. Ahmed*.²³ The lead case was *Craft*, but no petition for certiorari was filed in it. The two *Circuit City* cases were per curiam reversals relying on *Craft* and petitions for certiorari were filed in both.²⁴ The Supreme Court granted certiorari in the *Adams* case on May 22, 2000 and it was argued on November 6, 2000. The critical focus of the article will nevertheless be on *Craft* in which the Ninth Circuit set forth its reasoning.

Craft was a suit brought in federal district court claiming, among other things, racial discrimination in violation of Title VII of the Civil Rights Act of 1964.²⁵ An employee of Campbell Soup, an industry affecting commerce, who was not involved in transportation brought the

19. See *McWilliams, II. v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357-58 (7th Cir. 1997); *Cole*, 105 F.3d at 1470-72; *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, Local 437*, 207 F.2d 450, 452 (3d Cir. 1953).

20. See discussion *infra* Part II.

21. 177 F.3d 1083 (9th Cir. 1999).

22. 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (U.S. May, 2000) (No. 99-1379).

23. 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378).

24. See *id.*; *Circuit City Stores, Inc. v. Adams*, 120 S. Ct. 2004 (U.S. May 22, 2000) (No. 99-1379).

25. See *Craft*, 177 F.3d at 1084.

case.²⁶ The plaintiff was covered by a collective bargaining agreement containing a non-discrimination clause and an arbitration provision.²⁷ Campbell Soup moved for summary judgment on the ground that under the collective bargaining agreement the plaintiff's exclusive remedy was arbitration.²⁸ The motion was denied.²⁹ Campbell Soup appealed.³⁰

The Ninth Circuit never reached the merits. It directed the parties to address the question of whether it had jurisdiction to hear the appeal.³¹ The denial of a motion is not a final decision permitting an appeal under 28 U.S.C. § 1291.³² The FAA, however, provides an exception. Section 16(a)(1)(A), added to the FAA in 1988, provides that "[a]n appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title. . . ."³³ Treating the denial of the motion as the equivalent of an order refusing a stay under section 3 of the FAA, Campbell Soup argued that section 16 gave the court appellate jurisdiction.³⁴ The Ninth Circuit, in an extended two to one per curiam opinion, held that the FAA was inapplicable and dismissed the appeal for want of jurisdiction.³⁵ It held, contrary to the other circuits, that the section 1 exemption covered contracts of employment of employees engaged in an industry affecting commerce even though they were not themselves engaged in interstate transportation.³⁶

If the Ninth Circuit had reached the merits its decision would have been based on section 301 of the Labor Management Relations Act of 1947,³⁷ and the Federal Arbitration Act would have been irrelevant. The Supreme Court in *Textile Workers Union v. Lincoln Mills of Ala.*,³⁸ held that the enforceability of arbitration provisions in a collective bargaining

26. *See id.* at 1084-85.

27. *See id.* at 1084.

28. *See id.*

29. *See id.* It appears likely that the district court denied the motion on the ground that the bargaining agreement should not be read as making the statutory claim arbitral. *See Craft*, 177 F.3d at 1084. The District Court's decision is unreported, but on appeal the Ninth Circuit cited its own decision in *Doyle v. Raley's, Inc.*, 158 F.3d 1012 (9th Cir. 1998), describing the district court's decision. *See Craft*, 177 F.3d at 1084 n.3. The *Doyle* Court had held that a suit claiming discrimination in violation of several statutes was not barred by the anti-discrimination and arbitration provisions of a collective bargaining agreement. *See Doyle*, 158 F.3d at 1013, 1015-16.

30. *See Craft*, 177 F.3d at 1084.

31. *See id.* at 1083.

32. *See* 28 U.S.C. § 1291 (1994).

33. 9 U.S.C. § 16(a)(1)(A) (1994).

34. *See Craft*, 177 F.3d at 1085 & n.5.

35. *See id.* at 1083, 1094.

36. *See id.* at 1092.

37. 29 U.S.C. § 185 (1994).

38. 353 U.S. 448 (1957).

agreement was to be governed by section 301.³⁹ Then in the *Steelworkers Trilogy*⁴⁰ the Supreme Court held that section 301 embodied a pro-arbitration policy and that all doubts had to be resolved in favor of arbitration.⁴¹ After argument in the *Craft* case, however, the Supreme Court decided *Wright v. Universal Maritime Service Corp.*⁴² *Wright* held that where arbitrability under a collective bargaining agreement is posed as a bar to an anti-discrimination suit the presumption is reversed: the waiver of the right to sue must be clear and unmistakable.⁴³ Perhaps because *Wright* would have required an affirmance on the merits, Campbell Soup did not seek review of the Ninth Circuit decision that there was no appellate jurisdiction.

The *Circuit City Stores*⁴⁴ cases arose in a quite different context and directly involved the FAA. Both cases arose from suits against Circuit City Stores, Inc., a Virginia Corporation, filed by California residents in California trial courts claiming violations of California's anti-discrimination statute.⁴⁵ The plaintiffs were salespersons, in different stores, who had agreed as a condition of employment to arbitrate disputes with their employer.⁴⁶ Circuit City believed that the plaintiffs were obligated by the FAA to arbitrate their statutory claims.⁴⁷ It did not, however, remove the state court actions to federal court. It could not because the plaintiffs had joined, as defendants, individuals who were California residents and there was therefore not the required complete diversity.⁴⁸ Section 4 of the FAA, however, authorizes any federal district court having jurisdiction to issue an order directing arbitration on the petition of anyone aggrieved by the failure of a party to an agreement to arbitrate.⁴⁹ In both cases, Circuit City Stores filed petitions in federal

39. See *id.* at 450-51.

40. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

41. See *Warrior*, 363 U.S. at 582-83.

42. 525 U.S. 70 (1998).

43. See *id.* at 79-82.

44. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (U.S. May 22, 2000) (No. 99-1379); *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378).

45. See *Adams*, 194 F.3d at 1071; *Ahmed*, 195 F.3d at 1132.

46. See *Adams*, 194 F.3d at 1071; *Ahmed*, 195 F.3d at 1132.

47. See *Adams*, 194 F.3d at 1071; *Ahmed*, 195 F.3d at 1132.

48. See *Adams*, 194 F.3d at 1071, 1072; *Ahmed*, 195 F.3d at 1132, 1133.

49. See *Adams*, 194 F.3d at 1071 (quoting *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)).

district courts under section 4, relying on diversity for jurisdiction.⁵⁰ They requested an order directing arbitration of the plaintiffs' claims and staying the state court actions. The orders were granted and the plaintiffs appealed to the Ninth Circuit.⁵¹ The Ninth Circuit reversed in per curiam decisions, citing *Craft* for the inapplicability of the FAA because of the exemption.⁵² Circuit City Stores filed petitions for certiorari in both cases.⁵³ The Supreme Court granted the petition in the *Adams* case.⁵⁴ The petition in the *Ahmed* case remains pending.

III. THE NINTH CIRCUIT'S *CRAFT* RATIONALE

The difference between the Ninth Circuit and the other circuits as to the meaning of the section 1 exemption revolves around the meaning of the commerce requirement, defined as interstate or foreign commerce. It is not unreasonable, apart from the context, to read the words "engaged in commerce" to mean just that - participating or taking part in interstate or foreign transportation or closely connected to it. That is how all the other circuits have read it. The problem, the Ninth Circuit argued, is the context.⁵⁵ The FAA itself only applies to contracts "evidencing a transaction involving commerce."⁵⁶ "Involving commerce" could mean the same thing as "engaged in commerce," that is actually involving or connected to interstate or foreign transportation. In 1925, when it passed the Act, Congress indeed must have understood that "involving commerce" had that same narrow reading because, at that time, the Supreme Court had held that was the extent of Congress's power under the commerce clause of the Constitution.⁵⁷ The coverage of the exemption in 1925 was therefore, the Ninth Circuit concluded, coextensive with the Act's.⁵⁸

Since 1925, however, the Supreme Court changed its view of the

50. See *Circuit City Stores, Inc. v. Adams*, No. C98-0365, 1998 U.S. Dist. LEXIS 6215, at *6 (N.D. Cal. Apr. 29, 1998).

51. See *Adams*, 194 F.3d at 1071; *Ahmed*, 195 F.3d at 1132.

52. See *Adams*, 194 F.3d at 1071-72; *Ahmed*, 195 F.3d at 1133.

53. See *Circuit City Stores, Inc. v. Adams*, 1205 S. Ct. 2004 (U.S. May 22, 2000) (No. 99-1379); *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378).

54. See *Adams*, 120 S. Ct. at 2004.

55. See *Craft v. Campbell Soup Co.*, 117 F.3d 1083, 1093 (9th Cir. 1999).

56. 9 U.S.C. § 2 (1994).

57. *United Leather Workers Int'l Union, Local 66 v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 471-72 (1924); *Hammer v. Dagenhart*, 247 U.S. 251, 269-73 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *Howard v. Ill. Cent. R.R. Co.*, 207 U.S. 463, 492-93 (1908).

58. See *Craft*, 177 F.3d at 1085.

commerce power. As presently construed, the Constitution permits Congress to regulate industries affecting, but not actually in, commerce.⁵⁹ The Court in 1995 decided that in using the words “involving commerce,” Congress meant to encompass all the activity it had the power to regulate.⁶⁰ To carry out that presumed intention, “involving commerce” should be construed to mean “affecting” commerce, not just being engaged in it.⁶¹ So a contract to inspect a house for termites, the Supreme Court held, came within the FAA because the contractor used materials that came from out of state.⁶²

Once we understand that Congress in 1925 must have meant the exemption to cover exactly the same area as the statute itself, the Ninth Circuit concluded, it follows that the expansive reading now given to the statute must also be extended to the exemption.⁶³ To do otherwise would be to run exactly contrary to the intention of Congress insofar as we can know it. The exemption, therefore, applied to the plaintiff’s contract and the FAA’s grant of jurisdiction over the appeal did not apply.⁶⁴

The exemption issue had been addressed in precisely the same jurisdictional context once before. In *Pryner v. Tractor Supply Co.*,⁶⁵ the Seventh Circuit held that it had jurisdiction to hear an appeal of an order refusing to stay an action on the ground that the claim was arbitrable under a collective bargaining agreement.⁶⁶ It held that section 16 of the FAA, as well as section 301, applied and the exemption in section 1 was inapplicable because the plaintiffs were not engaged in interstate transportation.⁶⁷ It then went on to hold, in disagreement with the Fourth Circuit,⁶⁸ that the union did not have the power under section 301 to waive the individuals’ right to sue.⁶⁹

IV. THE PROPER INTERPRETATION OF THE EXEMPTION

The Ninth Circuit’s *Craft* logic is irrefutable in the absence of any

59. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-75 (1995).

60. See *id.*

61. See *id.*

62. See *id.* at 282.

63. See *Craft*, 177 F.3d at 1093.

64. See *id.* at 1094.

65. 109 F.3d 354 (7th Cir. 1997).

66. See *id.* at 359-60.

67. See *id.* at 360.

68. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885-86 (4th Cir. 1996).

69. See *Pryner*, 109 F.3d at 363.

contrary indication of Congressional intention, and there is none. The conventional reading of the exemption, as covering only contracts of those engaged in transportation, appears nonsensical as a matter of common sense. Why would a Congress aware of the then understood limit on its powers under the commerce clause choose to exempt the activity that it most clearly had the power to regulate from a statute which the Supreme Court has now told us was intended to exercise its power to the Constitutional limit?

In an attempt to rationalize such a result the courts that have endorsed this view have offered various rationales. They range from the assumption that seamen's right to arbitration was already protected,⁷⁰ to the claim that Congress was aware that enforcement of arbitration was already provided for railroad employees in the Railway Labor Act.⁷¹ As Professor Matthew Finkin has devastatingly demonstrated, all of them are illusory.⁷² The seamen's statute⁷³ did not provide for judicial enforcement of arbitration and the Railroad Labor Act's arbitration provisions did not exist when the FAA was passed.⁷⁴

Lacking any rationale for the restricted view of the exemption, some courts have relied on the difference between the words "engaged in commerce" in the section 1 exemption and "involving commerce" in the coverage language in section 2. The difference is, however, easily explained: "Engaged" is used in describing persons while "involving" is used in describing transactions. One could not say that a person was "involving" commerce or that a transaction was "engaged" in commerce.

70. See *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, Local 437*, 207 F.2d 450, 452 (3d Cir. 1953).

71. See *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997).

72. See Matthew W. Finkin, "Workers' Contracts" Under The United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282, 291-92 (1996) [hereinafter Finkin, *Workers' Contracts*]; Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 329, 331 (1997) [hereinafter Finkin, *Employment Contracts*].

73. Law of June 7, 1872, ch. 5, § 4554, 53 R.S. 887, 887 (1872) (provision in effect when the FAA was passed); See 46 U.S.C. § 651 (1982) (repealed 1983). It gave shipping commissioners the power to hear and decide disputes between masters, agents or owners and members of a crew that both parties had agreed in writing to submit to him to decide those disputes. See § 4554, 53 R.S. at 887; Act of June 7, 1872, ch. 322, § 25, 17 Stat. 262, 267 (1872). It did not make the agreements enforceable. Indeed, it was precisely because the FAA would make them enforceable that gave rise to the opposition to the Act that the exemption was drafted to meet. See *infra* pp. 263-64.

74. The earlier decision of the Third Circuit in *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, Local 437*, 207 F.2d 450 (3d Cir. 1953), did not make this chronological error. It cited Title III of the Transportation Act, 1920, 41 Stat. 496. See *Tenney*, 207 F.2d at 452 n.8. That Act, a predecessor of the Railway Labor Act, did provide a procedure for the resolution of grievances, but arbitration under that Act was not legally enforceable. See *Pa. R.R. Co. v. United States R.R. Labor Bd.*, 261 U.S. 72, 84 (1923).

It would be entirely logical to assume that the two terms were meant to be co-extensive and the difference was simply syntactical.

Some courts have invoked the principle of *ejusdem generis*. *Ejusdem generis* is an interpretative tool that assumes that the drafter of a document intended that general terms which follow specific ones should be limited to those similar to the specified terms.⁷⁵ Thus, in those courts' view, the general phrase "other workers engaged in foreign or interstate commerce" should be limited to those who are similar to the specified seamen and railroad employees who are actually engaged in the movement of goods in commerce.⁷⁶ The *ejusdem generis* principle must, however, be applied in context. Let us posit, as we must given the Supreme Court's decision, that (1) Congress intended by using "involving commerce" to exercise the full extent of its powers under the commerce clause as it understood them in 1925 and assume further (2) that in 1925 it had the same understanding as to its power with respect to the exemption, and assume finally (3) that it explicitly wrote the *ejusdem generis* principle into the exception. On those assumptions the exemption would read as follows: "Nothing contained herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers whose contracts are now similarly subject to regulation under the commerce clause of the Constitution." The similarity which the Congress in 1925 assumed still exists and the modern view of the extent of Congressional power should be applied to the exemption.

Putting aside the *post hoc* rationales and the language quibbles and lacking any Congressional statement of an intention to differentiate between the Act's coverage and the exemption, the only tool available to discern the probable intention of the exemption is the history of how it came to be. Thanks to the work of Professor Finkin we do know that.

Briefly summarized, the facts as reported by Finkin are that the Act was the product of and was drafted by the American Bar Association ("ABA").⁷⁷ The initial draft provoked the vigorous opposition of Andrew Furuseth, the head of the International Seamen's Union, who enlisted the opposition of the American Federation of Labor.⁷⁸ To meet this opposition, which it did not fully understand,⁷⁹ the ABA agreed to and

75. See BLACK'S LAW DICTIONARY 608 (4th ed. 1951).

76. See *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 598 (6th Cir. 1995).

77. See Finkin, *Workers' Contracts*, *supra* note 72, at 283.

78. See Finkin, *Workers' Contracts*, *supra* note 72, at 284; Finkin, *Employment Contracts*, *supra* note 72, at 329-30.

79. When the American Arbitration Association's first version, without the exemption, was before the Senate Judiciary Committee the ABA representative adverted to Furuseth's objection and said that the only criticism was that the bill would compel arbitration between "the stevedores and

the Congress adopted, the language of the exemption in the precise words suggested by Secretary of Commerce Herbert Hoover to meet the union opposition.⁸⁰ There are no significant references to the exemption in the committee reports on the bill or in the debates on the floor.

To get some insight into what Congress meant to accomplish, therefore, we must look to the basis of the opposition which engendered the Congressional action designed to meet that opposition. The fundamental basis for Furuseth's opposition was the effect he believed the FAA would have on his constituents, seamen.⁸¹ Furuseth had been instrumental in obtaining the passage of the Seamen's Act of 1915.⁸² That Act gave seamen certain rights he believed would be taken away by a statute making agreements to arbitrate enforceable.⁸³ Uniquely among American workers, seamen were and still are required by statute to sign individual contracts of employment called "shipping articles."⁸⁴ These "articles" are individual written contracts of employment committing the seamen to serve on a specified voyage and the employer to provide certain basic benefits.⁸⁵ According to Furuseth, there had arisen a practice of including in "articles" something not required by statute: an agreement to arbitrate disputes before a shipping commissioner or, if in a foreign port, before a United States consul.⁸⁶ Such an arbitration, in Furuseth's view, would constitute "compulsory labor" because an arbitrator might require a seaman to remain on or return to a ship even though under the Seamen's Act he would have the right to leave, forfeiting only pay.⁸⁷ He therefore opposed enforcement of agreements to arbitrate.⁸⁸

That history certainly explains the exemption of contracts of employment of seamen. But what about the railroad workers and other workers engaged in foreign or interstate commerce? Professor Finkin argues that Furuseth believed that the consequences to seamen that he feared as a result of making arbitration agreements enforceable would

their employers." Finkin, *Workers' Contracts*, *supra* note 72, at 285. Furuseth, who represented seamen, spent much of his life battling stevedores. See HYMAN WEINTRAUB, *ANDREW FURUSETH: EMANCIPATOR OF THE SEAMEN* 78-84 (1959).

80. See Finkin, *Employment Contracts*, *supra* note 72, at 330.

81. *See id.*

82. Act of Mar. 4, 1915, ch. 153, 38 Stat. 1164 (1915). For a description of Furuseth's role in the enactment of the statute see WEINTRAUB, *supra* note 79, at 113-32.

83. See Finkin, *Employment Contracts*, *supra* note 72, at 330.

84. 46 U.S.C. § 10302 (1994); see Finkin, *Workers' Contracts*, *supra* note 72, at 286.

85. See 46 U.S.C. §§ 10302(a)-10302(b)(8).

86. See Finkin, *Workers' Contracts*, *supra* note 72, at 287, 292.

87. *See id.* at 287.

88. *See id.* at 287-88.

also apply to other workers covered by collective bargaining agreements.⁸⁹ Furuseth's view was that collective agreements were, in legal effect, incorporated into individual contracts of employment of the workers covered by the collective agreements.⁹⁰ Whether Furuseth's legal theory can then be attributed to the American Bar Association and to Secretary of Commerce Herbert Hoover and, through them, to the Congress, seems to me to be a considerable stretch. More likely is the explanation that drafters and sponsors of the legislation had in mind only commercial contracts, not anything whatsoever to do with the employment relationship, as the ABA representative told the Senate Judiciary Committee when he responded to Furuseth's opposition and suggested an exemption.⁹¹

Whatever the true explanation of the origin of the exemption, there is certainly nothing in that history which refutes the Ninth Circuit's simple and direct explanation that given the then extant view of the scope of Congress's authority, it must have intended the exemption to be as broad as the Act's coverage. The real question is whether the courts which have expanded the coverage of the Act beyond that which Congress contemplated in 1925 should refuse to do so also with respect to the exemption. Reading the commerce requirement in section 2 of the statute differently from the commerce requirement in section 1 of the same statute would seem to warrant Mr. Justice Jackson's dissenting comment in *Farmers Reservoir & Irrigation Co. v. McComb*,⁹² "If the Court could say 'To be or not to be: that is the question,' it might reasonably answer in support of either side. But here the Court tells us that the real solution of this dilemma is 'to be' and 'not to be' at the same time."⁹³ There is no reason to engage in such an anamorphic exercise unless there is some sound policy reason to do so.

One such policy reason might be the breadth that could be given to the exemption by reading the commerce requirement in it broadly. That, indeed, was suggested by the Seventh Circuit in *Pryner v. Tractor*

89. See *id.* at 289.

90. See *id.*

91. See Finkin, *Workers' Contracts*, *supra* note 72, at 285. ABA representative W.H.H. Piatt's testimony was:

It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.

Id. at 285.

92. 337 U.S. 755 (1949).

93. *Farmers*, 337 U.S. at 772.

*Supply Co.*⁹⁴ There, the Seventh Circuit declared that reading “commerce” identically in both the coverage and exemption provisions would “give the exclusion a breathtaking scope. It would mean that an arbitration clause in an employment contract between a giant multinational corporation and its chief executive officer would, though plausibly ‘involving’ interstate commerce within the meaning of section 2, not be enforceable in federal court.”⁹⁵

Not so. The exemption must be read as a whole. Merely meeting the commerce requirement does not automatically make it applicable. All of the decisions and the commentary as to the scope of the exemption have focused solely on the commerce requirement and have assumed that if it was met, all contracts of employment would be exempt.⁹⁶ But there are other requirements. Once we pass the specific industries mentioned in the exemption, the only employees whose contracts are exempted from the act are “workers.” That term is not defined, but in common parlance it does not include a “chief executive officer,” or indeed any management employee. Thus, the *United Steel Workers*, the *United Automobile Workers*, and the *United Mine Workers* are organizations of working men and women, not management. When the ABA’s representative suggested the exemption because the Act was not intended to refer to “labor disputes,” he was not referring to disputes between management and owners.⁹⁷ The dictionaries confirm that the term “workers” excludes management. Webster’s says that “worker” is synonymous with laborer or toiler, “one who is employed esp[ecially] at manual or industrial labor for a wage” or “a member of the working class.”⁹⁸ The American Heritage Dictionary defines “worker” as “[o]ne who does manual or industrial labor” as “[a] member of the working class.”⁹⁹

The only appellate decision on the question agrees. In *Bernhardt v. Polygraphic Co. of Am.*,¹⁰⁰ the Second Circuit held that the exemption

94. 109 F.3d 354 (7th Cir. 1997).

95. *Id.* at 358.

96. Including Professor Finkin, who asserts broadly that the Act “exempts contracts of employment, all contracts of employment, over which Congress had constitutional authority.” Finkin, *Workers’ Contracts*, *supra* note 72, at 298.

97. *See supra* note 91.

98. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2634 (1982).

99. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1554 (3d ed. 1993).

100. 218 F.2d 948 (2d Cir. 1955), *rev’d on other grounds*, 350 U.S. 198 (1956). The Court of Appeals had held that section 3 of the Act, providing for a stay of a suit for breach of contract if the contract provided for arbitration, was applicable even in the absence of an allegation that the contract evidenced a transaction involving interstate commerce. *See id.* at 951. The Supreme Court reversed, holding that sections 1, 2 and 3 are integral parts of the statute and that section 3 was

was inapplicable in a suit for breach of an employment contract by a superintendent of a plant because the superintendent was not a "worker."¹⁰¹ Lacking a statutory definition that would draw the line between management and "workers" the line can be drawn on a case by case basis. Alternatively, and preferably, courts can turn to the decisions which had to draw that line in establishing the rights of workers to be free of anti-union discrimination and to bargain collectively under the National Labor Relations Act of 1935.¹⁰² There is a substantial body of law construing that Act that can be utilized to precisely define the limits of the exemption. So construing the exemption would confine it precisely to the kind of employees that were encompassed in Furuseth's and the ABA's concerns. Executives would be covered. And so would almost all unionized workers, as I shall argue below.

To come within the section 1 exemption, an agreement to arbitrate must also be contained in a "contract[] of employment."¹⁰³ That includes individual agreements to arbitrate future disputes that workers are required to execute as a condition of employment. It does not, however, include an *ad hoc* agreement not required as a condition of employment to arbitrate specific disputes between a worker and an employer, and it does not include collective bargaining agreements.

In *Craft* the Ninth Circuit assumed, without really addressing the question, that the collective agreement providing for arbitration was a "contract of employment" and that, therefore, the FAA did not cover Campbell Soup's motion to compel arbitration of the plaintiff's Title VII claim.¹⁰⁴ While I believe, for the reasons already stated, that it was correct in concluding that the interstate commerce limitation in the exemption was satisfied because the plaintiff's employment affected commerce, it was wrong in assuming that a collective bargaining agreement requiring arbitration should be treated as a "contract of employment." The Supreme Court had made the same assumption in a footnote in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*,¹⁰⁵

inapplicable to a contract not covered by section 2 because not involving a transaction involving commerce. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201-02 (1956). The Court did not reach the "worker" question.

101. See *Bernhardt*, 218 F.2d at 951-52.

102. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). Ideally the exemption should include employees held to be protected by the NLRA under *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), prior to the 1947 exclusion of supervisors since foreman are not normally able to negotiate the terms of their employment. See *infra* text at p. 275.

103. 9 U.S.C. § 1 (1994).

104. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (1999).

105. 484 U.S. 29, 40 n.9 (1987).

but without explanation.¹⁰⁶ The assumption is wrong.

It is plain, of course, that the collective agreement is not in itself a contract of employment. As the Supreme Court put it in *J.I. Case Co. v. NLRB*,¹⁰⁷

Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone.¹⁰⁸

That should settle the question, but not quite. Another question is whether, when an employee is hired, the law, and in particular the FAA, should treat the terms of the collective agreement as being incorporated in individual contracts of employment between the employee and the employer so as to make the exemption applicable. Andrew Furuseth so believed and the Supreme Court in *J.I. Case* seemed to so suggest. The suggestion is wrong.

Except in rare cases, because no written individual contracts of employment exist under a collective agreement, the question of whether the law should deem there to be an oral agreement embodying the terms of the collective agreement depends on whether the consequences of so doing corresponds to what the parties to that collective agreement normally expect.¹⁰⁹ One consequence of imputing the existence of an individual contract of employment from a collective agreement is that each party to that imputed contract is legally responsible to the other for any breach. But this is plainly not so as between an employer and an employee under a typical industrial collective bargaining agreement. Such an agreement sets out standards for the conduct of the employer (the payment of wages, scheduling, providing rest periods, etc.) and for the employee (reporting times, work standards, absenteeism, abstention from strikes, etc.).¹¹⁰ But the expected consequence of a failure to comply by either the employer or employee with the standards set forth in the collective agreement is not a suit for damages or for specific performance.

106. *See id.*

107. 321 U.S. 332 (1944).

108. *J.I. Case*, 321 U.S. at 334-35.

109. *See* David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 748 (1973) [hereinafter Feller, *General Theory*].

110. *See id.* at 739-40.

Take the rules governing employee conduct. If the agreement provides that the employee shall report for work at his assigned station by a specified hour and the employee fails to do so, the expected consequence is not a suit for breach of contract even if arbitration is not provided for. If the agreement provides that the employee shall not smoke in designated areas because of the hazard of explosion and an employee does smoke and an explosion occurs, it is not anticipated that the employee shall be responsible for the consequential damages. The consequence which the parties envisage for failure of an employee to comply with the standards set forth in the collective agreement, or rules which the agreement authorizes the employer to establish, is not a law suit, but discipline.¹¹¹ That discipline may be discharge, often referred to as industrial capital punishment, or it may be some lesser punishment such as a warning or a suspension, depending upon the nature of the offense and the employee's length of service, his past record and other factors similar to those considered in determining punishments for offenses against the criminal law.¹¹²

That the parties do not normally intend the collective agreement to be embodied in individual contracts of employment is shown equally with respect to employer violations of the standards set forth in the collective agreement. The typical collective agreement provides: that when an employee claims that the employer has not complied with the standards set forth in the agreement, the appropriate action is not the filing of a lawsuit, but the filing of a grievance.¹¹³ The grievance, if not resolved in negotiation, is ultimately resolved in arbitration, a proceeding not between the employer and the employee, but between the parties to the collective agreement - the union and the employer.¹¹⁴ And the remedies which the parties authorize the arbitrator to provide either explicitly, or as a matter of custom and practice, are not the same as the remedies which would follow if the employer's violation of the terms of the agreement were deemed to be a violation of an individual contract with the employee.¹¹⁵

The simplest case to illustrate this is the discharge grievance. Collective agreements usually provide that an employee shall not be

111. See *id.* at 740, 742-43.

112. See Sanford H. Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations*, in *LABOR ARBITRATION: PERSPECTIVES AND PROBLEMS* 125, 132-36, 138-39, 141-42 (Mark L. Kahn ed., 1964).

113. See Feller, *General Theory*, *supra* note 109, at 738.

114. See *id.* at 745.

115. See *id.* at 749-50.

discharged except for just cause.¹¹⁶ If an employee is discharged and believes that there was not just cause for the discharge, he can file a grievance.¹¹⁷ If the grievance is not resolved, the union, not the employee, can take it to arbitration.¹¹⁸ The arbitrator may sustain the grievance. He may decide that the employee did not commit the offense for which he was discharged or he may find that the employee did commit the offense, but the offense was not so serious as to warrant discharge and reduce the penalty to a suspension or a warning. In either case the remedy usually prescribed, or assumed to be prescribed, in the collective agreement, is not the remedy which would be provided if it were a suit for breach of a contract of employment.¹¹⁹ The remedy is reinstatement, with or without back pay, a remedy not normally available in court for breach of an employment contract.¹²⁰ But the remedy would be damages if the arbitration were deemed to be merely a substitute mechanism for adjudication of a suit for breach of contract between the employer and the employee.¹²¹

The consequences of deeming a collective agreement to be incorporated into individual contracts of employment of the employees covered by it is contrary to the relationship which the parties to a typical bargaining agreement intend to create. The question, then, is to what extent has the law corresponded to that reality. To that I now turn.

Until the enactment of section 301 of the Labor Management Relations Act of 1947, the judicial characterization of the tripartite relations created by a collective bargaining agreement was a matter of state law. Section 301 (a) provided for federal jurisdiction over “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce”¹²² And in 1957, the Supreme Court decided in *Textile Workers Union v. Lincoln Mills of Ala.*,¹²³ that “the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws.”¹²⁴ Before *Lincoln Mills*, the most extensive federal

116. See *id.* at 740, 749.

117. See *id.* at 738.

118. See Feller, *General Theory*, *supra* note 109, at 745.

119. See *id.* at 749-50.

120. See *id.* at 750.

121. Indeed, that is what the Supreme Court held in *Moore v. Ill. Cent. R.R. Co.*, 312 U.S. 630, 632-36 (1941). But *Moore* was overruled in 1972 by *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 326 (1972).

122. 29 U.S.C. § 185(a) (1994).

123. 353 U.S. 448 (1957).

124. *Id.* at 456.

examination of the legal relationships created by a collective agreement was contained in the decision of the Court of Appeals for the Third Circuit in *Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*¹²⁵ Westinghouse was a section 301 suit by a union claiming that the employer had docked the pay of salaried workers contrary to the terms of the collective bargaining agreement and requesting that the employees be paid the docked amount.¹²⁶ The question was whether section 301 covered such a suit.¹²⁷ The Third Circuit first examined and rejected in turn the four extant theories as to the nature of the legal obligations created by a collective agreement: 1) none; 2) a usage to be embodied in individual hiring contracts; 3) a contract made by the union as agent for its members; or 4) a third party beneficiary contract.¹²⁸ After examining in detail the types of provisions contained in collective agreements it then concluded with what it termed an "eclectic" theory.¹²⁹ Insofar as the agreement contained provisions governing relationships between the employer and the union, such as the union shop or arbitration, the collective agreement constituted an enforceable contract between them.¹³⁰ With respect to the provisions dealing with the employer's relationship with employees, such as wages or benefits, however, the collective agreement was only a promise by the employer to the union to include such provisions in the individual employees' contracts of hire.¹³¹ Section 301 provided jurisdiction only for suits for breach of contracts between an employer and a union.¹³² While outright repudiation of the wage provisions of the agreement might be a violation of the employee-union contract, an erroneous application of those provisions was a breach only of the assumed individual contracts with the employers.¹³³ That, the Third Circuit concluded, was not within section 301.¹³⁴

The Supreme Court affirmed, but there was no opinion of the Court.¹³⁵ The lead opinion, by Mr. Justice Frankfurter and two others,

125. 210 F.2d 623 (3d Cir. 1954), *aff'd*, 348 U.S. 437 (1955) [*Westinghouse*, 210 F.2d 623].

126. *See Westinghouse*, 210 F.2d at 624-25.

127. *See id.* at 625.

128. *See id.* at 626.

129. *Id.*

130. *See id.*

131. *See Westinghouse*, 210 F.2d at 626-27.

132. *See id.* at 624-25, 630.

133. *See id.* at 627.

134. *See id.*

135. *See Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 437-38 (1955) [*Westinghouse*, 348 U.S. 437].

rejected the Court of Appeals' theory, but held that since state law would govern the interpretation and enforcement of the agreement between the union and the employer, there were such constitutional problems that the Court should conclude that it had no jurisdiction under section 301.¹³⁶ All of the other justices, including the dissenters, concurred either expressly or implicitly in the notion of imputed individual contracts of employment. Chief Justice Warren and Mr. Justice Clark concurred in the result on the ground that Congress had not intended to authorize a union to enforce "the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer."¹³⁷ Mr. Justice Reed disagreed that state law was to be applied, but concurred in the result on essentially the same ground asserted by the Court of Appeals.¹³⁸ Justices Douglas and Black dissented.¹³⁹ They too, however, said: "Individual contracts of employment result from each collective bargaining agreement[,]"¹⁴⁰ but believed that the union had standing under section 301 to enforce them.¹⁴¹

The next section 301 case, *Textile Workers Union v. Lincoln Mills of Ala.*,¹⁴² did not directly address the individual contract of employment question. *Lincoln Mills* was a suit by a union to enforce the arbitration provisions of a collective bargaining agreement and, therefore, did not involve the question of whether the collective agreement should be deemed to be incorporated into individual contracts of employment.¹⁴³ *Westinghouse* was, however, ultimately overturned in 1962 by *Smith v. Evening News Ass'n.*¹⁴⁴ *Smith* was a suit by individual employers claiming that, contrary to the collective bargaining agreement, they were denied an opportunity to work during a strike by another union.¹⁴⁵ Stating that the agreement did not contain an arbitration provision, the Court concluded that an individual suit for breach of the terms of the collective bargaining agreement could be brought under section 301.¹⁴⁶ The decision impliedly rejected the notion that an individual's right to

136. See *id.* at 459.

137. *Id.* at 461.

138. See *id.* at 462-64.

139. See *id.* at 465.

140. *Westinghouse*, 348 U.S. at 466.

141. See *id.* at 467.

142. 353 U.S. 448 (1957).

143. See *id.* at 449.

144. 371 U.S. 195, 199 (1962).

145. See *id.* at 195-96.

146. See *id.* at 199-200.

receive the benefit of the collective bargaining agreement terms arose out of an imputed individual contract of employment.¹⁴⁷ Section 301 gives jurisdiction to the federal courts only over “[s]uits for violation of contracts between an employer and a labor organization”¹⁴⁸ The question in *Smith* was whether “between” applied to “suits” or “contracts,”¹⁴⁹ i.e., whether 301 provided jurisdiction only over suits between employers and labor organizations or, more broadly, over suits by anyone for violation of contracts between employers and labor organizations. The Court said that the latter reading was correct.¹⁵⁰ It followed that section 301 covered a suit by an individual employee for violation of a contract between an employer and a labor organization.¹⁵¹ Implied in that result was that the source of the individual’s right to the benefits contained in a collective agreement was the collective bargaining agreement itself, not any subsumed and implied individual contract of employment.¹⁵²

The notion that a collective bargaining agreement was incorporated into individual contracts of employment of those hired under its terms reappeared briefly, however, in 1966 in *Int’l Union, UAW v. Hoosier Cardinal Corp.*¹⁵³ That was a suit by a union, not by individual employees.¹⁵⁴ The question was whether it was barred by the statute of limitations.¹⁵⁵ The Court decided that it would not create a federal statute of limitations, but would adopt the applicable state statute of limitations.¹⁵⁶ The question then was whether the statute governing written contracts or oral contacts should apply.¹⁵⁷ The Court first acknowledged that “[they had] rejected the view that a suit such as this is based solely upon the separate hiring contracts, frequently oral, between the employer and each employee.”¹⁵⁸ Nevertheless, it went onto say that “[i]t does not follow, however, that the separate contracts of employment [of the individual employees] may not be taken into account in characterizing the nature of a specific § 301 suit for the

147. *See id.*

148. 29 U.S.C. § 185(a) (1994); *see also Smith*, 371 U.S. at 198.

149. *Smith*, 371 U.S. at 200.

150. *See id.* at 200-01.

151. *See id.*

152. *See id.*

153. 383 U.S. 696 (1966).

154. *See id.* at 698.

155. *See id.* at 697-98.

156. *See id.* at 704-05.

157. *See id.* at 705-06.

158. *UAW*, 383 U.S. at 706.

purpose[s] of selecting the appropriate state limitations provision.”¹⁵⁹ Therefore, the Court held the state law governing oral contracts of employment should be the controlling statute even though the suit was brought by the union complaining of violation of the collective agreement.¹⁶⁰

Since then the notion that the collective agreement creates an individual contract of employment incorporating its terms has disappeared in the Supreme Court. Most significantly, in 1981 the Court addressed the question of whether an employer could bring suit under section 301 against individual employees who violated the collective agreements provision against strikes during the term of the collective bargaining agreement.¹⁶¹ The strike was unauthorized and, indeed, arose out of a dispute between the strikers and their union.¹⁶² The Court held that the employees could not be sued for violation of contract.¹⁶³ The assigned reason was section 301 (b).¹⁶⁴ That section provides that a money judgment against a labor organization should be enforceable only against the union and should not be enforceable against any individual member of the union.¹⁶⁵ This was enacted, explicitly, to reverse the result in the *Danbury Hatters* case in which individual members were held liable for the union’s actions.¹⁶⁶ The Court, however, read into the “penumbra” of section 301 (b) the proposition that individual strikers were not liable for damages whether or not they were authorized by the union to strike.¹⁶⁷ The reasoning was specious, as the dissenting opinion by Chief Justice Burger and Justice Rehnquist amply demonstrated.¹⁶⁸

159. *Id.*

160. *See id.* at 707. The holding has since lost almost all significance. Collective agreements normally provide for arbitration of claims of violation and under *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), that procedure, with its much shorter time limits, must be utilized. *See Republic*, 379 U.S. at 652, 658-59. In individual suits, breach of the duty of fair representation must be shown, *see Vaca v. Sipes*, 386 U.S. 171, 180-81 (1967), and the Court has held that the six month statute of limitation in section 10(b) of the National Labor Relations Act applies. *See Del Costello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 169 (1983).

161. *See Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 402 (1981).

162. *See id.* at 403.

163. *See id.* at 417. The Court had earlier avoided deciding that question in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). *Atkinson* was a suit brought against individual union officers for damages for engaging in an authorized strike during the contract term. *See Atkinson*, 370 U.S. at 240. The Court held that the individuals were being sued for what was essentially a union breach and were therefore, not liable. *See id.* at 246-47.

164. *See Complete Auto*, 451 U.S. at 415.

165. *See* 29 U.S.C. § 185(b) (1994).

166. *See Complete Auto*, 451 U.S. at 406-07.

167. *Id.* at 407.

168. *See id.* at 425-29.

The result, however, was correct. Reliance on section 301 (b) was unnecessary. The decision was correct because the collective agreement is not embodied in individual contracts of employment. The no-strike provision does constitute a contractual obligation of the union with respect to strikes during the term. But, with respect to employees, it is not a contract of employment but a rule of conduct subjecting offenders to discipline.

Employees covered by a collective agreement may also have individual contracts of employment, as the Supreme Court recognized in *Caterpillar, Inc. v. Williams*.¹⁶⁹ Indeed, the “articles” that were the source of Furuseth’s objection to the proposed Arbitration Act were just that. And some collective agreements, particularly in the newspaper and entertainment industries, expressly envisage such contracts providing compensation above the collectively imposed minimums. But that is far different from the proposition that the collective agreement is, in itself, a contract of employment or is, without more, incorporated in contracts of employment of those working under it.

V. THE RESULT IS SOUND AND CONSISTENT WITH *GILMER*¹⁷⁰

We are now in a position to summarize by setting out exactly which agreements by employees to arbitrate are, or are not, covered by the Federal Arbitration Act as a result of the exemption in section 1 when properly construed. Because of the exemption, the Act does not apply to individual contracts to arbitrate future disputes executed by seamen, railroad employees or other workers such as those covered by the National Labor Relations Act that are a condition of employment. Despite the exemption, the Act does apply to agreements to arbitrate specific disputes not made as a condition of employment. It applies to contracts of employment of executives and management employees and to collective bargaining agreements if an industry affecting commerce is involved. The Ninth Circuit decision in *Craft v. Campbell Soup Co.*,¹⁷¹ was correct in holding that the exemption covered employees in an industry affecting commerce, but it was wrong in concluding that the exemption applied: the contract involved was a collective agreement rather than an individual one.¹⁷² The *Circuit City* cases,¹⁷³ which relied on

169. 482 U.S. 386, 395-96 (1987).

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

171. 177 F.3d 1083 (9th Cir. 1999).

172. See discussion *supra* Part II, III.

173. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S.

Craft, involved individual contracts of employment of workers protected by the National Labor Relations Act and the Court correctly held the FAA to be inapplicable.¹⁷⁴

Construing the labor exemption as I have argued is not only sound as a matter of statutory interpretation, but would serve to substantially ameliorate the undesirable side effects of the *Gilmer* decision while leaving its holding intact. It would limit the scope of the FAA largely to those who are genuinely able to negotiate the terms of their employment either individually or collectively. The *Gilmer* holding would be unaffected. Robert Gilmer was not a “worker,” but a Manager of Financial Services.¹⁷⁵ He was, as the Supreme Court described him, an “experienced businessman.”¹⁷⁶ He was, in short, a management employee and as such not within the exemption of section 1 of the FAA even though he was engaged in an industry affecting commerce. If we ignore for the moment what the Court itself ignored—that if he was to function as a broker federal law required him to register with the New York Stock Exchange and the Exchange required him to agree to arbitration, a situation which no longer exists — he was the kind of employee who was in a position to refuse to agree to waive his right to judicial enforcement of his statutory rights. Although he was engaged in an industry affecting commerce, he was not a “worker” and therefore, not within the exemption.

But the *Gilmer* doctrine would be inapplicable to rank and file workers in most industries who are, in fact, not in Robert Gilmer’s assumed position. The desirable line is between those who have a real choice as to whether they agree to arbitrate their potential statutory claims and those who, in practice, do not. Reading the commerce requirement in the exemption broadly while limiting the exemption to written contracts of employment of rank and file employees as defined in the labor statutes does not draw the line with razor-like precision at the desirable line but comes close.¹⁷⁷ Excluding collective agreements

Ct. 2004 (U.S. May, 2000) (No. 99-1379); *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378).

174. See discussion *supra* Part II, III.

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

176. *Id.* at 33.

177. There is one glaring discrepancy: occupations in which the attractiveness of particular employees to the public plays a major role in determining their compensation. Examples are the entertainment industry, including baseball and other sports, and newspapers. Collective agreements in these industries permit, or sometimes require, individual contracts of employment as to which genuine arm’s length bargaining takes place. Defining “workers” as those employees covered by the labor status would lead to exemption from the FAA of the arbitration provisions in such contracts. If

from the exemption is also desirable. Given the decision of the Court in *Wright v. Universal Mar. Serv. Corp.*,¹⁷⁸ arbitration of individual statutory claims would not be required by virtue of a collective bargaining agreement unless the agreement clearly and explicitly authorized arbitration of statutory claims.¹⁷⁹ As I have argued elsewhere, enforcement of such agreements is, on balance, desirable.¹⁸⁰

VI. THE EFFECT ON COLLECTIVE AGREEMENTS

Reading the exemption as not including collective agreements would have another desirable effect, one wholly unrelated to the rights of individual employees to enforce their claims. It would make it possible to apply the FAA to suits to enforce the arbitration provisions of collective bargaining agreements. The Court in *Textile Workers Union v. Lincoln Mills of Ala.*¹⁸¹ held that the enforcement of collective agreements would be governed by federal labor law as a premise for concluding that the agreement's arbitration provision could be specifically enforced despite the common law and Alabama's laws to the contrary.¹⁸² Reliance on section 301 was essential because the FAA of itself does not provide federal jurisdiction. But it need not have followed that the FAA is inapplicable once federal jurisdiction was established and the Court did not explicitly so hold.¹⁸³ The Court simply ignored the FAA.

The real reason for the Court's reliance on section 301 and labor policy while ignoring the FAA for the enforcement of the arbitration provision of a collective bargaining agreement was to provide a basis for a more generous application of the rules governing arbitrability. At the time *Lincoln Mills* was decided, the courts were hostile to arbitration under the FAA. As the Supreme Court later said there was an "outmoded

that question arises, as it did in *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972), perhaps a different and more realistic definition of "workers" should be applied. If not, one must be content with less than the ideal.

178. 525 U.S. 70 (1998).

179. See *id.* at 79-80.

180. See David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. & EMP. L.J. 53, 81 (1998).

181. 353 U.S. 448 (1957).

182. See *id.* at 456-57.

183. The First Circuit, in a companion case decided together with *Lincoln Mills*, had relied on the FAA for the enforceability of the arbitration provision. See *Local 205, United Elec. Radio & Mach. Workers v. General Elec. Co.*, 233 F.2d 85, 100-01 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957).

presumption of disfavoring arbitration proceedings,”¹⁸⁴ as evidenced by the decision of the Court in *Wilko v. Swan*.¹⁸⁵ *Lincoln Mills*’s reliance on labor law rather than the FAA for the enforcement of arbitration permitted the Court three years later to derive a presumption of arbitrability from section 203 (a) of the Labor Management Relations Act. It said that “the run of arbitration cases, illustrated by *Wilko v. Swan* . . . becomes irrelevant to our problem. . . . Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement [i.e. under the FAA], the hostility evinced by courts toward arbitration of commercial agreements has no place here.”¹⁸⁶

Since those words were written, however, there has been a complete reversal of the Court’s attitude toward FAA arbitration. The presumption of arbitrability which the Court first announced in a section 301 case has now been applied in almost identical words under the Federal Arbitration Act.¹⁸⁷ The courts, including the Supreme Court, have begun to cite labor arbitration cases indistinguishably from commercial arbitration cases in determining whether arbitration should be ordered.¹⁸⁸ In determining arbitrability, there is now no difference in the standard applied under section 301 and that under the Federal Arbitration Act.¹⁸⁹

That is not, however, the case with respect to the enforcement of awards once made. The third case in the *Steelworkers Trilogy* dealt with the role of the courts in enforcing or vacating a labor arbitration award.¹⁹⁰ At issue in *Enterprise* was an award issued after a collective bargaining agreement had expired and no successor agreement existed.¹⁹¹ The award ordered reinstatement with back pay to employees who had been discharged during the term of the agreement.¹⁹² The court of appeals held that the arbitrator had no authority to award relief beyond the express termination date of the agreement.¹⁹³ There was a certain plausibility to

184. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

185. 346 U.S. 427, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

186. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (citation omitted).

187. *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983).

188. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-45 (1995).

189. *See Jonathan R. Nelson, Judge-Made Law and the Presumption of Arbitrability: David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 58 BROOK. L. REV. 279, 303 (1992).

190. *See United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 595-96 (1960).

191. *See id.* at 596.

192. *See id.* at 595.

193. *See Enter. Wheel & Car Corp. v. United Steelworkers*, 269 F.2d 327, 332 (4th Cir. 1959).

that holding. In the absence of a new agreement the employer had the right to discharge employees without contractual limitation and there was no agreement as to rates of pay.¹⁹⁴ The Supreme Court nevertheless reversed.¹⁹⁵ The agreement “could have provided,” the Court said, “that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work.”¹⁹⁶ The agreement did not say that, but the arbitrator, who was not required to write an opinion, could have interpreted it as so providing and the question of interpretation of the agreement was a question for the arbitrator.¹⁹⁷ “[T]he courts have no business overruling him because their interpretation of the contract is different from his[.]” the Court said.¹⁹⁸ That holding, it appeared to most, provided the same finality under section 301 for a labor arbitration award as was provided at common law for a commercial arbitration award,¹⁹⁹ and is provided under section 10 of the Federal Arbitration Act.²⁰⁰

Unfortunately the Court in *Enterprise Wheel* had some preliminary words to say about the function of a labor arbitrator. The arbitrator, the Court said, “is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement.”²⁰¹ Those words provided a loophole which the lower courts were quick to seize upon in order to vacate awards with which they did not agree. It is possible for a court to conclude that the arbitrator’s reasoning does not comport with its reading of the agreement and, therefore, does not draw its “essence” from it, or to say that the arbitrators so misread the contract or the evidence that they must have been dispensing their “own brand of industrial justice.” As the Sixth Circuit said in 1987:

[T]here may be a departure from the essence of the agreement if “(1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the

194. See *id.* at 331.

195. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

196. *Id.* at 598.

197. See *id.* 598-99.

198. *Id.* at 599.

199. See, e.g., *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1855).

200. See 9 U.S.C. § 10 (1994).

201. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement.²⁰²

Then in 1987, in *United Paperworkers Int'l Union v. Misco, Inc.*,²⁰³ the Supreme Court sought to arrest this trend. While repeating the "essence" language, the Court made it clear that under section 301 courts should not second guess the arbitrator. It said: "[A] court should not reject an award on the ground that the arbitrator misread the contract."²⁰⁴ The Court continued: "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."²⁰⁵

Despite that language, many of the lower courts have persisted in doing just that if they believe that the arbitrator's reading of the contract was contrary to the court's view as to its plain meaning. As the Fifth Circuit said in 1989, "[w]e agree with the company that the rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected."²⁰⁶ The First Circuit has agreed.²⁰⁷ The Sixth Circuit in 2000 has reiterated its pre-*Misco* characterization of the grounds on which a court can find a departure from the essence of the agreement.²⁰⁸ The Eighth Circuit has said, in direct contradiction to the holding in *Enterprise*, "where an arbitrator fails to discuss a probative contract term and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, there arises a strong possibility that the award was not based on the contract."²⁰⁹ And the Ninth Circuit has concluded that where an arbitrator credited the testimony of a witness that the court believed to be incredible, he must have been dispensing "his own brand of industrial justice."²¹⁰

202. *Dobbs, Inc. v. Local No. 614, Int'l Bhd. of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987) (quoting *Cement Divisions, Nat'l Gypsum Co. v. United Steelworkers*, 793 F.2d 759, 766 (6th Cir. 1986)).

203. 484 U.S. 29 (1987).

204. *Id.* at 38.

205. *Id.*

206. *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989).

207. See *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 944 (1st Cir. 1988).

208. See *Wyandot, Inc. v. Local 227, United Food & Commercial Workers Union*, 205 F.3d 922, 926-28 (6th Cir.), *cert. denied*, 121 S. Ct. 62 (2000).

209. *George A. Hormel & Co. v. United Food & Commercial Workers, Local 9*, 879 F.2d 347, 351 (8th Cir. 1989).

210. *Garvey v. Roberts*, 163 L.R.R.M. (BNA) 2449, 2454 (9th Cir. 2000).

The degree to which the courts will use the express terms to set aside an arbitrator's award is illustrated by *Bruce Hardwood Floors v. UBC, S. Council of Indus. Workers, Local Union No. 2713*.²¹¹ The collective agreement prohibited immediate discharge without prior warning, but an exception was made for specified serious misconduct.²¹² Among those exceptions was "immoral conduct."²¹³ The grievant was faced with her electricity being cut off at her home for the entire weekend unless she paid her bill during working hours.²¹⁴ In order to get time off to pay the bill, she made up a false excuse to get 45 minutes off, without pay.²¹⁵ When the company found out that the excuse was false, she was discharged although there had been no prior warning.²¹⁶ The arbitrator found that the false excuse was not "immoral conduct" so as to come within the exception and ordered reinstatement.²¹⁷ The Fifth Circuit set aside the award on the ground that a lie was, by definition, "immoral conduct."²¹⁸

It is not that the courts of appeal ignore the doctrine of *Enterprise Wheel*, reinforced by *Misco*. They duly recite it, but then, under one guise or another, reach conclusions precisely contrary to the doctrine. Perhaps the most vivid demonstration was the decision of the Seventh Circuit in *Polk Bros., Inc. v. Chicago Truck Drivers*.²¹⁹ In that case, the arbitrator concluded that the employer had violated the contract by contracting out some driving work and terminating drivers.²²⁰ The arbitrator awarded reinstatement with back pay.²²¹ The decision, however, was issued after the contract had expired, exactly as in *Enterprise Wheel*.²²² The Seventh Circuit, after reciting the limited scope of review under *Enterprise Wheel*, set aside the order.²²³ It said: "We hold that the collective bargaining agreements did not allow the arbitrator to award reinstatement beyond their express termination dates. Our holding is consistent with the decisions of several other circuits, which have struck down arbitrator's decisions which were contrary to

211. 103 F.3d 449 (5th Cir. 1997).

212. *See id.* at 451 n.1.

213. *Id.*

214. *See id.* at 453.

215. *See id.*

216. *See Bruce Hardwood*, 103 F.3d at 453-54.

217. *See id.* at 451, 454.

218. *See id.* at 452 & n.4.

219. 973 F.2d 593 (7th Cir. 1992).

220. *See id.* at 595.

221. *See id.* at 595-96.

222. *See id.* at 596.

223. *See id.* at 597-99.

contractual provisions.”²²⁴ Citing decisions of the First, Second, Fifth, Sixth and Eleventh Circuits,²²⁵ it thus reached a result exactly contrary to *Enterprise Wheel* after reciting the doctrine of that case.

So long as the qualifying words in *Enterprise Wheel* as to awards under section 301 remain, the courts of appeal will utilize them to set aside awards they strongly feel are wrong. And the plain fact is that the Supreme Court will not intervene if the courts recite the appropriate doctrine. Mere error is insufficient to warrant review.

There is a second ground on which labor arbitration awards under section 301 are attacked. Even where it is clear that an arbitrator is exercising the authority given him or her to determine that a discharge is not for just cause, many of the lower courts have set aside awards of reinstatement on the ground that what the discharged employee did was contrary to public policy, even though public policy would not have prevented the employer from voluntarily reinstating the employee.²²⁶ The Supreme Court has recognized public policy as a ground for vacating an award if the policy is ascertained by reference to the “laws and legal precedents” and not from “general considerations of supposed public interests.”²²⁷ But it has yet to explain whether the public policy thus ascertained is to be measured against what the employee did or what the arbitrator ordered. At least some of the lower courts clearly hold that it is the former.²²⁸

None of this is true under the Federal Arbitration Act. The courts are quite explicit in saying that a contention that an award subject to the FAA is contrary to the language of the agreement is not a ground for setting it aside. Section 10 of the FAA provides an award to be set aside only, in reality, if one can show corruption, bias or fraud.²²⁹ That a court is convinced that an arbitrator’s decision is wrong, even plainly wrong, is not a ground for setting it aside.²³⁰ As for vacating on public policy

224. *Polk Brothers*, 973 F.2d at 598-99.

225. *See id.* at 599.

226. *See Iowa Elec. Light & Power Co. v. Local Union 204 of the Int’l Bhd. of Elec. Workers*, 834 F.2d 1424, 1429 (8th Cir. 1987).

227. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

228. *See United States Postal Serv. v. Nat’l Ass’n of Letter Carriers*, 847 F.2d 775, 777-78 (11th Cir. 1988); *Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 671, 674 (11th Cir. 1988); *Iowa Elec.*, 834 F.2d at 1426-27; *contra Northwest Airlines, Inc. v. Air Line Pilots Ass’n, Int’l*, 808 F.2d 76, 78 (D.C. Cir. 1987). Since this article was drafted, the conflict has been substantially resolved by the Supreme Court in *E. Associated Coal Corp. v. United Mine Workers*, 121 S. Ct. 462 (Nov. 28, 2000).

229. *See* 9 U.S.C. §§ 10(a)(1)-(2) (1994).

230. *See Delta Air Lines*, 861 F.2d at 670.

grounds, only when arbitrators have found an illegal act have commercial awards been set aside under the Federal Arbitration Act as being contrary to public policy.²³¹ As the leading treatise on FAA arbitration puts it:

[A] number of considerations pertinent to vacation in collective bargaining arbitration are not pertinent to FAA arbitration. These include different rules respecting the public policy defense, a greater inclination of some courts treating collective bargaining awards to find a 'failure to draw its essence from the contract' or that an award is against the plain meaning of the collective bargaining agreement.²³²

In the *Steelworkers Trilogy*, the Court extolled the virtue of labor arbitration. In *United Steel Workers v. Warrior & Gulf Navigation Co.*, it said:

Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. . . . Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.²³³

Labor arbitration was thus put on a higher plane than arbitration of commercial disputes under the FAA. Yet, as a result of the elevation of FAA arbitration in later years and the misapplication of *Enterprise Wheel*, when it comes to enforcement of awards, the reverse is now true. Labor arbitration is given less respect than commercial arbitration. Applying the FAA to labor arbitration, which the Court correctly thought in 1960 would denigrate labor arbitration, would today serve at least to restore balance between the two. What the Court said in *Enterprise Wheel & Car* and *Misco* should be the rule in reviewing arbitration awards under a collective bargaining agreement would be

231. See 4 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 40.8.2, at 40:100 (Supp. 1999).

232. *Id.* § 40.5.1.3, at 40:38-40:39. The authors also state that the two standards from LMRA cases: "contrary to the plain language of the agreement" and "failure to draw its essence from the contract[,] are inapplicable to FAA arbitration. *Id.* § 40.5.2.6, at 40:51, § 40.6.1, at 40:73.

233. 363 U.S. 574, 578, 581 (1960).

reinforced if it were now explicitly held that the FAA is applicable to collective bargaining agreements. The courts and the commercial interests that have a stake in the principle of finality would no longer be able to shrug off as irrelevant to their concerns decisions setting aside labor arbitration awards. A court would not be able, as the First Circuit was in *Advest, Inc. v. McCarthy*,²³⁴ to enforce a commercial award and put aside labor cases, saying that there are differing standards for the review of labor and commercial awards.²³⁵ Furthermore, the FAA provides a detailed procedural mechanism for the enforcement of arbitration and the review of arbitration awards which is simply absent under section 301, as well as provisions for appeal of interim orders which, as *Craft v. Campbell Soup Co.* illustrates, are not available if the FAA is not applicable to collective bargaining agreements.²³⁶

For all of these reasons, the law respecting arbitration under collective bargaining agreements would be both clear and more effective if such arbitration was governed by the FAA. That result would be achieved if the exemption in section 1 should explicitly be held not to include collective bargaining agreements.

VII. THE ERIE QUESTION

State laws as to the enforceability of agreements to arbitrate such as those contained in *Campbell Soup*²³⁷ and the *Circuit City Stores* cases²³⁸ vary enormously. In a substantial number of states such agreements are not enforceable.²³⁹ If the Ninth Circuit is reversed and the section 1 exemption in the FAA is held to be inapplicable those state laws become irrelevant except for workers engaged in transportation. The FAA controls.²⁴⁰ But, if the FAA is inapplicable because of the exemption another question is presented. Are such contracts nevertheless enforceable in federal courts and what law, federal or state, governs that

234. 914 F.2d 6 (1st Cir. 1990).

235. See *id.* at 9.

236. See *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999).

237. *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999).

238. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (U.S. May 22, 2000) (No. 99-1379); *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378).

239. The Brief for the States of California, Arizona, Arkansas, et al. As Amici Curiae in Support of Respondent in *Circuit City Stores, Inc. v. Adams* lists statutory provisions in 12 such states. In several others enforcement is limited by statute or judicial decision.

240. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

question?

The common law rule was that an agreement to arbitrate was revocable at any time before the arbitrator's decision and the agreement could not be specifically enforced over the objection of the other party.²⁴¹ The FAA was enacted to reverse that doctrine. If the FAA is inapplicable in the federal courts because of the section 1 exemption, presumably the common law remains effective. But if the FAA is inapplicable, does *Erie R.R. Co. v. Tompkins*²⁴² require that a federal court apply state law in those states in which agreements such as the Circuit City Stores' agreement would be enforced? In 1956, the Court in *Bernhardt v. Polygraphic Co. of Am.*,²⁴³ held that when the FAA is inapplicable, *Erie* requires a federal court to follow state law.²⁴⁴ *Bernhardt* was a suit for damages for breach of an employment contract.²⁴⁵ Originally brought in a Vermont court, it was removed to federal court on diversity grounds.²⁴⁶ There was no allegation of interstate commerce. The employment contract contained a provision for arbitration and the defendant moved for a stay pending arbitration.²⁴⁷ Vermont adhered to the common law principle that agreements to arbitrate were revocable.²⁴⁸ The district court denied the stay.²⁴⁹ The Court of Appeals held that section 3 of the FAA covered all arbitration agreements, without reference to the commerce requirement contained in sections 1 and 2, and required that the stay be granted.²⁵⁰ The Supreme Court reversed, finding that the FAA as a whole applied only to agreements involving interstate commerce.²⁵¹ The Court then went on to hold that *Erie* required that state law govern and that the stay should be denied.²⁵² What it said in 1956, in concluding that state law governed, is worth quoting:

The Court of Appeals . . . followed its earlier decision . . . which held

241. See WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 45 (1930). For the limited exceptions see IAN R. MACNEIL, AMERICAN ARBITRATION LAW 20 (1992).

242. 304 U.S. 64 (1938).

243. 350 U.S. 198 (1956).

244. See *id.* at 202-03.

245. See *id.* at 199.

246. See *id.*

247. See *id.*

248. See *Bernhardt*, 350 U.S. at 199-200.

249. See *id.* at 200.

250. See *id.* at 200-01.

251. See *id.* at 201-02.

252. See *id.* at 202-03.

that, 'Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure We disagree with that conclusion. . . . If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in *Wilko v. Swan*, 346 U.S. 427, 435-438.²⁵³

The view of arbitration underlying the Court's decision in *Bernhardt* has now been completely reversed. Beginning in 1985, with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²⁵⁴ the Court adopted precisely the proposition that arbitration is "merely a form of trial,"²⁵⁵ and in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*,²⁵⁶ overruled *Wilko v. Swan*.²⁵⁷ Finally, in *Gilmer* the Court said, referring to the *Mitsubishi Trilogy*: "In these cases we recognized that 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"²⁵⁸

It is, therefore, at least arguable that *Bernhardt* went with *Wilko* and would not be followed today. But even if it is still good law and would govern in a suit based on state law, it is clearly distinguishable in a case like *Craft*.²⁵⁹ The premise of *Bernhardt* was that the case was based on diversity. As the Court said before the language quoted above:

We deal here with a right to recover that owes its existence to one of the States, not to the United States. The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the

253. *Bernhardt*, 350 U.S. at 202-03.

254. 473 U.S. 614 (1985).

255. *Wilko v. Swan*, 346 U.S. 427, 433 (1953).

256. 490 U.S. 477 (1989).

257. *See id.* at 480, 484.

258. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

259. *See generally* *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999).

federal court enforcing a state-created right in a diversity case is . . . in substance 'only another court of the State.' The federal court therefore may not 'substantially affect the enforcement of the right as given by the State.'²⁶⁰

Unlike *Bernhardt*, the Ninth Circuit in *Craft v. Campbell Soup Co.*,²⁶¹ was dealing with a right to recover that owed its existence to the United States, rather than an individual state. The suit was filed in federal court and the plaintiff claimed violations of Title VII of the Civil Rights Act of 1964.²⁶² The Court did not have to address the state law question because of the case's posture. The issue was whether a non-final order denying enforcement of the agreement to arbitrate was appealable, clearly a question of federal procedure.²⁶³ But if the Ninth Circuit's position as to the labor exemption in section 1 is sustained,²⁶⁴ the question will have to be addressed in other cases and it should be resolved in favor of federal law if the lawsuit is based on a federal statute. Although the Supreme Court has held that the jurisdictional procedures of Title VII (and consequently the ADA and the ADEA), are not exclusive and that claims of violations of the statutes may be pursued in the state courts,²⁶⁵ the rights granted by those statutes are federal rights, not state rights. It would be preposterous to conclude that a federal court in which enforcement of a federal right is being sought is required by *Erie* to follow the procedures which would apply if the suit were brought in a state court.

The situation is otherwise in the *Circuit City Stores* cases and is directly comparable to *Bernhardt*. Both of those cases derived from state court actions claiming violations of California's Fair Employment and Housing Act.²⁶⁶ California has a detailed statute providing for the enforcement of agreements to arbitrate.²⁶⁷ Implicit in these cases, therefore, is the question of whether the enforcement of the workers'

260. *Bernhardt*, 350 U.S. at 202-03 (quoting *Guar. Trust Co. v. York*, 326 U.S. 99, 108-09 (1945)).

261. 177 F.3d 1083 (9th Cir. 1999).

262. *See id.* at 1084.

263. *See id.* at 1083.

264. *See discussion supra* Parts II, III.

265. *See Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 821 (1990); *see also Krouse v. Am. Sterilizer Co.*, 872 F. Supp. 203, 205 (W.D. Pa. 1994).

266. *See Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (U.S. May 22, 2000) (No. 99-1379); *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131, 1132 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378).

267. *See CAL. CIV. PROC.* §1281 (West 1982 & Supp. 2000).

agreement to arbitrate should be determined under California law. Again, however, the question was not decided in the Ninth Circuit because of the procedural posture of the cases. The cases were independent actions under section 4 of the FAA seeking stays of the state court actions.²⁶⁸ The district courts granted the stays and, as a result, the actions remained alive in state court, but stayed pending arbitration because of the FAA.²⁶⁹ The only question before the Ninth Circuit on appeal was whether section 4 of the FAA applied.²⁷⁰ In the particular cases, arbitration would not be required under California law. Circuit City's arbitration requirement has been held unenforceable as an unconscionable contract of adhesion.²⁷¹ Again, as in the *Craft* case, the question of the applicability of state arbitration law is potentially applicable in other cases which, as in *Bernhardt*, are removed to federal court, or, as to state law claims, joined with federal law claims in suits brought in federal courts.

For the reason already stated, I believe that *Bernhardt* is outdated and would be overruled by the Supreme Court. Until it does so, however, the lower federal courts are obliged to follow it,²⁷² unless the case can be distinguished. It can. If, as I believe it should, the Court affirms the Ninth Circuit's holding that the workers' contracts exemption is applicable it can well be argued that state law is preempted by the FAA.²⁷³ In *Southland Corp. v. Keating*,²⁷⁴ and *Doctor's Assocs., Inc. v. Casarotto*,²⁷⁵ the Court held that the federal policy favoring arbitration embodied in the FAA required invalidation of state law limiting the availability of arbitration.²⁷⁶ Similarly, if the labor exemption is held to make the FAA inapplicable, it can be argued that there is a federal policy disfavoring arbitration in cases covered by the exemption and that state law enforcing arbitration in such cases should not be effective.

268. See *Adams*, 194 F.3d at 1071; *Ahmed*, 195 F.3d at 1132.

269. See *Adams*, 194 F.3d at 1070-71; *Ahmed*, 195 F.3d at 1131-32.

270. See *Adams*, 194 F.3d at 1071; *Ahmed*, 195 F.3d at 1132.

271. See *Ramirez v. Circuit City Stores, Inc.*, 5 Wages-Hours Cas.2d (BNA) 1360, 1362-64 (Cal. Ct. App. 1999).

272. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (overruling *Wilko v. Swan* while at the same time chastising the Court of Appeals for assuming that the Court would do so).

273. See 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 10.8.2.2, at 10:76-10:84 (Supp. 1999).

274. 465 U.S. 1 (1984).

275. 517 U.S. 681 (1996).

276. See *id.* at 688; *Southland*, 465 U.S. at 14-16.

VIII. CONCLUSION

The exemption of workers' contracts of employment by the Federal Arbitration Act, when it is properly interpreted, would confine the *Gilmer* decision to those employees for whom it makes sense and, at the same time, would serve to reinforce the Supreme Court's pronouncements with regard to arbitration under collective bargaining agreements. Affirmance of the Ninth Circuit's reading of the commerce requirement in the exemption would be a first step in that direction. Reversal of its assumption that a collective bargaining agreement comes within the exemption, and limiting the class of employees encompassed in the exemption, would complete the task.