

THE PRETEXT OF TEXTUALISM: DISREGARDING STARE  
DECISIS IN *14 PENN PLAZA V. PYETT*

by  
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*In 14 Penn Plaza LLC v. Pyett, the Supreme Court ignored the principles of stare decisis and justified its disregard of precedent established thirty-five years earlier in Alexander v. Gardner-Denver Co. on the basis of changed judicial methods of interpretation. This article will examine how the Supreme Court, in Pyett, as well as in other decisions, has used the judicial method of interpretation known as textualism, including a version I call "no-text textualism," to reinvent statutes, abandon precedent, and create its own norms in the field of arbitration. The Pyett decision demonstrates how the Supreme Court has freely disregarded a statute's text, its legislative history, and even the Court's own judicial precedent when fashioning a law of arbitration to suit its policy preferences. In the field of arbitration, the Court's use of textualism has frequently served as a pretext for creating national law and policy that differ substantially from statutory text and purpose as evidenced by legislative history. Pyett serves as a strong invitation to Congress to adopt new legislation that will overturn inconsistent "legislation" created by the Court.*

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## I. INTRODUCTION

“Principles of *stare decisis* . . . demand respect for precedent *whether judicial methods of interpretation change or stay the same*. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.”<sup>1</sup> A year after making this statement, the Supreme Court ignored the principles of *stare decisis* in *14 Penn Plaza LLC v. Pyett*<sup>2</sup> and justified its disregard of precedent established in *Alexander v. Gardner-Denver Co.*<sup>3</sup> because it had changed judicial methods of interpretation.<sup>4</sup> This is a rather unusual basis for abandoning precedent. Normally, when there has been no intervening amendment by Congress, the Court is bound by its prior interpretation of a statute under the principles of *stare decisis*.<sup>5</sup>

This Article will examine how the Supreme Court in *Pyett*, as well as in other decisions, has used the judicial method of interpretation known as textualism,<sup>6</sup> including a version I call “no-text textualism,” to reinvent statutes, abandon precedent, and create its own norms in the field of arbitration. *Pyett* serves as a strong invitation to Congress to adopt new legislation that will overturn inconsistent “legislation” created by the Court. *Pyett* demonstrates how the Supreme Court has freely disregarded a statute’s text, its legislative history, and even the Court’s own judicial precedent when fashioning a law of arbitration to suit its own policy preferences. In the field of arbitration, the Court’s use of textualism has frequently served as a pretext for creating national law and policy that differ substantially from both statutory text and congressional intent behind enactment.

In *Pyett*, the majority held that in a collective bargaining agreement (CBA), union and management could require an individual to arbitrate

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<sup>1</sup> *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (emphasis added).

<sup>2</sup> 129 S. Ct. 1456 (2009).

<sup>3</sup> 415 U.S. 36 (1974).

<sup>4</sup> The Court asserted that a new interpretation was warranted because prior Supreme Court decisions rested on either an “analytical mistake” or a “misconceived view of arbitration.” *Pyett*, 129 S. Ct. at 1464 n.5, 1469.

<sup>5</sup> Once the Court has construed a statute, it will not depart from *stare decisis* “without some compelling justification.” *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991). The majority in *Pyett* raised no compelling justification for its departure from the holding of *Gardner-Denver*. The statement that prior Supreme Court arbitration decisions rested upon a “misconceived view” suggests that the current Court has a different ideology or a different methodology of construction from prior Courts. *Pyett*, 129 S. Ct. at 1469. Such a non-compelling justification for disregarding precedent is exactly what *stare decisis* was meant to prevent.

<sup>6</sup> See generally Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

his statutory discrimination claims and forego the right to bring a civil rights claim in court.<sup>7</sup> This meant that without obtaining the individual's consent, union and management could waive the employee's statutory right to resolve his claim of discrimination in court. CBAs are contracts between the union and management and, until *Pyett*, had never been interpreted to require an individual employee, who is not a party to the contract, to give up the statutory right provided in civil rights statutes to bring a claim of individual discrimination in court. In reaching its decision, the Court went against the well-established thirty-five year old precedent of *Gardner-Denver*, which held that a CBA between union and management could not waive an individual employee's right to bring a statutory civil rights claim in court.<sup>8</sup> Under *Gardner-Denver*, even if the union took the employee's claim to arbitration and lost, the employee could still subsequently assert his discrimination claim in federal court.<sup>9</sup>

In reaching a different conclusion in *Pyett*, the Court reversed the Second Circuit Court of Appeals which had held, in reliance on *Gardner-Denver*, that "a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress."<sup>10</sup> The Supreme Court held the opposite, that individual union members can be required to forego a judicial forum and arbitrate individual statutory civil rights claims under a CBA, despite the lack of any individual consent.<sup>11</sup>

In its decision, the Court claimed to rely on the texts of the Age Discrimination in Employment Act of 1967 (ADEA),<sup>12</sup> the National Labor Relations Act (NLRA),<sup>13</sup> and the Civil Rights Act of 1991<sup>14</sup> as reasons for disregarding its precedent in *Gardner-Denver*. It also relied on the change in judicial methods of interpretation since its *Gardner-Denver* decision in 1974. One important methodological difference is the growth of support for the doctrine of textualism. Statutory interpretation, over the last twenty-five years or so, has been sometimes viewed as a battle between textualism, a focus almost exclusively on the text of the statute, and purposivism or intentionalism, a focus on either the purpose of the statute or the intent of the legislature, obtained from an examination of

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<sup>7</sup> See 129 S. Ct. at 1474.

<sup>8</sup> *Gardner-Denver*, 415 U.S. 36, 49-51 (1974).

<sup>9</sup> See *id.* at 59-60 ("[A]n employee [can] pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.").

<sup>10</sup> *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 91 n.3 (2d Cir. 2007).

<sup>11</sup> See *Pyett*, 129 S. Ct. at 1456, 1475-76 (Stevens, J., dissenting).

<sup>12</sup> 29 U.S.C. §§ 621-34 (2006).

<sup>13</sup> 29 U.S.C. §§ 151-69 (2006).

<sup>14</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991).

the legislative history of the statute.<sup>15</sup> Purposivism and intentionalism involve consideration by courts of the historical context of the statute, looking to the legislative processes as well as the statute as a whole to determine what Congress intended to accomplish, and then interpreting the text consistent with that intent or with the purpose of the statute.<sup>16</sup>

The textualists, on the other hand, led by Justice Antonin Scalia, believe that in interpreting a statute, judges should look primarily, if not exclusively, at the language of the statute to determine its meaning.<sup>17</sup> Although textualists will acknowledge that “context” may be important, to them “context” means dictionary definitions, canons of construction, grammatical use, and how a particular term may be used in other parts of the same statute or in related statutes.<sup>18</sup> “Context,” to textualists, does not include the historical or legislative context. For the most part, textualists consider legislative history to be irrelevant, because they believe legislative history cannot show the actual purpose or intent of Congress.<sup>19</sup> According to textualists, many members of Congress will have little actual knowledge about the legislation or will have different purposes in voting for it; therefore, there is no ascertainable group intent.<sup>20</sup> From a textualist perspective, to the extent legislative intent can be known, it will be found in the text of the statute. Textualists also put forth an interest group critique asserting that the manipulation by partisan groups makes

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<sup>15</sup> See, e.g., Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 427–28 (2005); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206–14 (2000); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1898–1905 (2008).

<sup>16</sup> Intentionalists discern and apply the legislature’s intent, usually based on both the text and the legislative history. Purposivists identify the purpose of the statute and attempt to interpret the statute consistently with that purpose. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–26, 332–33 (1990); Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 818–19 (2002).

<sup>17</sup> See Scalia, *supra* note 6, at 29–37.

<sup>18</sup> See Molot, *supra* note 6, at 44 (“[T]extualists . . . place heavy emphasis on dictionary definitions, the use of identical language in other statutory provisions, and ‘textual’ or ‘linguistic’ canons of construction that have nothing to do with statutory purposes or societal effects.”).

<sup>19</sup> See Tiefer, *supra* note 15, at 215–16.

<sup>20</sup> See *id.* See also, Milavetz, Gallop & Milavetz, P.A. v. U.S., 130 S. Ct. 1324, 1341–42 (2010) (Scalia, J., concurring in part and concurring in the judgment) (“[The House Report] tell[s] us nothing about what the statute means, since (1) we do not know that the members of the Committee read the Report, (2) it is almost certain that they did not vote on the Report (that is not the practice), and (3) even if they did read and vote on it, they were not, after all, those who made this law.”).

legislative reports and drafting history unreliable.<sup>21</sup> To textualists, because legislative history is unreliable, a focus on it simply permits a judge to put forth his or her own preferred interpretation of the statute.<sup>22</sup>

Although textualism has had significant influence on the Supreme Court's decisions, in recent times there has been a resurgence of support for the importance of legislative history in interpreting statutes. Increasingly, scholars have put forth empirical, constitutional, and philosophical support, as well as theory from developmental psychology and linguistics, to confirm legislative history as a critical element in the process of interpreting legislation.<sup>23</sup> They point out that denying the relevance of the historical context of a statute simply means the statute is understood in some other context, rather than the constitutionally-preferred context, which involves the process of congressional approval and presentment to the President.<sup>24</sup> One commentator maintains that "legislative history is the best evidence of what occurred during the bicameral and presentment process[es], [and therefore] provides a

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<sup>21</sup> See Molot, *supra* note 6, at 28 ("[B]orrowing heavily from public choice theory, textualists emphasized that the legislative process is messy and full of compromises, some principled and some unprincipled.").

<sup>22</sup> See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting a conversation with Judge Leventhal for the proposition that citing legislative history is like "looking over a crowd and picking out your friends").

<sup>23</sup> See, e.g., Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 964 (2007) ("[S]tatutes are a form of human communication. . . . When an interpreter substitutes his or her own meaning for the meaning intended by Congress, the interpreter usurps the authority granted to the legislature by the Constitution."); James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001, 1002 (2007) ("Advocates for an intentionalist approach have applied lessons from political science, democratic constitutionalism, analytic philosophy, and developmental psychology to help justify the existence and importance of a collective legislative purpose that can illuminate statutory meaning under the right conditions." (citations omitted)); Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1286 (2005) ("Because legislative history is the best evidence of what occurred during the bicameralism and presentment process, that material provides a constitutionally-preferred context for interpreting statutory text."); Molot, *supra* note 6, at 2 ("Textualism has outlived its utility as an intellectual movement."); Solan, *supra* note 15, at 484 ("[I]t is both natural and sensible to talk about the intent of a group, especially a group that makes decisions together through deliberation."); Tiefer, *supra* note 15, at 206–11, 250–71 (discussing the new concept of using legislative history developed by Justices Breyer and Stevens beginning in 1995, and the support for such use found in analytical philosophy and political theory).

<sup>24</sup> See McGreal, *supra* note 23, at 1287 ("When Justice Scalia refers to plain text, what he really means is text understood in some context *other than the statute's legislative history*. Thus, the real choice is *not* between text and legislative history, but rather between text understood within its legislative history and text understood within some other context.").

constitutionally-preferred context for interpreting the statutory text.”<sup>25</sup> Communication scholars state that because legislators compress meaning when writing statutes, decoding or expanding the meaning when applying or interpreting the statutes requires an understanding of how the legislation was manufactured throughout the legislative process.<sup>26</sup> Moreover, as to ascertaining congressional intent, studies from the fields of psychology, political science, philosophy, and communication all support the coherence and validity of group intent, and the importance of the broader historical context of a statute to convey that intent.<sup>27</sup>

Furthermore, one of the textualists’ main complaints—that judges use legislative history to manipulate meaning to accord with their own policy preferences—does not find empirical support. For example, a study of the use of legislative history by liberal justices in workplace cases concluded that in this area, these justices relied on legislative history in a non-ideological fashion.<sup>28</sup> In other words, in interpreting statutes, the liberal justices followed the logic of the legislative history, whether or not it led in the direction of their perceived policy preferences.<sup>29</sup>

Manipulation of legislative history to obtain a particular result is less likely than manipulation of a textual interpretation by judges who reach an ideological result by ignoring legislative history.<sup>30</sup> As a number of scholars have pointed out, when a judge ignores the historical context that demonstrates the intent of the enacting Congress and substitutes his own meaning, he is usurping the authority granted to the legislature by the Constitution.<sup>31</sup>

This is not to say that textualism has not made contributions to the interpretation of statutes. A focus on the language of a statute is certainly

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<sup>25</sup> *Id.* at 1286.

<sup>26</sup> See Boudreau et al., *supra* note 23, at 958–64. “[T]he purpose of statutory interpretation is to produce a constitutionally legitimate decoding of statutory commands in cases where the meaning . . . is contested.” *Id.* at 959.

<sup>27</sup> See generally, Molot, *supra* note 6; Solan, *supra* note 15; Tiefer, *supra* note 15.

<sup>28</sup> See James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 173 (2008).

<sup>29</sup> See *id.* at 139. The study showed that liberal Justices used legislative history to help support pro-employer outcomes more often than pro-employee outcomes.

<sup>30</sup> See McGreal, *supra* note 23, at 1289–90 (“[W]e must hypothesize a context within which to understand the words. . . . [Justice Scalia] neither acknowledges the need to choose a context, nor provides a standard or method for making that choice. Without standards, the decision is wholly unconstrained, leaving maximum discretion. . . . With Justice Scalia’s hypothetical contexts . . . both the chosen words and their context spring from the judge’s imagination. No external source circumscribes that choice, leaving the judge free to manipulate the hypothetical context to suit her preferred interpretation.”).

<sup>31</sup> See, e.g., Boudreau et al., *supra* note 23, at 964; McGreal, *supra* note 23, at 1287–88.

important and may serve to discourage courts from relying on the purpose of the statute to expand the statutory text.<sup>32</sup> However, textualists tend to ignore the reality that judicial leeway is always present in the interpretation of statutes. First of all, there is leeway in determining if the statute is clear or ambiguous. To the extent textualists believe that textualism can eliminate ambiguity and the need to understand the purpose of the statute, they are expanding their own judicial discretion. Professor Jonathan Molot has noted:

[A]s textualist scholars and judges begin to believe that textualist tools can be employed not just to resolve statutory ambiguity, but also to eliminate it, the opportunities for judicial creativity and abuse increase dramatically. Indeed, by placing so much emphasis on the distinction between clarity and ambiguity, and by rushing to find clarity and thereby excluding consideration of statutory purposes, aggressive textualism may undermine . . . [the] ability to cabin judicial discretion.<sup>33</sup>

Second, it is one thing to focus on the language of the statute, and something else entirely to focus on the absence of language in the statute. In a number of major decisions shaping the Court's various interpretations of statutes with respect to arbitration, the Court has relied on what I call "no-text textualism" to derive the specific meaning of a statute by interpreting what is actually not in the statute at all. This moves the textualists in the direction of the purposivists they criticize for expanding the statute beyond its actual text. When there is no text on which the Court bases its interpretation, and when it has divorced the actual text from any congressional intent or purpose, then the Court can easily turn a statute on its head.

Third, in *Pyett*, the Court relied on policies it created from whole cloth, unrelated to the text of any statute, and then rejected policies relied on in its prior decisions as not being based on the text of the statute. The majority's rejection of prior Supreme Court policies for not being text-based, as well as its reliance on no-text textualism, were key to its dismissal of statutory precedent that was thirty-five years old, had never been overruled, and had been reaffirmed over the years by both Congress<sup>34</sup> and the Supreme Court.<sup>35</sup>

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<sup>32</sup> See Tiefer, *supra* note 15, at 214 (noting that decisions of the Warren Court in the 1960s and early 1970s were criticized as expanding statutes by liberal, purposive readings that found implied private causes of action in regulatory statutes). For example, in *J.I. Case Co. v. Borak*, the Court created an implied right of action for securities fraud, despite no specific reference to a private right of action in the text of the statute. 377 U.S. 426 (1964).

<sup>33</sup> Molot, *supra* note 6, at 49–50.

<sup>34</sup> See, e.g., H.R. REP. NO. 102-40, at 97 (1991) (stating that "any agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the

## II. THE PRETEXT OF TEXTUALISM

Although focusing on the text is something one should do when interpreting a statute, the kind of disconnected textualism practiced by the Supreme Court in many of its arbitration decisions in the last twenty-five years has been simply a pretext to mask its instrumental motivation. What the Court has actually been doing is rewriting statutes with two related goals in mind. One is to remove cases from court dockets, particularly those pesky discrimination and consumer protection cases, and the second is to undermine enforcement of individual rights and protections, producing advantages for big business and commercial interests.<sup>36</sup> The actual text of a statute has frequently had very little to do with the decision reached. In too many instances, textualism has become a pretext for reaching a preferred result.

In *Pyett*, the Court directly interpreted three statutes, the NLRA, the ADEA, and the Civil Rights Act of 1991, and indirectly two others, Title VII and the Federal Arbitration Act (FAA). The Court's goal with respect to the interpretation of each statute was to overcome the principle of *stare decisis*, based on its earlier *Gardner-Denver* decision, in order to further expand the scope of its judicially-created arbitration policy. In *Gardner-Denver*, the Court had unanimously held that an employee's statutory right to bring a discrimination claim in court could not be waived by a union as part of the collective bargaining process. *Gardner-Denver* was based on Title VII of the Civil Rights Act of 1964, but courts have long held that the ADEA is similar in purpose and application to Title VII, and that the analysis of one statute is pertinent to the other.<sup>37</sup>

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enforcement provisions of Title VII," and noting that this view is "consistent with the Supreme Court's interpretation of Title VII in . . . *Gardner-Denver* . . .").

<sup>35</sup> See, e.g., *McDonald v. City of W. Branch*, 466 U.S. 284, 291 (1984); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981).

<sup>36</sup> See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333 (1996) ("Those who have been prejudiced by the Court's handiwork include many American consumers, patients, workers, investors, shopkeepers, shippers, and passengers. Those whose interests have been served include all those engaged in interstate or international commerce deploying their economic power to evade enforcement of their contractual duties or the lash of those state or federal commercial laws that are privately enforced.").

<sup>37</sup> See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("[The] interpretation of Title VII . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" (quoting *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978)) (citations omitted)). See also, *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("The ADEA and Title VII share common substantive features and also a common purpose."). *But cf.*, *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348-49 (2009) (where the Court failed to interpret the ADEA in line with Title VII as to burden of proof).

Thus, there was no claim by the parties or the Court in *Pyett* that any distinction should be made between the interpretations of the two statutes.

An important earlier decision leading up to *Pyett*—*Gilmer v. Interstate/Johnson Lane Corp.*<sup>38</sup>—had also involved the ADEA. In that decision, an employee, required to register as a securities representative, had completed a registration application which included an agreement to arbitrate.<sup>39</sup> When he was terminated he brought suit, which his employer countered with a motion to compel arbitration.<sup>40</sup> The Court held that the arbitration agreement was enforceable.<sup>41</sup> It distinguished *Gardner-Denver* because in that case the employee had not agreed to arbitrate, and the arbitrators were not authorized to resolve statutory claims.<sup>42</sup> It also distinguished *Gardner-Denver* because the arbitration occurred in a collective bargaining context, noting “the tension between collective representation and individual statutory rights, [was] a concern not applicable to [Mr. Gilmer].”<sup>43</sup>

Part of the “tension” referred to in *Gilmer* was the potential conflict between the union and the employee. Although the union has sole authority to make the decision under the CBA whether or not to arbitrate on an employee’s behalf, an employee’s statutory discrimination claim could potentially be brought against the union.<sup>44</sup> Deciding whether to represent an individual with a claim of discrimination against the union certainly raises a conflict for a union.

A few years after *Gilmer*, the Court in *Wright v. Universal Maritime Service Corp.* held that in a CBA, the union could not waive covered employees’ rights to a judicial forum for federal claims of employment discrimination absent a “clear and unmistakable waiver” of those rights.<sup>45</sup> It found there was no such waiver in the case before it, but it also stated that it was not deciding whether, if there were such a waiver, it would be enforceable.<sup>46</sup> The decision was perceived, however, by a number of unions, including Local 32BJ of the Service Employees International

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<sup>38</sup> 500 U.S. 20 (1991).

<sup>39</sup> *Id.* at 23.

<sup>40</sup> *Id.* at 23–24.

<sup>41</sup> *See id.* at 23.

<sup>42</sup> *See id.* at 35.

<sup>43</sup> *Id.*

<sup>44</sup> Title VII and the ADEA both prohibit discrimination by labor organizations. 42 U.S.C. § 2000e-2(c) (2006); 29 U.S.C. § 623(c) (2006).

<sup>45</sup> 525 U.S. 70, 79–81 (1998).

<sup>46</sup> *Id.* at 81–82.

Union—the union involved in the *Pyett* case—as an invitation to include such a specific waiver in its CBA.<sup>47</sup>

Accordingly, when it granted certiorari in *Pyett*, the Court believed that the CBA before it contained a clear and unmistakable waiver of the employees' right to bring a statutory claim of discrimination in court.<sup>48</sup> Thus, despite the unanimous holding of *Gardner-Denver* that a union cannot waive an individual's right to a federal forum, reaffirmed in a number of subsequent Supreme Court decisions,<sup>49</sup> and despite the principle of stare decisis, the *Pyett* Court, in a five to four decision, reached an opposite conclusion. It held that a CBA that clearly required arbitration as the exclusive remedy of an employee's statutory discrimination claim was enforceable.<sup>50</sup> In order to do so, the Court had to discredit the various lines of reasoning of the *Gardner-Denver* Court, and claim that the *Gardner-Denver* holding was extremely narrow. In the process, it also interpreted the NLRA, the ADEA, and the Civil Rights Act of 1991, based on a combination of its version of textualism, including "no-text textualism," and of its own non-text based judicially-created policies.

#### A. *The NLRA and the ADEA*

There is nothing in the text of NLRA that deals with statutory claims of employment discrimination based on race, sex, age, etc. The statute, adopted in 1935, makes clear that its purpose was to permit employees to organize unions and bargain collectively in order to promote labor

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<sup>47</sup> See Brief of the Service Employees International Union, Local 32BJ as Amicus Curiae in Support of Respondents at 13, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581) [hereinafter *Brief of the Service Employees International Union*] ("[T]he standard no-discrimination clause in the Local 32BJ/Realty Advisory Board collective bargaining agreements was amended in 1999 to take account of this Court's decision in *Wright v. Universal Maritime Service Corp.*").

<sup>48</sup> The waiver was not as "clear and unmistakable" as it first appeared. See *infra* notes 136–44 and accompanying text.

<sup>49</sup> See *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 737–38 (1981) ("[I]n *Alexander v. Gardner-Denver* . . . [t]he Court found that in enacting Title VII, Congress had granted individual employees a nonwaivable, public law right to equal employment opportunities that was separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining. Moreover, because Congress had granted aggrieved employees access to the courts, and because contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights, the Court concluded that Title VII claims should be resolved by the courts *de novo*." (citations omitted)). See also, *McDonald v. City of W. Branch*, 466 U.S. 284, 290 (1984) ("[O]ur decisions in *Barrentine* and *Gardner-Denver* compel the conclusion that [arbitration] cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard.").

<sup>50</sup> 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009).

peace.<sup>51</sup> Nothing in the text of the NLRA addresses or permits the arbitration of individual statutory discrimination claims, because this was simply never contemplated in 1935, and is not within the scope of the statute. Nonetheless, the *Pyett* Court ignored the lack of text with respect to this point and fell back upon the policy of “freedom of contract” to assert that as long as a CBA provision governing individual ADEA claims is negotiated between the employer and the union, it is properly within the “broad sweep” of the NLRA, *unless* prohibited by the ADEA.<sup>52</sup> This is the first step of the Court’s innovative “no-text textualism.” If there is no text prohibiting arbitration of statutory claims, then it must be permitted, unless the prohibition is found in the ADEA.

The Court then turned to an interpretation of the text of the ADEA. There is, of course, nothing in the text of the ADEA that states that an individual’s ADEA claim can be required to be arbitrated under a CBA without that individual’s consent. The Court thus resorted further to its interpretative method of “no-text textualism,” interpreting the absence of pertinent text as establishing that what the Court wished to do was permitted. Quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>53</sup> where it first developed this no-text ploy,<sup>54</sup> and *Gilmer*, in which it also took up the banner, the Court stated that “if Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.”<sup>55</sup> In other words, since nothing in the statutory text said anything about protecting an individual against the waiver of the right to go to court, then Congress intended to permit waiver. Although nothing in the text of either the NLRA or the ADEA supported the Court’s position, according to its “no-text textualism,” it was carrying out the will of Congress when it adopted its own policy of choice.

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<sup>51</sup> 29 U.S.C. § 151 (2006) (“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.”).

<sup>52</sup> *Pyett*, 129 S. Ct. at 1459. The freedom of contract principle is not really applicable in this situation, however, because freedom of contract applies only to the parties to the contract, not to non-contracting parties, like the individual employees.

<sup>53</sup> 473 U.S. 614 (1985) (enforcing an arbitration agreement requiring arbitration in Japan of U.S. antitrust claims raised by Puerto Rican car dealership).

<sup>54</sup> See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 138–43 (2006).

<sup>55</sup> *Pyett*, 129 S. Ct. at 1465 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628, and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991)).

Because the textualists on the Court think that legislative history is irrelevant, they did not consider the fact that when the ADEA was adopted in 1967, statutory claims were simply not arbitrated,<sup>56</sup> so it would not have occurred to Congress to prohibit something that was not permitted anyway. Arbitration of statutory claims only really began in 1985 with *Mitsubishi*.<sup>57</sup> There, the Court used the same no-text textualism tactic to find that, although the text of the FAA (from 1925) only dealt with contract claims and not statutory claims, nonetheless, because the text did not expressly prohibit statutory claims, Congress intended statutory antitrust claims to be arbitrated.<sup>58</sup> Essentially, the Court's view is that if Congress said nothing about an issue, even though it was not pertinent at the time the statute was enacted, then the Court can interpret the statute to support its own policy preferences based on the absence of text.

Thus, using the statutory interpretation method of no-text textualism, the Court concluded that because the text said nothing, Congress must have intended ADEA claims to be determined by arbitration under a CBA without the individual's consent. The far more likely scenario is that Congress did not foresee that anyone would ever think that individual discrimination claims under Title VII or the ADEA could be forced into arbitration under a CBA without the consent of the individual. However, because Congress did not prohibit involuntary arbitration of statutory claims, then according to the no-text textualism of the Court, this was permitted, because there was "no evidence that 'Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act.'"<sup>59</sup> The Court's approach is to articulate its policy preference despite the absence of any textual support, and then interpret that absence in the text to mean its policy prevails.

A true textualist, looking at the NLRA, would have to conclude that nothing in the statute supports the Court's conclusion. And an examination of the text of the ADEA would reveal that the elaborate federal machinery put in place for a claimant to file a charge would make it more likely than not that Congress did not intend for ADEA claims to

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<sup>56</sup> See Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 2–3, 14–16 (2009) (noting that for over three hundred years, arbitration had been viewed as a way for commercial disputes to be resolved between merchants, and that statutory claims, except in very rare cases, were simply not decided in arbitration). The Supreme Court's decision in 1985 in *Mitsubishi* that statutory antitrust claims could be arbitrated created a major paradigm shift.

<sup>57</sup> 473 U.S. at 626–27.

<sup>58</sup> See *id.* at 628 (“[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.”).

<sup>59</sup> *Pyett*, 129 S. Ct. at 1465 (quoting *Gilmer*, 500 U.S. at 35).

be shunted into arbitration by a union-management contract. Specifically, because the focus in the text of the statute is on the importance of protecting the individual rights of the older worker, the text does not suggest in any way that the right of the individual to bring its case in court could be removed without its consent.<sup>60</sup>

The Court brushed over completely the core aspect of arbitration: consent. The power of the arbitrators only comes from the consent of the parties who agree to come before them.<sup>61</sup> There is no textual support in the NLRA or the ADEA for finding that an employee can be forced to arbitrate her individual statutory claim without her consent. The Court ignored this, asserting that there was no difference in an employee who consented directly, as in *Gilmer*, and one who agreed by union representation.<sup>62</sup> The Court's choice of words is interesting: "Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."<sup>63</sup> The Court did not identify which law (or text) it was referring to—the ADEA or the NLRA—but it does not really matter, because the Court was again resorting to no-text textualism. It is the lack of text that persuaded the Court to conclude that agreeing directly is the same as having someone else agree for you without your consent. The result of the no-text methodology is that if the path the Court wants to tread is not specifically prohibited in the statute's text, then, according to the Court, this provides evidence that the path it selected should be taken.

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<sup>60</sup> A true textualist would also consider how specific provisions of the statute might bear on the question of waiver. The ADEA was amended in 1990 by the Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 201, 104 Stat. 983 (1990), to add a new section, 29 U.S.C. § 626(f), which permits waiver of ADEA rights only if the waiver is "knowing and voluntary." This was to ensure that older workers did not give up their rights in settlement with an employer unless they truly understood what they were giving up. There are extensive procedural steps which must be followed, including the right to consult with an attorney, the right to consideration that is in addition to what the employee is already entitled to receive, at least twenty-one days to consider the employer's offer, and seven days after execution during which the employee may revoke his consent. 29 U.S.C. § 626(f) (2006). Some courts have held that these protections only apply to an employee's waiver of its substantive rights under the ADEA, rather than a waiver of its right to bring its case in court. *See, e.g., Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660–61 (5th Cir. 1995); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 181–82 (3d Cir. 1998). However, it seems incongruous that legislation would make it very difficult for an employee to waive its substantive rights under the ADEA, and yet at the same time intend to make it very easy for a union to waive the employee's right to go to court, particularly when the union could decide in good faith not to bring an arbitration on behalf of the employee.

<sup>61</sup> *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion.").

<sup>62</sup> *Pyett*, 129 S. Ct. at 1465.

<sup>63</sup> *Id.*

Yet, consider what the Court is saying: There is no difference between situations where Ms. Jones, an employee, agrees directly with her employer to arbitrate ADEA claims, or where the same Ms. Jones, if her employment is covered by a union, is bound by her union, without her consent, to have her ADEA claims arbitrated instead of litigated in court. It is like the difference between Ms. Jones agreeing with Mr. Smith to buy his house, or Ms. Jones, without her consent, being bound by her broker to buy Mr. Smith's house. Most people think there is a difference.

The only way one can understand the perspective of the Court is simply to recognize that the Court has little if any regard for an individual's statutory rights to be free from discrimination. For example, despite the obvious efforts of Congress to protect the individual rights of employees to equal employment opportunities, the Court is perfectly satisfied to let those rights be subordinated to the rights of the union and the employer, the more powerful parties in the transaction, who benefit from controlling the arbitration process.

#### *B. The Civil Rights Act of 1991*

The disregard for an individual's statutory rights can also be seen in the Court's so-called textual analysis of a provision in a third statute involved in *Pyett*—the Civil Rights Act of 1991.<sup>64</sup> The *Pyett* majority set forth the “plain language” of this statute as another basis for asserting that Congress intended to permit unions to waive an individual's right to take her ADEA claim to court. Section 118 of the Civil Rights Act says that “[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.”<sup>65</sup> Taking what it claimed was a textualist approach, the Court maintained that the text of the Civil Rights Act was clear.<sup>66</sup> It asserted that the word “arbitration” included both commercial arbitration and collective bargaining arbitration.<sup>67</sup> It thus concluded that the term supported its position that in a collective bargaining context, the union could waive the employee's right to bring ADEA claims in court.<sup>68</sup>

In rendering this interpretation, the Court expressly rejected a House Report that contradicted its view.<sup>69</sup> That Report commented with respect to section 118 that if an employee were to submit his claims to

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<sup>64</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>65</sup> Civil Rights Act of 1991 § 118.

<sup>66</sup> See *Pyett*, 129 S. Ct. at 1465 n.6.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

arbitration in the context of a CBA, he would not be precluded from seeking relief in federal court under Title VII.<sup>70</sup> Importantly, the House Report went on to state, “This view is consistent with the Supreme Court’s interpretation of Title VII in *Alexander v. Gardner-Denver Co.*”<sup>71</sup>

Of course, at the time the Civil Rights Act was passed in 1991, the Supreme Court had expressly set forth, in *Gardner-Denver* and in other cases, its view that the union could not, in a CBA, waive an individual’s statutory right to bring claims in court. The House Report emphasized the intent in section 118 of the Civil Rights Act to support consensual alternative dispute resolution without precluding an employee from individually protecting his statutory right in court.<sup>72</sup>

Yet, the *Pyett* majority asserted that the House Report mischaracterized the holding of *Gardner-Denver*, which, according to the majority, did not protect the employee from union waiver if statutory claims were clearly covered by the CBA.<sup>73</sup> It should be noted that in 1991, not a single court or scholar shared the *Pyett* majority’s view of the *Gardner-Denver* holding. Nonetheless, the *Pyett* Court claimed that the text of the Civil Rights statute was clear and unambiguous: it encouraged arbitration for dispute resolution without imposing any constraints on collective bargaining.<sup>74</sup> Accordingly, in the Court’s view, waiver by the union of the employee’s right to try ADEA claims in court was textually supported in the Act.<sup>75</sup> Thus, concluded the Court, because there was a conflict between the text and the legislative history, the text must prevail.<sup>76</sup>

The Court’s analysis is not supported by the text of the Civil Rights Act. Although nothing in the text of the Civil Rights Act says that arbitration of ADEA claims within collective bargaining is excluded, it is equally true that nothing in the text states that arbitration will preclude an employee from going to court on his statutory claims. More significantly, the House Report took pains, first, to point out that the Civil Rights Act was not intended to limit an employee who arbitrated from also taking his claim to court, and second, to note that this was its understanding of the holding of *Gardner-Denver*. At best, the text of section 118 is ambiguous, because two interpretations might arguably be made, that of the *Pyett* Court and that of the House Report. In that light,

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<sup>70</sup> *See id.*

<sup>71</sup> *See* H.R. REP. NO. 102-40, at 97 (1991).

<sup>72</sup> *Id.* (“[A]ny agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.”).

<sup>73</sup> 129 S. Ct. at 1465 n.6.

<sup>74</sup> *Id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

the Court's assertion that the text is clear is a good example of one of the abuses of textualists, which is to find clarity where there is none. This is the kind of abuse that can lead to uncabined judicial discretion, because clarity, to the textualist, means that a particular judge can determine meaning without any regard to historical or legislative context.<sup>77</sup> Moreover, although ambiguity arguably exists, pertinent information points in a different direction from the majority's view, based on the historical context, that is, what everyone at the time understood the holding of *Gardner-Denver* to be, and the specific statement of the House Report. These factors suggest that the majority's assertion that the text is clear and unambiguous is a simple pretext for reaching a result not intended by Congress but desired by a majority of the Court.<sup>78</sup>

Ironically, a primary purpose of the Civil Rights Act was to expand the scope of relevant civil rights statutes, and it was adopted pursuant to a specific finding that the Supreme Court "has weakened the scope and effectiveness of Federal civil rights protections."<sup>79</sup> Yet, despite this specific language in the text of the statute, the Court's textual analysis did not consider whether its interpretation of section 118 would strengthen the scope and effectiveness of federal civil rights protections. To the contrary, *Pyett* demonstrates how the Court has continued to create law and policy that undercut civil rights protections, while disingenuously asserting that it was respecting the choice made by Congress.<sup>80</sup> For example, in the first part of the *Pyett* decision, the Court relied upon its methodology of no-text textualism to conclude that examination of the NLRA and the ADEA "yields a straightforward answer to the question presented,"<sup>81</sup> i.e., that arbitration of an individual ADEA claim under a CBA is enforceable as an exclusive remedy, despite the lack of individual consent. It then claimed that accordingly, "[t]he Judiciary must respect [Congress's] choice."<sup>82</sup>

The Court is so far removed from respecting the choice made by Congress that it calls to mind an observation made by Justice Aharon Barak of the Supreme Court of Israel. Justice Barak observed that the "minimalist" judge 'who holds that the purpose of the statute may be learned only from its language' has more discretion than the judge 'who

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<sup>77</sup> See Molot, *supra* note 6 and text accompanying note 33.

<sup>78</sup> In this context, the Court stated, "[W]e do not resort to legislative history to cloud a statutory text that is clear." *Pyett*, 129 S. Ct. at 1465 n.6 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994)).

<sup>79</sup> Civil Rights Act of 1991 § 2(2).

<sup>80</sup> See 129 S. Ct. at 1466.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

will seek guidance from every reliable source.’”<sup>83</sup> In citing to Justice Barak in *Circuit City Stores, Inc. v. Adams*,<sup>84</sup> Justice Stevens noted in his dissent that “[a] method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.”<sup>85</sup> Using no-text textualism, disengaged from any historical or legislative context, the Court arrived at its own choice, not the choice made by Congress in the ADEA or the NLRA.

### C. *Discrediting Gardner-Denver*

Claiming to have answered the question presented by means of its “textual” interpretation of statutes, the Court then proceeded to address its prior decision in *Gardner-Denver*. Its purpose in the second part of the *Pyett* decision is to narrow and discredit *Gardner-Denver*, in order to overcome its stare decisis effect. Because *Gardner-Denver* was decided in 1974, the law and policy reflected therein are consistent with the first fifty years of interpretation of the FAA. The Court’s major decisions that rewrote the FAA began when it created the “liberal federal policy favoring arbitration” in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* in 1983.<sup>86</sup> Then, in 1984, the Court declared in

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<sup>83</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 133 (2001) (Stevens, J., dissenting (quoting AHARON BARAK, JUDICIAL DISCRETION 62 (Yadin Kaufmann trans., 1989))).

<sup>84</sup> In *Circuit City*, the Court held, despite clear evidence to the contrary in both the text and legislative history, that almost all workers were covered by the FAA. 532 U.S. at 119. *See also* *Moses*, *supra* note 54, at 148–49 (“Nothing in the FAA text suggests that ‘other workers’ should be limited to transportation workers rather than, as the text clearly states, ‘any other class of workers engaged in foreign and interstate commerce.’ [9. U.S.C. § 1] By refusing to assess the legislative history, allegedly because the text was so clear, the Court essentially freed itself to follow its own preferences and policies as to the structure and application of the FAA, rather than to interpret the legislation actually enacted.”).

<sup>85</sup> *Circuit City Stores, Inc.*, 532 U.S. at 133.

<sup>86</sup> 460 U.S. 1, 24 (1983). There was no basis for the statement in *Moses H. Cone* that section 2 of the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements.” *Id.* at 24. Nothing in the legislative history suggests that Congress favored arbitration. Rather, Congress agreed to adopt the FAA so that arbitration contracts could be enforced like other contracts. The FAA was designed to place arbitration agreements “upon the same footing as other contracts.” H.R. Rep. No. 68-96 (1924). The policy the Supreme Court announced in *Moses H. Cone* was a policy that concerned labor arbitrations, but not commercial arbitrations. There are national policy justifications for favoring arbitration of a CBA—to promote industrial peace and prevent strikes and worker violence. But these policy reasons are not applicable to commercial arbitration, which is simply an alternative to litigation, and not one particularly favored by Congress, contrary to the Court’s assertion. *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI-KENT L.

*Southland Corp. v. Keating* that the FAA, which the 1925 enacting Congress believed to be a procedural statute applying only in federal court, was substantive law that applied in state court and pre-empted state law.<sup>87</sup> In 1985, the Court took another major step in rewriting arbitration law when it determined that statutory anti-trust claims could be arbitrated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>88</sup> In 2001, after a number of decisions expanding the reach of the FAA to virtually all statutory claims,<sup>89</sup> the Court, in *Circuit City Stores, Inc. v. Adams*,<sup>90</sup> determined that the exclusion of workers, set forth in the FAA and confirmed by the legislative history, was only a very limited exclusion, so that actually almost all workers were included within the scope of the FAA.<sup>91</sup> The Court therefore determined that employees could be forced to arbitrate all of their claims by their employers as a condition of employment.<sup>92</sup>

In these decisions, the Court kept moving away from concerns about protecting individual rights. Using its judicially-created policies and various interpretive methods, the Court has succeeded in denying access to the courts and eroding protections legislated in the fields of federal antitrust, securities and employment law. Moreover, by pre-empting state law, the Court has prevented states from enforcing legislation that could protect its citizens from potential abuses of arbitration.<sup>93</sup>

The Court explained its revised view of *Gardner-Denver* by the “radical change, over two decades, in the Court’s receptivity to arbitration,”<sup>94</sup> cautioning that because of this radical change, one cannot rely on previous decisions that do not reflect its current policy preferences.<sup>95</sup> Its “receptivity to arbitration” can best be understood in terms of some of the major judicial policies it has created since the mid-1980s. These

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REV. 753, 797 (1990) (“Arbitration in nonunion settings does not warrant an aggressive pro-arbitration policy akin to the *Steelworkers Trilogy*.”).

<sup>87</sup> 465 U.S. 1, 11, 16 (1984).

<sup>88</sup> 473 U.S. 614, 626–28 (1985).

<sup>89</sup> See, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (Carriage of Goods by Sea Act claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (ADEA claims); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (securities claims); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (securities and RICO claims).

<sup>90</sup> 532 U.S. 105 (2001).

<sup>91</sup> See *id.* at 114–15, 119.

<sup>92</sup> See *id.* at 109, 119.

<sup>93</sup> See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 688 (1996) (holding that Montana state law requiring a notice be put on front of agreement if it contained an arbitration clause was preempted by federal law, which did not allow arbitration to be singled out for special treatment).

<sup>94</sup> *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 (2009) (quoting *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 77 (1998)).

<sup>95</sup> See *Pyett*, 129 S. Ct. at 1470.

judicial policies have no basis in the text of the FAA, or in the intent of Congress or the purpose of the Act. They are simply the Court's view of what the national law and policy of arbitration should be:

1. There is a strong federal policy favoring arbitration.<sup>96</sup>
2. Substantive rights are as well protected in arbitration as in litigation.<sup>97</sup>
3. Arbitral tribunals are readily capable of handling the factual and legal complexities of statutory claims.<sup>98</sup>

None of these policies are textually based, just as the majority's interpretation of the NLRA, the ADEA, and the Civil Rights Act of 1991 in *Pyett* were not textually based. However, they have been used in many of the Court's opinions to bootstrap a result not indicated in the text or legislative history. For example, in order to find in *Mitsubishi* that antitrust claims were arbitrable, the Court faced a number of obstacles. There was no support in the text of the FAA or in the text of the antitrust statutes for arbitration of such claims, there were counter-indications in the legislative history, and no prior Court had ever found antitrust claims to be arbitrable.<sup>99</sup> The major rationale of the Court for its creation of new law was the "liberal federal policy favoring arbitration agreements,"<sup>100</sup> a policy it had created and announced in *Moses H. Cone*<sup>101</sup>.

The second basic rationale in *Mitsubishi* for suddenly determining that antitrust claims were arbitrable was that the dispute had arisen in an international context.<sup>102</sup> However, this rationale quickly dropped to the

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<sup>96</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>97</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("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."). *But see* Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 491 (2008) (pointing out that NASD (FINRA) securities arbitrations lack substantive fairness, and that "[t]he social cost of such a lawless system of governance is considerable."). *See also infra*, notes 118–20.

<sup>98</sup> *Pyett*, 129 S. Ct. at 1471 (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987)).

<sup>99</sup> *See Mitsubishi Motors Corp.*, 473 U.S. at 646 (Stevens, J., dissenting):

The plain language of this statute encompasses Soler's claims that arise out of its contract with Mitsubishi, but does not encompass a claim arising under federal law[] . . . Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.

<sup>100</sup> *Id.* at 625 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

<sup>101</sup> *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. *See also supra* note 86.

<sup>102</sup> 473 U.S. at 631. Referring first to "the emphatic federal policy in favor of arbitral dispute resolution," the Court stated that the policy "applies with special force in the field of international commerce." *Id.* According to the Court, "a strong belief in the efficacy of arbitral procedures for the resolution of international

wayside in subsequent domestic arbitration cases, as the Court decided in case after case that every statute was arbitrable, unless an explicit provision in another federal statute prevented it.<sup>103</sup> In *Pyett*, therefore, the Court reached out to snag the last bastion of resistance—statutory claims under CBAs.

Although the Court claimed it distinguished rather than overruled *Gardner-Denver*,<sup>104</sup> in effect, virtually nothing remains of the decision. The majority's primary means of distinguishing *Pyett* from *Gardner-Denver* was to claim that the *Gardner-Denver* holding was solely based on the narrow ground that the CBA in that case did not specifically cover statutory claims, unlike the CBA in *Pyett*.<sup>105</sup> It then asserted that all the other lines of reasoning in *Gardner-Denver* were dicta, and were based on a "misconceived view of arbitration"<sup>106</sup> or "a distorted understanding."<sup>107</sup> In other words, because the Supreme Court's view of arbitration in 2009 differed from its view in 1974, the earlier views were erroneous and could not now be relied upon. This is exactly the basis for the criticism by Justice Stevens in his dissent, to the effect that the Court was ignoring principles of stare decisis in favor of its current preference for arbitration.<sup>108</sup>

The majority defended itself, however, by strongly denying that its preference for arbitration had anything to do with its decision. It asserted that "contrary to Justice Stevens' accusation, it is the Court's fidelity to the ADEA's text—not an alleged preference for arbitration—that dictates the answer to the question presented."<sup>109</sup> It then attacked Justice Stevens for ignoring the text and seeking to vindicate his own preferences, which, according to the Court, "he disguises as a search for congressional purpose."<sup>110</sup> In its attack, the majority did not respond to the specific

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commercial disputes" outweighed prior views that antitrust claims were not arbitrable. *Id.*

<sup>103</sup> See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989) ("Under [the FAA], the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute." (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987))).

<sup>104</sup> *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1469 n.8 (2009).

<sup>105</sup> See *id.* at 1468.

<sup>106</sup> *Id.* at 1469.

<sup>107</sup> *Id.* at 1470.

<sup>108</sup> *Id.* at 1475 (Stevens, J., dissenting) ("Notwithstanding the absence of change in any relevant statutory provision, the Court has recently retreated from, and in some cases reversed, prior decisions based on its changed view of the merits of arbitration. . . . Today the majority's preference for arbitration again leads it to disregard our precedent.").

<sup>109</sup> *Id.* at 1470 n.9.

<sup>110</sup> *Id.*

point Justice Stevens made in his dissent in *Pyett*, which was that Justices should not overturn an interpretation of an Act of Congress that has been settled for many years, just because they may have conflicting policy interests.<sup>111</sup> Rather, the majority referred to Justice Stevens' dissent in *Gilmer* in 1991, where he said that permitting the compulsory arbitration of employment discrimination claims conflicted with the congressional purpose animating the ADEA.<sup>112</sup> Apparently, the majority reached back to *Gilmer* because it wanted to set up a conflict between textualist and purposivist approaches, so that it could then state: "This Court is not empowered to incorporate such a preference into the text of a federal statute."<sup>113</sup> Thus, the Court appears to be saying that if a justice tries to ascertain a congressional purpose, it will be viewed as merely his own personal preference. For the Court, the only preferences which are entitled to weight are the Court's own judicially-created preferences, unconnected to any intent of Congress or purpose of the legislation. Moreover, because the Court's preferences have changed since *Gardner-Denver*, the prior policies expressed there are no longer valid.<sup>114</sup>

The Court's preference for arbitration is evident in its efforts to explain away some of the other lines of reasoning in *Gardner-Denver*, based on its newer perspectives. The Court emphasized, for example, its current policy that substantive rights are not affected by a change of forum, and that in *Gardner-Denver* the Court erroneously assumed that a waiver of the right to a judicial forum was a waiver of substantive rights.<sup>115</sup> Under the *Pyett* Court's policy, rights such as the right to bring a claim in court are procedural and can be waived.<sup>116</sup>

The Court's current policy that no substantive rights are affected simply by having them determined in an arbitral rather than a judicial forum cuts against earlier Supreme Court policy which, according to the majority, the Court has abandoned.<sup>117</sup> An example of the abandoned policy is the statement in *Gardner-Denver* that "we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'"<sup>118</sup> Other earlier Supreme Court cases also noted

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<sup>111</sup> *See id.*

<sup>112</sup> *Id.*; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 41 (1991).

<sup>113</sup> *Pyett*, 129 S. Ct. at 1470 n.9.

<sup>114</sup> *See id.* at 1470.

<sup>115</sup> *Id.*

<sup>116</sup> *See id.* at 1470–71.

<sup>117</sup> *Id.* at 1470.

<sup>118</sup> 415 U.S. 36, 56 (1974) (quoting *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 359–60 (1971) (Harlan, J., concurring)). The *Gardner-Denver* Court also pointed out that:

the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil

that rights were less well protected by arbitration because of the lack of trial by jury, the fact that arbitrators do not always give reasons for their results, the record of proceedings is not as complete, and judicial review of the award is much more limited than judicial review of a trial.<sup>119</sup> In addition, commentators have noted that the process of arbitration can undermine protection of an individual's statutory rights.<sup>120</sup>

The Supreme Court's adoption of the policy that there is no difference in the protection of substantive rights in arbitration than in a court proceeding simply does not take into account the limited discovery available in arbitration, the lack of a jury trial, and the limited judicial review. Moreover, the Court asserted, without any support except its own judicial fiat, that concerns that arbitrators may not be competent to resolve questions of public law and that arbitration may be ill-suited as a forum for the resolution of statutory rights are "misconceptions [that] have been corrected."<sup>121</sup>

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trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable.

415 U.S. at 57–58.

<sup>119</sup> See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result."); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 744–45 (1981) ("[N]ot only are arbitral procedures less protective of individual statutory rights than are judicial procedures, but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief." (citations omitted)); *McDonald v. City of W. Branch*, 466 U.S. 284, 291 (1984) ("[A]rbitral factfinding is generally not equivalent to judicial factfinding. . . . '[T]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." (quoting *Gardner-Denver*, 415 U.S. at 57–58)).

<sup>120</sup> See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) (noting that processes that are informal and lack safeguards may increase the risk of class-based discrimination); Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U.J. GENDER SOC. POL'Y & L. 519, 520 (2004) ("Unfortunately, the very features that attract parties to ADR undermine the protection of an individual's statutory rights. Because ADR is less formal and is not held to the same standards as judicial proceedings, there is a risk that laws may be misapplied, or not applied at all, and that justice will be exchanged for efficiency."); Carrington & Haagen, *supra* note 36, at 348 ("While discovery may be regarded as a mixed blessing at best, because of its costs, it cannot be doubted that the availability of discovery assures that courts are in general more effective than arbitral tribunals in detecting wrongdoing and enforcing the rights of victims, whether of securities fraud, price-fixing conspiracies, race or gender discrimination, or environmental misdeeds.").

<sup>121</sup> *Pyett*, 129 S. Ct. at 1471.

In support of the suitability of arbitration, the Court noted in a footnote in *Pyett* that arbitration remains subject to judicial review.<sup>122</sup> It did not point out, however, that judicial review of arbitration decisions rendered pursuant to a CBA is not a review on the merits.<sup>123</sup> Courts are highly deferential to arbitrators' decisions and are not authorized to review for legal or factual errors or misinterpretations of the contract.<sup>124</sup> Because there is no review of any error of law or fact for an arbitral award, the determination of a statutory claim in arbitration results in unreviewable discretion by the arbitrator. The rights against discrimination that Congress sought to provide are thus subject to erroneous, uncorrectable decisions by an arbitrator. The fact that an arbitrator may just get it wrong, with no mechanism for the wrong to be corrected by a court, is far more serious when public law issues affecting many people are at stake than in the typical arbitration that only affects two contracting parties.<sup>125</sup> The trade-off of convenience or efficiency for an unreviewable application of the law may be acceptable in a commercial case where parties have clearly consented to the arbitral forum. However, in the case of individual statutory rights, particularly where the parties have not consented to arbitrate, the exchange of a court proceeding for arbitration is not consistent with the protections Congress intended to provide in Title VII and the ADEA.

The final line of reasoning from *Gardner-Denver* that the Court felt obliged to discredit in *Pyett* was the concern that the *Gardner-Denver* Court expressed about a union's exclusive control over whether it would arbitrate an individual grievance and the possibility that a union might subordinate the interest of individual employees to the collective interest

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<sup>122</sup> *Id.* at 1471 n.10.

<sup>123</sup> *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.").

<sup>124</sup> *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement." (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987))).

<sup>125</sup> A number of commentators have written about the need for heightened scrutiny of statutory claims decided in arbitration. See, e.g., Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 88, 114 (2006) (stating that for arbitration of any claims under mandatory laws, a court should review the award to ensure correct application of the law); Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U.L. REV. 453, 514 (1999) ("Unless U.S. courts are determined to abdicate completely their responsibility for participating in the enforcement of mandatory U.S. law, they must undertake some review of . . . arbitral resolutions of claims arising under mandatory U.S. law, and their review must depart significantly from current standards that properly permit virtually no merits reviews of arbitral resolutions of nonmandatory law claims.").

of all employees.<sup>126</sup> Interestingly, the *Pyett* Court did not mention a further concern expressed in *Gardner-Denver* that in light of Congress's decision to afford individuals protection against discrimination by unions under Title VII, there could well be a conflict of interest between the employee and the union with respect to a discrimination claim.<sup>127</sup>

The *Pyett* Court's response to the question of conflict was that this "judicial policy concern" cannot be relied upon as authority "for introducing a qualification into the ADEA that is not found in its text."<sup>128</sup> It further stated that the Court should not substitute its view of policy for legislation passed by Congress, and that it is not proper to consider any alleged conflict of interest between a union and its members "[u]ntil Congress amends the ADEA to meet the conflict of interest concern identified in the *Gardner-Denver* dicta . . ."<sup>129</sup> The Court did not seem troubled that its own judicial policy concerns cannot be found in any text.<sup>130</sup>

One might find it difficult to discern from the Court's statement how to distinguish a judicial policy concern that is not in the text, and is therefore not acceptable, from a judicial policy concern that also is not in the text, but is acceptable. Take, for example, the judicial policy concerns expressed by the majority that the rights protected by Title VII and the ADEA are substantive rights that are as equally well-protected in arbitration as in court<sup>131</sup> and that the right to go to court is a procedural

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<sup>126</sup> *Pyett*, 129 S. Ct. at 1472.

<sup>127</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974). Chief Justice Warren Burger expressed this concern graphically in his dissent in *Barrentine v. Ark-Best Freight Sys., Inc.*, 450 U.S. 728, (1981). Chief Justice Burger disagreed with the majority's view that a FELA claim could be brought in court after having been unsuccessfully submitted to a grievance committee under a CBA. However, he agreed with the majority and with the *Gardner-Denver* decision that claims under civil rights statutes

should not be subject to waiver by a collective-bargaining agreement negotiated by a union. . . . The long history of union discrimination against minorities and women . . . led Congress to forbid discrimination by unions as well as employers. Against a background of union discrimination, Congress was aware that, in the context of claims under the Civil Rights Act, unions sometimes had been the adversary of workers. Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

*Barrentine*, 450 U.S. at 749–50 (citations omitted).

<sup>128</sup> 129 S. Ct. at 1472.

<sup>129</sup> *Id.*

<sup>130</sup> *See supra*, text accompanying notes 96–101.

<sup>131</sup> *See Pyett*, 129 S. Ct. at 1471.

right—not a right protected by the statutes.<sup>132</sup> There is no statutory basis for these policy determinations. Thus, one would think that if the Court were consistent, it would not give credence to such policies unless Congress amended the text of the statutes to address those policy issues.

Moreover, the current texts of both Title VII and the ADEA appear to contradict the Court's declared policy about the right to go to court, because both statutes clearly give plaintiffs a right to bring their action in court.<sup>133</sup> The four person minority in *Pyett* noted the weakness of the majority's position on this point in its dissent:

The majority seems inexplicably to think that the statutory right to a federal forum is not a right, or that *Gardner-Denver* failed to recognize it because it is not "substantive." But *Gardner-Denver* forbade union waiver of employees' federal forum rights in large part because of the importance of such rights and a fear that unions would too easily give them up to benefit the many at the expense of the few, a far less salient concern when only economic interests are at stake.<sup>134</sup>

It appears that the only way to distinguish policies that the *Pyett* majority finds are acceptable (even though they have no textual support), and those it claims are unacceptable, (because they do not have textual support) is to consider the twin goals of the current majority: (1) keep individual rights cases from having access to court, and (2) minimize protections created by Congress for parties with little or no bargaining power. With that perspective, one can understand why specific policies are or are not acceptable to the *Pyett* majority.

Essentially, the decision in *Pyett* represents a high-water mark of disingenuousness.<sup>135</sup> The Court claimed to rely on statutory text when there was no textual support to be found for its preferred position. It condemned Justice Stevens's dissent for focusing on congressional purposes, claiming he was interpreting the statute according to his personal preferences. At the same time, the Court made clear that its own judicially-created policies were the basis for ignoring congressional purpose in statutes such as the ADEA, Title VII, and the 1991 Civil Rights

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<sup>132</sup> See *id.* at 1469–70.

<sup>133</sup> See ADEA, 29 U.S.C. § 626(c)(1) (2006) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of [the Act]"); Title VII, 42 U.S.C. § 2000e-5(f)(3) (2006) ("Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this [title].").

<sup>134</sup> 129 S. Ct. at 1480 n.2. (Souter, J., dissenting) (citations omitted).

<sup>135</sup> Justice Stevens pointed out that the majority's derision of the "policy concern" regarding a union's conflict of interest "is particularly disingenuous given its subversion of *Gardner-Denver's* holding in the service of an extratextual policy favoring arbitration." *Id.* at 1476 (Stevens, J., dissenting).

Act, and instead imposing its own current preferences, in complete disregard of the principles of stare decisis.

*D. Disregard of the Facts*

What is perhaps equally disturbing is that the Court did not deal with the actual facts of the case. The employees, who were not parties to the CBA, did not participate in the negotiations between the employer and the union, who were parties.<sup>136</sup> Therefore, they apparently did not know until the union filed an amicus brief at the Supreme Court level that the CBA did not require the employees to arbitrate their ADEA claims with the employer if the union decided not to initiate arbitration.<sup>137</sup> Consequently, they did not raise this issue in the lower courts. The union's amicus brief in the Supreme Court proceedings makes clear what the actual agreement was.<sup>138</sup> Relying on the Supreme Court's decision in *Wright v. Universal Maritime Service Corp.*,<sup>139</sup> the union and the employer association, the Realty Advisory Board, had agreed that if the employee requested arbitration of statutory discrimination claims and the union agreed, then (1) the claims would be arbitrated, (2) the decision of the arbitrator would be binding, and (3) the employee would not be able to bring a subsequent discrimination claim regarding the same matter in court.<sup>140</sup>

The CBA did not provide, however, that if the union decided not to arbitrate the statutory discrimination claim, the employee would be required to arbitrate its claim with the employer.<sup>141</sup> The employee was free to litigate that claim in court. Although during negotiations the employer had proposed a provision for the CBA that would require, as a condition of employment, that employees must arbitrate directly with the employer any discrimination claim not brought by the union, this provision was rejected by the union, and the employer withdrew it.<sup>142</sup>

The Supreme Court became aware of this after certiorari was granted. Because this issue had not been raised below, however, the

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<sup>136</sup> Brief of the Service Employees International Union, *supra* note 47, at 4 ("The collective bargaining agreement at issue in this case is the 2002 'Contractors Agreement' between Local 32BJ and the Realty Advisory Board on Labor Relations, Inc.").

<sup>137</sup> *Id.* at 14. ("[T]he amended no-discrimination clause does not constitute a written agreement allowing employees to arbitrate statutory discrimination, much less an agreement requiring employees to arbitrate such claims where the Union has declined to arbitrate them.").

<sup>138</sup> *See id.* at 13–14.

<sup>139</sup> 525 U.S. 70 (1998).

<sup>140</sup> Brief of the Service Employees International Union, *supra* note 47, at 13.

<sup>141</sup> *See id.* at 14.

<sup>142</sup> *Id.*

Court refused to consider it. The Court stated that it would affirm on grounds not raised below only in exceptional circumstances, and it did not consider this case to be exceptional.<sup>143</sup> It therefore announced that the arguments concerning the content of the CBA “have been forfeited.”<sup>144</sup> Wanting to reach a particular result, the Court preferred to decide a case that was not in fact before it.

In so doing, the Court has created enormous problems that will have to be resolved, probably through litigation, because it has so fundamentally ignored or contradicted the way CBAs normally work.<sup>145</sup> It also has created more questions than answers with its assertion that “a substantive waiver of federally protected civil rights will not be upheld.”<sup>146</sup> For example, it did not determine whether a substantive waiver of rights had occurred in the instant case.<sup>147</sup> In *Pyett*, of course, the union had refused to arbitrate on behalf of the employees, and, under the Court’s decision, the employees had no right to file suit in court. Moreover, the arbitration clause of the CBA makes clear that “all Union claims are brought by the Union alone,” and that “no individual may compromise or settle any claim without the written permission of the Union.”<sup>148</sup> There is no provision in the CBA for the employee to directly arbitrate with the employer. If the employees are barred from going to court, and there is no provision in the CBA permitting employees to arbitrate their statutory claims, it would be difficult not to find that their substantive civil rights have been waived.

### III. PROCEDURAL PROBLEMS

Procedurally, the case also raises but does not answer a number of questions. The case came before the Court pursuant to an interlocutory appeal under section 16(a) of the FAA, because the lower courts had refused to grant the employer’s motion to compel arbitration under sections 3 and 4 of the FAA.<sup>149</sup> The Court did not deal with the question

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<sup>143</sup> See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009).

<sup>144</sup> See *id.*

<sup>145</sup> See generally, Alan Hyde, *Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiff May Sue Them*, 25 OHIO ST. J. DISP. RESOL. (forthcoming 2010). (“*Pyett* reverses a previously unbroken line of precedents keeping employees’ rights under collective bargaining agreements separate from their rights under state and federal statutes and common law . . . . Under any reading . . . the decision will now lead to a lengthy future chain of cases . . .”).

<sup>146</sup> *Pyett*, 129 S. Ct. at 1474.

<sup>147</sup> *Id.*

<sup>148</sup> Brief of the Service Employees International Union, *supra* note 47, at 7 (alterations omitted).

<sup>149</sup> *Pyett*, 129 S. Ct. at 1463.

of whether the FAA applies to CBAs covered by the Labor Management Relations Act (LMRA). The lower courts apparently assumed that it did, but most lower courts have held otherwise, finding that CBAs are covered by section 301 of the LMRA,<sup>150</sup> and are not within the scope of the FAA.<sup>151</sup> This raises questions about whether the Court intended to merge section 301 into the FAA, and whether section 301 has retained independent meaning.

But even assuming that one could apply the FAA to compel arbitration under a CBA, nonetheless, in determining whether arbitration should be compelled, the first thing a court should consider is whether there is a written arbitration agreement between the two parties, as required by the FAA.<sup>152</sup> Because the CBA empowers only the union to bring claims in arbitration, and because the employee is not a party to the arbitration agreement, there is no written arbitration agreement between the parties. It is the normal practice that unless there is a written agreement between parties to arbitrate with each other, courts refuse to stay proceedings.<sup>153</sup> Accordingly, the Supreme Court's reversal of the

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<sup>150</sup> Section 301 of the LMRA has been codified as 29 U.S.C. § 185 (2006).

<sup>151</sup> See *Int'l Ass'n of Machinists & Aerospace Workers Local 2121 v. Goodrich*, 410 F.3d 204, 207 n.2 (5th Cir. 2005) (“[M]ost courts, both before and after *Circuit City*, adhere to the traditional view that suits arising under Section 301 and concerning collective bargaining agreements are outside the scope of the FAA.”). See, e.g., *IBEW, Local 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1097 (8th Cir. 2004) (stating that nothing in *Circuit City* undermines the Supreme Court's holding in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451–52 (1957) (that section 301 “provides an independent basis for federal jurisdiction to enforce labor arbitration”)); *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 53 (2d Cir. 2001) (“We hold that in cases brought under section 301 . . . the FAA does not apply.”); *Int'l Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 494 (5th Cir. 2003) (citing, inter alia, *Coca-Cola Bottling Co.* and stating that the “district court appropriately relied only on [section 301, as opposed to the FAA] when it confirmed the arbitration award because this case involves arbitration under a CBA.”). But see *Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Indus. Workers of Am.*, 36 F.3d 712, 715 (7th Cir. 1994) (“As it happens, however, our circuit is among the minority that has limited § 1 [of the FAA] to the transportation industries and therefore applies the Arbitration Act to most collective bargaining agreements.” (citing *Pietro Scalzitti Co. v. Int'l Union of Operating Eng'rs, Local 150*, 351 F.2d 576, 579–80 (7th Cir. 1965))).

<sup>152</sup> 9 U.S.C. § 2 (2006).

<sup>153</sup> See, e.g., *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1278–79 (2009) (describing how Maryland courts follow federal procedure with respect to determining if there is a valid arbitration agreement: “If a party to an arbitration agreement . . . refuses to arbitrate, the other party may file a petition with a court to order arbitration . . . . If the court determines that the agreement exists, it shall order arbitration. Otherwise it shall deny the petition.” (quoting Md. CODE ANN., CTS. & JUD. PROC. § 3-207 (LexisNexis 2006))). See also CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS*, 51 (1st ed. 2002) (“The arbitration agreement must be in

lower courts' denial of the motion to compel arbitration under the FAA does not seem well-grounded in the law.

The Court's decision, as well as the methodology used to reach that decision, is inconsistent with the statutes it interpreted to reach its preferred result. Using the pretext of textualism, the Court in *Pyett*, as well as in earlier arbitration decisions, has disregarded and distorted legislation to create an arbitration law that does not comply with the legislation adopted by Congress. *Pyett* should be understood as a strong and compelling invitation to Congress to reinstitute the protections in its legislation that have been eroded by uncabined judicial discretion. One way to accomplish this goal is for Congress to adopt the Arbitration Fairness Act of 2009.

#### IV. ARBITRATION FAIRNESS ACT OF 2009

Congress has recently taken note of the exclusion of so many individuals from access to the court by means of arbitration clauses imposed upon them without their consent. Currently pending bills on arbitration fairness in both the House and Senate would amend the FAA to make certain pre-dispute arbitration clauses unenforceable.<sup>154</sup> Arbitration clauses that were entered into before a dispute arose, in situations where one party essentially had no bargaining power, would simply not be enforced. The bills in both the House and the Senate apply to employees, consumers, franchisees, and civil rights plaintiffs.<sup>155</sup> They set forth extensive findings of Congress, which are identical in the two bills, about the negative impact of arbitration on individuals with little bargaining power.<sup>156</sup> The findings are quite explicit in stating that the Supreme Court has changed the meaning of the FAA by extending it to disputes between parties of greatly disparate economic power.<sup>157</sup> Further, the findings note that such mandatory arbitration undermines the development of public law because it is not transparent, there is no right to a jury, and there is no meaningful judicial review of arbitrators' decisions.<sup>158</sup> Congress's findings emphasize that "because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a

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writing: only 'written provisions' to settle disputes by arbitration are enforceable." (citing 9 U.S.C. § 2 (2006)).

<sup>154</sup> Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3 (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009).

<sup>155</sup> S. 931 § 3(a); H.R. 1020 § 4(4)(b)(1).

<sup>156</sup> S. 931 § 2(3); H.R. 1020 § 2(3).

<sup>157</sup> S. 931 § 2(2); H.R. 1020 § 2(2).

<sup>158</sup> S. 931 §§ 2(2), (5), (6); H.R. 1020 §§ 2(2), (5), (6).

bank account, getting a credit card, and the like.”<sup>159</sup> The findings also point to abuses by many corporations, whose mandatory arbitration clauses include “unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes.”<sup>160</sup>

Although both the House and Senate Bills agree that the solution is to ban pre-dispute arbitration clauses in employment, consumer, franchise, or civil rights disputes,<sup>161</sup> there is a great deal of difference in the details. In 2007, the two bills were essentially the same, but when reintroduced in 2009, the Senate Bill had been changed in significant ways. One of those changes relates to the *Pyett* decision. Although both bills exclude application to any arbitration provision in a CBA, the Senate Bill goes further:

Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, *except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.*<sup>162</sup>

The italicized portion of the text above leaves no doubt that the *Pyett* decision would be overturned by Congress if the Senate Bill were adopted. It is also clear that in 2007, the drafters of both bills saw no need to include this language because until *Pyett* it was understood that employees’ rights to a judicial forum for statutory claims could not be waived by a CBA.<sup>163</sup>

The Arbitration Fairness Act would restore the FAA to its purpose as enacted by Congress in 1925 and as interpreted by the Court for approximately the first sixty years of its existence. The 1925 Congress was concerned that arbitration be voluntary and that it not be imposed by powerful parties on weaker parties. The Court did not begin to enforce arbitration clauses in adhesion contracts until the last twenty to twenty-five years.<sup>164</sup> Once it started down this path, however, businesses in a broad range of industries quickly began adding arbitration clauses to all

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<sup>159</sup> S. 931 § 2(3); H.R. 1020 § 2(3).

<sup>160</sup> S. 931 § 2(7); H.R. 1020 § 2(7).

<sup>161</sup> See S. 931, § 3; H.R. 1020 § 4(4)(b)(1).

<sup>162</sup> S. 931 § 3(a) (emphasis added).

<sup>163</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (noting that employees’ rights to a judicial forum for statutory claims could not be waived by a CBA).

<sup>164</sup> See Jean Sternlight, *Creeping Mandatory Arbitration: Is it Just?* 57 STAN. L. REV. 1631, 1636–37 (2005).

kinds of contracts.<sup>165</sup> In addition, against the clear weight of evidence to the contrary in both text and legislative history,<sup>166</sup> the Court in *Circuit City* interpreted the FAA to cover arbitrations between employers and employees.<sup>167</sup> These kinds of non-volitional arbitrations are exactly what the enacting Congress disfavored.<sup>168</sup> At the hearings, members of Congress sought and received assurance from the drafters and proponents that the FAA would not cover arbitrations that were not voluntary.<sup>169</sup>

The Supreme Court, in its arbitration decisions culminating in *Pyett*, has followed its policy preference that consent is not necessary for arbitration agreements to be enforced. For its purposes, if the stronger economic party can force the weaker into arbitration, this will help clear court dockets. It will also lessen the protections enacted by Congress for the benefit of those weaker parties, since in arbitration there will be less of a right to discovery, no jury trial, and no judicial review on the merits. In *Gilmer*, the Court held that the employee was required to arbitrate an ADEA claim with his employer, even though Mr. Gilmer had merely registered as a securities representative with several stock exchanges, as required by his employer.<sup>170</sup> In the registration application was a provision that indicated an agreement to arbitrate any controversy covered by stock exchange rules, including termination of

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<sup>165</sup> See, e.g., Edward Brunet, *The Core Values of Arbitration*, in ARBITRATION LAW IN AMERICA 8 (2006) (“[R]epeat users of arbitration include banks, credit card issuers, computer manufacturers, physicians, securities brokers, car dealers, and chain restaurant franchisers . . .”); Sternlight, *supra* note 164, at 1638–39 (“[A]rbitration [is] mandated by a broad range of industries, including financial institutions (as to personal accounts, house and car loans, payday loans, and credit cards), service providers (termite exterminators, gymnasiums, telephone companies, and tax preparers), and sellers of goods (mobile homes, computers, and eBay) . . . health care (hospitals and health maintenance organizations), nursing homes, and educational institutions.” (citations omitted)).

<sup>166</sup> See David Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 76 (1997) (“The drafters and proponents of the FAA were extremely clear . . . their intention was limited to the commercial paradigm, and excluded contracts of employment.”). See also Moses, *supra* note 54, at 146–52 (discussing how the text and legislative history of the FAA concerning employment contracts demonstrate that, “in 1925 . . . no workers were covered by the FAA.”).

<sup>167</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

<sup>168</sup> Members of Congress raised questions during the Hearings about the voluntary nature of the arbitration contemplated under the Act. For example, Senator Walsh of Montana expressed concern about unequal bargaining situations where one party was required to enter a contract on a “take-it or leave-it basis.” See *Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 9 (1924).

<sup>169</sup> See *id.* at 10, 14, 15.

<sup>170</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

employment.<sup>171</sup> For the Court, this fig leaf of consent was enough to require Mr. Gilmer to arbitrate his age discrimination claims. From the Court's perspective, "[h]aving made the bargain to arbitrate, [Mr. Gilmer] should be held to it . . . ."<sup>172</sup> It was of no consequence that the "bargain" was not negotiated, but simply imposed. Thus, it was short step for the Court in *Pyett* to simply remove the fig leaf of consent and lay bare the non-volitional state of the arbitration process it preferred. For that reason, it found no difference in "the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."<sup>173</sup> Consent by the individual simply did not matter to the Court.

The Arbitration Fairness Act makes consent matter again.<sup>174</sup> If disputes cannot be resolved by arbitration unless parties make that choice after the dispute has arisen, there is more likelihood of an actual choice, and therefore genuine consent. There is also an incentive for employers, if they believe arbitration is a better method of dispute resolution than litigation, to work to provide a system that is fair and reasonable so that the other party will want to choose arbitration. That incentive is lacking when arbitration is imposed.

It is, of course, difficult to get legislation through Congress, and unclear whether the Arbitration Fairness Act will be enacted. The wheels of Congress tend to move slowly, and the movement is distorted by interest groups that can bring resources to bear to defeat passage of legislation they do not want. Corporations and industries are strongly in favor of mandatory arbitration, which avoids jury trials and denies access to court for consumers, investors, and employees. Moreover, many industries are able to "stack the deck" against the economically weaker party by creating an arbitration process which does not provide a level playing field.<sup>175</sup>

There will thus be strong opposition to any attempts to eliminate mandatory arbitration or to amend the FAA in other ways to overturn the

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 476 U.S. 614, 628 (1985)).

<sup>173</sup> *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 (2009).

<sup>174</sup> See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 84 (2000) ("Arbitration needs a substantial dose of freedom and creativity to thrive. This essential self-governance can be achieved by allowing party autonomy to fashion arbitration procedures deemed essential by the contracting partners.").

<sup>175</sup> See Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 2(7) (2009); H.R. 1020, 111th Cong. § 2(7) (2009) ("Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes.").

Supreme Court's recent rewriting of the original statute. The question is whether there is enough political will and organized strength to push back against the organized interests that are enormously pleased with the status quo. The Supreme Court has imposed by judicial fiat a legislative program that will not be easy to change through the democratic process.

Nonetheless, there are signs that the negative impact on our justice system of using mandatory arbitration to deny access to courts have begun to register with Congress. For example, the recently enacted Franken Amendment to the 2010 Department of Defense Appropriations Act<sup>176</sup> restricts defense contractors and subcontractors from entering into or enforcing any employment contract

that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.<sup>177</sup>

This amendment was prompted by the case of Jamie Leigh Jones, a former employee of Kellogg Brown & Root (KBR) (formerly owned by Halliburton) who reported being assaulted and gang-raped by co-workers in Iraq.<sup>178</sup> KBR and Halliburton wanted to handle her case in arbitration, asserting that her claims were all employment related and covered by an arbitration agreement. However, the Fifth Circuit ruled in September 2009, that her tort claims could be decided in court.<sup>179</sup> The Franken Amendment goes further than the Fifth Circuit decision because it excludes Title VII claims from arbitration<sup>180</sup> and eliminates any argument that torts connected with sexual assault, whether or not related to employment, could be covered by an arbitration clause.<sup>181</sup> Neither Congress nor the Fifth Circuit believed that such egregious conduct should be relegated to a private, confidential system of dispute resolution.

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<sup>176</sup> Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409 (2009). Contracts under \$1,000,000 are exempt from the provision.

<sup>177</sup> *Id.*

<sup>178</sup> *See Jones v. Halliburton Co.*, 583 F.3d 228, 230 (5th Cir. 2009). After Ms. Jones reported the incident, her employers confined her under armed guard in a shipping container and did not permit her to leave or to contact her family for an extended period. *Id.* at 232.

<sup>179</sup> *Id.* at 230.

<sup>180</sup> There may be a question about whether the language is intended to cover all Title VII claims of covered employees or just Title VII claims that raise issues of sexual assault or harassment. On its face, however, the language appears to be broadly applicable to all Title VII claims.

<sup>181</sup> Department of Defense Appropriations Act § 8116.

Another area where Congress has acted to curb potential abuses of arbitration is with respect to terms of consumer credit provided to members of the armed forces and their dependents.<sup>182</sup> The legislation was supported by a Department of Defense Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents, which criticized the use of mandatory arbitration in any agreement with members of the armed forces concerning the extension of consumer credit.<sup>183</sup> The report considered mandatory arbitration clauses as one of the predatory characteristics of loan contracts and payday loans, and found that “[b]y eliminating a borrower’s right to sue for abusive lending practices, these clauses work to the benefit of . . . lenders over consumers.”<sup>184</sup> The ensuing legislation amended Title X of the United States Code to add a new section on terms of consumer credit extended to members of the military and their dependents.<sup>185</sup> The last provision of this section renders unenforceable an agreement to arbitrate any dispute involving the extension of consumer credit to members of the military or their dependents.<sup>186</sup>

There are a few other enacted bills, and a number of other pending bills, that limit the application of arbitration in particular situations.<sup>187</sup> Congress has clearly indicated an interest in stopping some of the worst abuses. It could take a major step by adopting the Senate version of the Arbitration Fairness Act. The legislation would overturn the *Pyett* decision and restore to arbitration the requirement of consent that was so important to the enacting Congress.<sup>188</sup> Restoring the consent

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<sup>182</sup> See 10 U.S.C. § 987 (2006).

<sup>183</sup> See U.S. DEP’T. OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS, 51 (2006), available at [http://www.defenselink.mil/pubs/pdfs/Report\\_to\\_Congress\\_final.pdf](http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf).

<sup>184</sup> *Id.* at 13–14.

<sup>185</sup> 10 U.S.C. § 987(a).

<sup>186</sup> See *id.* at § 987(f)(4).

<sup>187</sup> For example, an amendment was enacted in 2002 to the Automobile Dealer’s Day in Court Act, which prohibited pre-dispute arbitration agreements between automobile dealers and manufacturers. 15 U.S.C. § 1226(a)(2) (2006). Some pending bills include the Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Congress § 17(b) (2009), which renders unenforceable pre-dispute arbitration agreements between residents of a long-term care facility and the facility, the Consumer Fairness Act of 2009, H.R. 991, 111th Cong. § 1003(a) (2009), which prohibits pre-dispute arbitration agreements in consumer contracts, and the Mortgage Reform and Anti-Predatory Lending Act, H.R. 1728, 111th Cong. § 206 (2009), which has passed the House. It prohibits creditors, assignees and securitizers from requiring consumers to enter pre-dispute arbitration agreements or from imposing other non-judicial procedures.

<sup>188</sup> Although there have been some criticisms of the Arbitration Fairness Act as not being consistent with international practice, those criticisms were directed to the 2007 version. See, e.g., Emmanuel Gaillard & Jennifer Younan, *Proposed U.S. Arbitration Fairness Act of 2007*, NEW YORK LAW JOURNAL, Apr. 22, 2008, at 3, 7. Most of these

requirement would encourage arbitration to be used in ways that do not damage our system of justice. The Arbitration Fairness Act would help undo the tilt toward big business that the Supreme Court has fostered by the preference it has imposed for denying access to courts for parties with little bargaining power. It would not affect arbitration between merchants with more or less equal bargaining power, for whose benefit the FAA was passed in 1925. Rather, it would help return arbitration to the status quo ante, after a judicially-created anomaly of twenty-five years.

## V. CONCLUSION

In *Pyett*, the Supreme Court has reached out to make new arbitration law and policy, claiming that its decision is compelled by statutory text, despite the absence of any text supporting this position. It has overturned precedent without a compelling reason, finding its own changed view of arbitration to suffice. The caliber of its reasoning does not persuade. The Court has provided faulty interpretations of statutory text to reach a decision that undermines Congress's protections of individual rights. In running roughshod over Congress's properly enacted legislation, the Court has exceeded its judicial role, undermined its credibility, and lost any right to deference by the legislative branch of government. To stop further erosion of individual rights by the Court, Congress should take steps to overturn *Pyett* and return the requirement of consent to arbitration.

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criticisms are no longer an issue in the Senate version of the 2009 bill, although they are relevant to the House version. For criticisms of the 2007 Act from an international perspective, see generally Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455 (2007). The 2009 Senate version of the Act would make the U.S. practice in arbitration more consistent with international practice, because the U.S. is one of the only countries that permits arbitration to be imposed on consumers and employees. See Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 253 (Supp. 2006); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 850 (2002) ("Despite my attempts, I have not yet identified any countries outside the United States and the European Union in which companies are regularly using pre-dispute arbitration agreements to require consumers to resolve their complaints through private arbitrators.").