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THE ARBITRAL IMPERATIVE IN LABOR AND EMPLOYMENT LAW

*Roberto L. Corrada**

For the better part of this decade, labor law scholars have turned their attention increasingly to labor law reform.¹ And for good reason. Private sector unionization has fallen from a high of forty percent in the mid-1950s to a low of about eleven percent today.² Many reasons—ranging from employer resistance to unionization to union inability to organize in the Sunbelt—explain this decline.³ Some scholars even suggest that a critical factor has been the Taft-Hartley Act of 1947, whose amendments to the Wagner Act, it is argued, have erected insurmountable barriers to unionization and collective bargaining.⁴

After fifty years, it seems clear that the ambitious experiment of government-controlled unionization in this country has regressed. And,

* Associate Professor, University of Denver College of Law. The author would like to thank the *Catholic University Law Review* and all of the participants in the Catholic University Law School Symposium on the Taft Hartley Act: The First Fifty Years, at which a version of this Article was originally presented. In particular, the author acknowledges the helpful comments of Clyde Summers, Nelson Lichtenstein, Roger Hartley, Charles Cohen, and Jeremiah Collins. The author also thanks his colleagues at the University of Denver College of Law who reviewed drafts of the manuscript, including especially Dennis Lynch, Ed Dauer, and Arthur Best. In addition, the author is grateful to the Hughes Research and Development Fund for its support of this work and to Jessica Duffey for her research assistance.

1. See, e.g., CHARLES B. CRAVER, *CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* (1993); WILLIAM B. GOULD, IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990).

2. See CRAVER, *supra* note 1, at 34 (stating that union members constituted approximately 35% of all nonagricultural workers); MICHAEL GODFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 tbl. 1 (1987); *STATISTICAL ABSTRACT OF THE UNITED STATES* 436 tbl. 681 (1996) (stating that 11.3% of private sector workers were covered by unions in 1995); WEILER, *supra* note 1, at 105 (noting that by the mid-1950s, collective bargaining covered nearly 40% of the private sector).

3. See CRAVER, *supra* note 1, at 39-40, 47-51 (discussing opposition to unionizing efforts in the sunbelt region, as well as opposition by employers); WEILER, *supra* note 1, at 105-14 (discussing employer resistance to unionizing efforts). *But see* GOULD, *supra* note 1, at 42-49 (questioning employer resistance as the sine qua non of private sector union decline).

4. See generally JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994* (1995) (advancing this argument).

even if that regression is not entirely attributable to the Taft-Hartley Act itself, if unionization continues its decline, then it will indeed be true that “what the state [has] offered workers and their organizations [presumably through laws like Taft-Hartley, is] ultimately no more than the opportunity to participate in the construction of their own subordination.”⁵

Sadly, the arbitral enterprise in the American workplace may ultimately be the only surviving legacy of Taft-Hartley and, indeed, of the entire National Labor Relations Act (NLRA). It appears, based on the Supreme Court’s 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,⁶ recent federal circuit court decisions interpreting *Gilmer*,⁷ and, most importantly, the proactive involvement of labor arbitrators and labor lawyers,⁸ that arbitration of workplace disputes will have an ever-growing impact on the American worker and in the American workplace. This Article examines arbitration in the American workplace and tries to shed some light on underlying rationales that explain what will be referred to as the arbitral imperative in labor and employment law.

This Article first examines some of the history of labor arbitration, Taft-Hartley’s arbitration provisions and the Supreme Court’s decisions in the late 1950s and early 1960s that served to establish labor arbitration as a critical part of American labor law. A possible explanation of the growth of labor arbitration may well have been the underlying efficiency concerns of the Court (meaning in this case a lower cost alternative to administrative adjudication or judicial litigation, with an accompanying shift in costs from the public sector to private parties) and, in particular, the unstated concerns of Justice William O. Douglas, who not only authored all three decisions in the *Steelworkers Trilogy*,⁹ but who also

5. CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 327 (1985).

6. 500 U.S. 20 (1991).

7. See *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997); *Wright v. Universal Maritime Serv. Corp.*, No. 96-2850, 1997 U.S. App. LEXIS 19299 (4th Cir. July 29, 1997), cert. granted, 66 U.S.L.W. 3570 (Mar. 2, 1998); *Borg-Warner Protective Servs. v. Gottlieb*, 116 F.3d 1485 (9th Cir. 1997); *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997); *Cosgrove v. Shearson Lehman Bros.*, 105 F.3d 659 (6th Cir. 1997), cert. denied, 118 S. Ct. 169 (1997). For a more complete listing of cases interpreting *Gilmer*, see *infra* notes 68, 72.

8. See *infra* notes 82-83 and accompanying text.

9. The *Steelworkers Trilogy* comprises three U.S. Supreme Court decisions on labor arbitration that were announced on the same day in 1960 and that all involved the Steelworkers Union. Those decisions are: *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

crafted the majority decision in *Textile Workers v. Lincoln Mills*,¹⁰ a critical precursor to the *Trilogy*.

The first part of this Article also analyzes briefly the National Labor Relation Board's (NLRB) decisions deferring to labor arbitration as an alternative means of handling NLRA disputes. In contrast to federal court deference to labor arbitration over contractual disputes, the Board's deferral doctrine applies to disputes that involve overlapping contract and statutory issues. An analysis of the Board's deferral decisions, particularly its pre-arbitral deferral decisions, reveals a strong efficiency rationale that may explain the development and increasingly broad applications of the deferral principle.

The second part of this Article has two purposes. First, it attempts to show that labor and employment arbitration are strongly similar and that their growth is easily explained by a submerged concern for efficiency. The efficiency rationale predicts explosive growth for arbitration and is the compelling reason that one can say there is indeed an arbitral imperative in labor and employment law. Second, the Article makes bold predictions for the growth of employment arbitration based on the history of the development of labor arbitration. For those who are concerned about arbitration's fairness, the chilling prediction is posited with an eye toward suggesting the possible improvement of the arbitral process, given its inevitable growth and the implications for future access by employees seeking to vindicate their statutory employment rights in the courts.

I. THE HISTORICAL DEVELOPMENT OF LABOR ARBITRATION

A. *The Taft-Hartley Act and Labor Arbitration*

When first invited to write for this Symposium, I was intrigued by a suggestion made by Roger Hartley that the actual role of arbitration in labor law has far outstripped what its mention in Taft-Hartley would seem to support. Other scholars also have noted this. Dennis Nolan and Roger Abrams, for example, agree that Taft-Hartley is scant regarding arbitration, given that the Supreme Court cited the Act when the Court declared arbitration to be the centerpiece of national labor policy.¹¹ According to Nolan and Abrams, labor arbitration is endorsed in the Act

10. 353 U.S. 448 (1957).

11. See Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 582 (1983).

“only in a peculiarly subtle manner.”¹² For example, although the national emergency section of Taft-Hartley was a reaction to the enactment of compulsory arbitration laws by various states,¹³ there is no mention of arbitration in the section. Rather the section speaks of a “cooling off” period followed by a “strike.”¹⁴ Section 301 of Taft-Hartley, later used by the Supreme Court to create a federal common law surrounding labor arbitration, does not even mention “arbitration.”¹⁵

The legislative history of the Taft-Hartley Act is likewise slim regarding arbitration. Nolan and Abrams conclude that “it is unclear why the endorsements of arbitration, particularly grievance arbitration, were so half-hearted.”¹⁶ This legislative silence is remarkable in light of how much labor arbitration was at the forefront of labor-related events in the immediate post-war period, and particularly during the time of the enactment of Taft-Hartley. For example, in November 1945, President Truman scheduled a national conference on industrial relations that he hoped would create a mechanism for resolving labor disputes. He charged the conferees with “insuring industrial peace for the lifetime of [labor] contracts.”¹⁷ The meeting participants unanimously approved a report that strongly endorsed grievance arbitration.¹⁸ In 1946, Truman gave a speech in which he strongly emphasized increased federal support for mediation, conciliation, and arbitration.¹⁹ None of this was, of course, surprising given the rapid spread of no-strike grievance arbitration systems in labor contracts during World War II. In 1944, under the War Labor Board’s encouragement and compulsion, seventy-three percent of all collective bargaining agreements contained arbitration provisions.²⁰

Thus, Congress passed the Taft-Hartley Act during a time when labor arbitration was central to events involving labor unions. Indeed, labor arbitration and the introduction of Taft-Hartley in Congress were linked by a need to curtail the number of strikes in this country in the immediate post-war period. A searching return to the text of Taft-Hartley and

12. *Id.*

13. *See id.*

14. *See id.*; *see also* Taft-Hartley Act §§ 206-10, 29 U.S.C. §§ 176-80 (1994).

15. *See* Nolan & Abrams, *supra* note 11, at 583; *see also* Taft-Hartley Act § 301, 29 U.S.C. § 185 (1994).

16. Nolan & Abrams, *supra* note 11, at 582.

17. Martin H. Malin, *Foreword: Labor Arbitration Thirty Years After the Steelworkers Trilogy*, 66 CHI.-KENT L. REV. 551, 553 n.10 (1990).

18. *See id.*; *see also* Nolan & Abrams, *supra* note 11, at 579.

19. *See* TOMLINS, *supra* note 5, at 274; *see also* SUSAN HARTMANN, TRUMAN AND THE 80TH CONGRESS 22 (1971).

20. *See* Malin, *supra* note 17, at 553.

its legislative history reveals not only marked silence concerning arbitration, but, if anything, a legislative intent to de-emphasize arbitration *per se*. In addition to silence in section 301 and in the national emergency section, in some cases arbitration was expressly mentioned in drafts of the legislation, but was later excluded. For example, the original Senate version of section 203(c) ordered the Director of the Federal Mediation and Conciliation Services (FMCS) to “encourage and facilitate arbitration if mediation or conciliation was unsuccessful,”²¹ but “[f]or unknown reasons this express reference to arbitration was replaced with euphemisms during the legislative process.”²² Indeed, section 203(d), which is often cited for the proposition that there is a national policy favoring labor arbitration, does not mention arbitration. It recites that “[f]inal adjustment by a method agreed upon by the parties [shall] be the desirable method for settlement of grievance disputes”²³

Thus, though Taft-Hartley and the NLRA in general have been viewed as the source of a national policy regarding labor arbitration, it appears that such is not truly the case. Rather, the national policy favoring labor arbitration was primarily fashioned by the Supreme Court of the United States in four decisions: *Lincoln Mills* in 1957 and the *Steelworkers Trilogy* in 1960, and by Justice Douglas in particular, who authored the majority opinions in those cases.

B. Rationales for Labor Arbitration

The fundamental question, given the scant language regarding arbitration in Taft-Hartley itself, is why did the Supreme Court create such an expansive arbitral regime in labor law? To answer the question requires scrutiny of the decisions and the legislation to cull from them the policy choices that motivated them. Any analysis must also include (I reveal my bias as a Legal Realist) a look at the players, primarily employers and unions, but, additionally, the courts themselves.

The first step in the analysis investigates policy rationales for arbitration. Labor arbitration has often been justified on two bases—one negative and one positive. The negative basis is that labor arbitration is an alternative to strikes. The major impetus for arbitration in the late nineteenth and early twentieth centuries, and during World War II, was as an alternative to disruptive, and sometimes violent, strikes.²⁴ For example,

21. Nolan & Abrams, *supra* note 11, at 582.

22. *Id.*

23. Taft-Hartley Act § 203(d), 29 U.S.C. § 174(d) (1994).

24. See Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373, 382 (1983) (“Arbitration gained early acceptance in those

the Arbitration Act of 1888 and the Erdman Act of 1898, ill-fated governmental attempts to establish arbitration in certain industries, were the direct products of intensive strike activity.²⁵ The Railway Labor Act in 1926 expressly outlawed some kinds of strikes and substituted certain grievance machinery to resolve disputes in the place of strikes.²⁶ The rise of arbitration clauses in collective bargaining agreements (to a high of 73% in 1944) is directly attributable to the War Labor Board's executive and congressional mandates to avoid disruption of wartime production.²⁷ Even after the War, the Supreme Court in *Lincoln Mills* tabbed the arbitration clause as the *quid pro quo* for the union's agreement not to strike.²⁸

The more positive basis used as a justification for labor arbitration is that arbitration encourages collective bargaining, consistent with a private industrial pluralist vision of labor-management relations.²⁹ This justification surfaced only after passage of the Wagner Act because, until then, the very question of collective bargaining was at the very heart of many disputes. As R.W. Fleming emphasized at the beginning of his book *The Labor Arbitration Process*:

"Arbitration," in the early discussions, meant what we would now call "negotiation" rather than a third-party decision-making process. This is not surprising when one recalls that it was 1886 before the first enduring national labor federation (the American Federation of Labor) was formed, and it was 1935 before companies were legally required to recognize unions for purposes of collective bargaining.³⁰

This notion of encouraging collective bargaining has been viewed as

American industries that were especially vulnerable to economic losses occasioned by strikes.").

25. See *id.* at 382-84. President Grover Cleveland, reacting to a drastic increase in strikes, recommended to Congress in 1886 the creation of a permanent board for voluntary arbitration of railroad labor disputes. See *id.* at 382. This recommendation resulted in the Arbitration Act of 1888, the nation's first federal law on labor arbitration. See *id.* The Erdman Act of 1898 was a result of the investigatory commission recommendations following the violent Pullman strike of 1894. See *id.* at 383.

26. See Nolan & Abrams, *supra* note 24, at 387.

27. See NELSON LICHTENSTEIN, *LABOR'S WAR AT HOME: THE CIO IN WW II* 178-82 (1982) (describing the efforts of the War Labor Board (WLB) to encourage grievance and arbitration provisions in collective bargaining agreements); TOMLINS, *supra* note 5, at 253; Malin, *supra* note 17, at 553.

28. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

29. See generally Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (explaining the industrial pluralist model of collective bargaining).

30. R. W. FLEMING, *THE LABOR ARBITRATION PROCESS* 1 (1965).

consistent with Taft-Hartley and the NLRA, and indeed has been cited favorably by both the Supreme Court and the NLRB as a reason for deferring to the arbitral process.³¹

Each of these policies is supported by substantial evidence. The Supreme Court's decisions in *Lincoln Mills* and in the *Steelworkers Trilogy* discuss both the policy in favor of industrial peace and the policy of encouraging collective bargaining as rationales decidendi.³² Even further, the same themes are echoed throughout the NLRB's deferral cases, running from *Collyer Insulated Wire* in 1971 to *Olin Corp.* in 1984.³³ In addition, it is clear that Justice Douglas, a New Deal democrat, was sympathetic to labor.³⁴

A deeper look at the history of arbitral development in labor law, and in particular of those involved in its development and their institutional interests, suggests additional explanations. Employers, for example, should favor arbitration if the alternatives are limitless strikes or endless hours in judicial litigation. Indeed, the system of self-government of which arbitration is an integral part "is designed, [in part] to aid management in its quest for efficiency"³⁵ In the early years, it is likely true that employers favorably viewed arbitration as an alternative to a strike, since strikes disrupted a number of critical industries at the turn of the century.³⁶ Moreover, arbitration would not necessarily have been fa-

31. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-82 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960); *Collyer Insulated Wire*, 192 N.L.R.B. 837, 839, 844 (1971).

32. See, e.g., *Lincoln Mills*, 353 U.S. at 453-54 (stating that Congress, in passing § 301, was intent on promoting collective bargaining agreements that avoided strikes); *United Steelworkers*, 363 U.S. at 567 ("Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement.").

33. See *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984) (stating that national policy strongly favors arbitration); *Collyer Wire*, 192 N.L.R.B. at 839, 844 (stating that arbitration procedures are an "integral part of collective bargaining").

34. Surprisingly little has been written about Justice Douglas's role in this area of such heavy significance to labor in this country. Although Justice Douglas was sympathetic to labor generally, he was also a believer in big government. How he mediated these two in order to author the *Steelworkers Trilogy* and why, in particular, he decided to defer so broadly to private arbitration would make an interesting study, particularly given the battles Douglas fought against stock exchange self-regulation as a Commissioner with the Securities and Exchange Commission. For a general discussion of Justice Douglas's labor law opinions, see VERN COUNTRYMAN, *THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS* 320-27 (1974).

35. Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955), quoted by Justice Frankfurter in his dissent in *Lincoln Mills*, 353 U.S. at 463.

36. See Nolan & Abrams, *supra* note 24, at 382-96 (discussing strikes in key American

vored as a substitute to litigation since most employers found courts to be allies against unions, at least prior to passage of the Norris LaGuardia Act in 1932.³⁷ Today, as the strike threat has generally diminished, if employers view arbitration favorably, they would likely see it as a substitute for litigation. Thus, labor arbitration today is no doubt viewed as efficient by employers, not in terms of avoiding disruptions in production, but, rather, as a means of lowering overall legal costs.³⁸

It is much more surprising that unions have embraced arbitration. Unions have a vested interest in collective bargaining and history has shown that there is little, and certainly not arbitration, that is better than effective strike pressure as a means of encouraging collective bargaining.³⁹ Moreover, arbitration may have acted on a broad scale against the better interests of the union movement in this country. For example, William Forbath has maintained that American labor's emphasis on voluntaristic goals and on particularized workplace politics, of which labor arbitration is a definite product, has served somewhat to dilute worker class consciousness by channeling employees into thinking more about their own individual interests in the workplace than in the overall betterment of the working class.⁴⁰ Katherine Stone has argued that arbitration has disadvantaged workers by transforming constitutional guarantees and statutory rights into mere contract language.⁴¹ Likewise, both James Atleson and Karl Klare, using slightly different approaches, have shown how arbitration has largely furthered the interests of management.⁴²

industries, such as coal mines and railroads).

37. See William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1123-25, 1237-45 (1989).

38. See Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1187 (1993) (citing lower costs, speed, and informality as being among the reasons for the success of labor arbitration); Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591, 592-93 (citing lower cost as a reason for the growth of employment arbitration and suggesting employers realized the benefit as a result of the success of labor arbitration).

39. See generally Nolan & Abrams, *supra* note 24, at 382-96 (discussing the use of strikes in key industries); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 44-66 (1983).

40. See William Forbath, *Law and the Shaping of Labor Politics in the United States and England*, in LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 204-07 (Christopher L. Tomlis & Andrew J. King eds., 1992).

41. See Stone, *supra* note 29, at 1514-15.

42. See generally ATLESON, *supra* note 39, at 160-70, 182 n.10 (1983) (explaining the doctrine of the law of successorship and how it has helped employers to avoid fulfilling its

Still, everyone who studies American labor law is well aware of the reasons that labor embraced labor arbitration. Although arbitration made some important gains before World War II, particularly in the automobile manufacturing industry, its acceptance truly spread during the War. During the war years, labor accepted arbitration because of the national importance of avoiding disruption in production.⁴³ Also, arbitration in that period was seen somewhat as a *quid pro quo* for maintenance of membership agreements, that is, union security.⁴⁴ Both Ken Casebeer (based on interviews with Leon Keyserling) and Christopher Tomlins have suggested that with the passage of Taft-Hartley, the outright prohibition of secondary boycotts and jurisdictional strikes meant that “unions really had little choice other than to conform themselves to the role assigned them in federal labor relations policy.”⁴⁵ Of course, that role could have been one of judicial policing of collective bargaining agreements, but that proved untenable for labor given the hostility of courts to the labor movement in this country, both through frequent issuance of strike injunctions and through constitutionally based decisions against labor laws favorable to unions. William Forbath reports that “[b]y the turn of the century state and federal courts had invalidated roughly sixty labor laws.”⁴⁶ Thus, in the voluntarist tradition which Samuel Gompers and others favored, unions began to argue in favor of judicial deference to labor arbitration.

C. The Efficiency Interest in Labor Arbitration

Employers and unions both had reasons for favoring arbitration. The fights between employers and unions in *Lincoln Mills* and the *Steelworkers Trilogy* were not about whether arbitration should exist, but, rather, about what judicial controls should govern it. Although unions won the day, they did not win a complete victory, since the Court did retain the

predecessor's collective agreement); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

43. See Malin, *supra* note 17, at 553 (describing the WLB's policies favoring arbitration). Obviously, President Franklin Delano Roosevelt's Executive Order creating the WLB, Executive Order No. 9017, played a strong part in unions' willingness to arbitrate to avoid disruption, as did Congress's passage of the Economic Stabilization Act of 1942 and the War Labor Disputes Act of 1943. See Nolan & Abrams, *supra* note 11, at 564-67.

44. See Nelson Lichtenstein, *Industrial Democracy, Contract Unionism, and the National War Labor Board*, 33 LAB. L.J. 524, 528-29 (1982).

45. TOMLINS, *supra* note 5, at 315; see also Kenneth Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73, 99 (1989).

46. Forbath, *supra* note 37, at 1133.

ultimate right to determine arbitrability.⁴⁷ Given that both employers and unions favored arbitration to some degree, and given that arbitration fit within the twin policy goals of the NLRA, it is not surprising that Justice Douglas was able to convince a majority of the Court to back him in forging a national policy in favor of labor arbitration. But how could this be accomplished? State law was generally hostile to labor arbitration.⁴⁸ Federal precedents, which existed only with respect to commercial arbitration, were likewise hostile.⁴⁹ Justice Douglas's answer to this thorny dilemma was, first, in *Lincoln Mills*, to make federal common law applicable. Later, in the *Steelworkers Trilogy*, Douglas distinguished labor arbitration from commercial arbitration by positioning labor arbitration as a mechanism to encourage collective bargaining and industrial peace rather than to substitute for litigation.

The remaining problem in forging a national labor arbitration policy must have been the Court's own concern about placing on federal courts the burden of fashioning an entirely new body of contract claims involving labor contracts between employers and unions. This concern was alluded to by Justice Frankfurter in his lengthy dissent in *Lincoln Mills*.⁵⁰ After *Lincoln Mills*, the prospect of inundating the federal courts in litigation involving even the minutest labor contract disagreement must have loomed large. Indeed, each of the *Trilogy* cases is an example of exactly the kind of claim that could easily come to occupy precious federal court time. The *Trilogy*, however, is surely a resounding answer to this concern. Heavy deference to arbitration would force many contract claims through arbitration which would operate as a filter for federal law claims under section 301. In this sense, the *Trilogy* can be viewed as a set of decisions that ensures arbitration will replace litigation. Justice Douglas himself balked at the possibility of judicial review of labor contracts under a regime where courts might be able to overturn arbitral decisions with which they disagree.⁵¹ Recall, however, that the Court could

47. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960) (concluding that it is the duty of the courts to determine arbitrability).

48. See Malin, *supra* note 17, at 553-56 (discussing the hostility of state courts to the concept of labor arbitration).

49. See *Warrior & Gulf Navigation Co.*, 363 U.S. at 578 (noting courts' hostility to the arbitration of commercial agreements).

50. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 464 (1957) (Frankfurter, J., dissenting) (recommending "self constraint" in undertaking to solve these problems unless the Court was "clearly directed to do so").

51. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960) ("The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract."). Justice Frankfurter's silent acquiescence to the *Trilogy's* sweeping deferral to labor arbitrators, after

not proclaim the burden on the courts or the cost of litigation as a reason for preferring arbitration without invoking the federal law regarding commercial arbitration, whose reason for existence was as a substitute for litigation. The Court could not invoke the substitution rationale, however, because the commercial precedents using it were hostile to arbitration. Indeed, the point of distinction between labor and commercial arbitration, the encouragement of collective bargaining as opposed to litigation alternatives, became the very opportunity for fashioning a broad manifesto of heavy deference to labor arbitration.

The NLRB's deferral decisions also reflect concerns about the time and expense involved in handling cases, despite the Board's descriptions of deferral as encouraging collective bargaining and industrial peace.⁵² That Board deferral to contract arbitration involves statutory rights under the NLRA has not prevented the Board from invoking the *Trilogy*—judicial deferral to arbitrators on issues of *contract* interpretation—to support its broad doctrine of deferral.⁵³ And the quibble here is not with respect to *Spielberg*-type post-arbitral deferral, where the Board has an opportunity to analyze an actual decision to determine its fidelity to statutory rights, and, where, indeed, one might be swayed by the argument that covering the same ground as an arbitrator would be wasteful.⁵⁴ The evidence that deferral is a way to avoid burdening the Board with litigation is most heavily presented in the Board's pre-arbitral deference decisions. In *Collyer*, for example, the Board expressly reveals its concerns about wasteful use of its processes when it states:

The long and successful functioning of grievance and arbitration procedures suggests to us that in the overwhelming majority of cases, the utilization of such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute.⁵⁵

such a long dissent in *Lincoln Mills*, may be further evidence that many of his federal jurisdictional and practical troubles disappear in a framework of private labor contract enforcement.

52. See generally *Olin Corp.*, 268 N.L.R.B. 573 (1984); *United Tech.*, 268 N.L.R.B. 557 (1984); *General Am. Transp. Corp.*, 228 N.L.R.B. 808 (1977); *National Radio Co.*, 198 N.L.R.B. 527 (1972); *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

53. See *Collyer Wire*, 192 N.L.R.B. at 840 (stating the Board's discretion to defer to the arbitration process has "never been questioned" by the courts of appeals).

54. See generally *Spielberg Mfg.*, 112 N.L.R.B. at 1080; see also FLORIAN BARTOSIC & ROGER C. HARTLEY, *LABOR RELATIONS LAW IN THE PRIVATE SECTOR* 381-86 (2d ed. 1986) (discussing the Board's preference to defer in favor of arbitration).

55. *Collyer Wire*, 192 N.L.R.B. at 843.

Of course, the history of pre-arbitral deferral since *Collyer*—despite a short period of remission under *General American Transportation Corp.*⁵⁶—is characterized by bolder and bolder statements that deferral is more about protecting Board resources than about encouraging collective bargaining or industrial peace, although language invoking those policies is always present in the decisions. Consider, for example, the Board's decision in *United Technologies Corp.* in 1984.⁵⁷ The Board re-emphasized its 1973 decision in *United Aircraft* where it boldly stated:

Being keenly aware of the limited resources of this Agency, we are not particularly desirous of inviting any labor organization . . . to bypass their [sic] own procedures and to seek adjudication by this Board of the innumerable individual disputes which are likely to arise in the day-to-day relationship between employees and their immediate supervisors⁵⁸

All of this underscores Member Howard Jenkins's dissent in *Collyer* in which he stated:

Indeed, the [Supreme] Court itself pointed out the difference [between the *Trilogy* cases and this case involving statutory rights], saying that in those cases "arbitration is the substitute for industrial strife" because no other remedy is available, and in contrast in commercial cases (where judicial fostering and support of arbitration is not the policy) as in this case, arbitration is merely the substitute for litigation before tribunals with "established" procedures or even special statutory safeguards.⁵⁹

As Theodore St. Antoine recently wrote, "[b]oth *Collyer* and *Spielberg-Olin* have obvious attractions for an underfunded NLRB struggling to handle an overflowing caseload."⁶⁰

II. THE ARBITRAL IMPERATIVE IN LABOR AND EMPLOYMENT LAW: LABOR HISTORY AND THE FUTURE OF EMPLOYMENT ARBITRATION

A. Efficiency Links Labor and Employment Arbitration

Labor arbitration's history and the modern case law built around deferral reveals that some of arbitration's ascendancy can be attributed to

56. 228 N.L.R.B. 808 (1977).

57. 268 N.L.R.B. 557 (1984). *United Technologies* is still good law despite the decided democratic shift in the Board's composition over the last several years.

58. *Id.* at 559 (quoting *United Aircraft Corp.*, 204 N.L.R.B. 879, 880 (1973)).

59. *Collyer Wire*, 192 N.L.R.B. at 854 (Member Jenkins, dissenting).

60. Theodore J. St. Antoine, *The Law of Arbitration, in LABOR ARBITRATION UNDER FIRE* 24 (James L. Stern & Joyce M. Najita eds., 1997).

its attraction as a substitute for litigation. Underlying the *Trilogy* and the Board deferral decisions are the Court's and the Board's institutional concerns over the number of cases litigated through court and agency processes. Moreover, given increasing concerns about government spending and continued pressure to downsize government, concern over litigation before agencies and courts will grow. This defines the arbitral imperative in labor and employment law. So long as courts and agencies are the institutional actors making decisions about the role of arbitration in the workplace, arbitration will grow because it replaces litigation—whether it costs more or less than litigation is of little matter since it moves the costs of justice from the public to the private sector.

Viewed this way, labor arbitration and employment arbitration of statutory claims are not as different as many scholars have suggested.⁶¹ Like labor arbitration, employment arbitration is on the rise despite dubious precedents in its favor. Section 2 of the Federal Arbitration Act⁶² seems to create an exception to its policy in favor of arbitrability for contracts of employment. The Supreme Court's 1991 decision in *Gilmer*, which has been cited by many federal courts upholding arbitration of employment discrimination claims, expressly reserved the question of the Federal Arbitration Act's exemption.⁶³ The Civil Rights Act of 1991 expresses a policy in favor of arbitration⁶⁴ and has legislative history that

61. There has been a general tendency, especially on the part of labor scholars, to distinguish labor and employment arbitration. The most well-known example is probably Julius Getman's article, *Labor Arbitration and Dispute Resolution*, written partially in response to an article written by Clyde Summers regarding arbitration for nonunion workers. See Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979). Getman argued that attempts to analogize from labor arbitration to other types of arbitration "overlook[ed] the idiosyncratic nature of labor arbitration and its crucial interrelationship with unionization and collective bargaining." *Id.* at 917. More recently, David Feller has echoed the sentiment that labor arbitration is different and special based on its goals, while at the same time acknowledging a trend toward viewing all arbitration as a substitute for litigation. See David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration*, ARB. J., Sept. 1993, at 18, 18-19. Samuel Estreicher has also stated that while nonunion arbitration must be viewed as a substitute for litigation, labor arbitration is a means to encourage collective bargaining. See generally Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990) (discussing the role of arbitration in the absence of collective representation). Many scholars make the distinction between union and nonunion arbitration on the basis of language in the *Steelworkers Trilogy* attempting to distinguish between labor arbitration and commercial arbitration. But, as I have maintained in this Article, the *Trilogy* should not necessarily be taken at face value.

62. 9 U.S.C. § 2 (1994).

63. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (choosing not to address the exclusivity clause of section 1 of the Federal Arbitration Act).

64. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991); see also Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Dis-*

strongly endorses the approach taken by the U.S. Supreme Court in *Alexander v. Gardner-Denver Co.*,⁶⁵ allowing employees to pursue claims in court as well as in arbitration.⁶⁶ That history also cautions against permitting compulsory arbitration of statutory claims.⁶⁷ Nonetheless, courts have been willing to craft arbitral deferral precedents with only superficial citation to the Civil Rights Act, as the Supreme Court did with reference to Taft-Hartley in the labor context.⁶⁸

Indeed, like labor arbitration after World War II and in the face of the Federal Arbitration Act's exemption for labor contracts, arbitration of statutory employment discrimination claims has grown. In 1995, the American Arbitration Association conducted 859 employment arbitrations and mediations.⁶⁹ Likewise, a 1996 survey of Fortune 1000 General Counsels showed that employment arbitrations and mediations had increased by twenty-eight percent in three years.⁷⁰ The American Arbitration Association currently estimates that three million employees in 300 companies are covered by arbitration agreements incorporating American Arbitration Association rules.⁷¹ In 1997 alone, there were fifteen decisions in nine federal circuits addressing the issue of the arbitrability of

putes, 13 LAB. LAW. 21, 23 (1997) (recognizing that civil rights statutes encourage the use of alternative dispute resolution mechanisms).

65. 415 U.S. 36 (1974).

66. See H.R. CONF. REP. NO. 102-40, pt. 2, at 41 (1991) (emphasizing that arbitration is only supplementary to Title VII); 137 CONG. REC. S15472, S 15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole encouraging the use of arbitration); 137 CONG. REC. H9505, H9530 (daily ed. Nov. 7, 1991) (statement of Sen. Edwards recognizing that arbitration is not to be used to "preclude rights and remedies that would otherwise be available"); see also Jennifer N. Manuszak, *Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages*, 12 OHIO ST. J. DISP. RESOL. 387, 407 (1997).

67. See *supra* note 66 and accompanying text (stating that alternative dispute resolution is not to supplant remedies available under Title VII).

68. See, e.g., *Cosgrove v. Shearson Lehman Bros.*, No. 95-3432, 1997 U.S. App. LEXIS 392 (6th Cir. Jan. 6, 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1345 n.5 (1997) (listing arbitration cases). For a listing of such arbitration decisions of the federal courts before 1997, see Manuszak, *supra* note 66, at 396-97.

69. See Bompey et al., *supra* note 64, at 24.

70. See *Alternative Dispute Resolution: Mandatory Arbitration Better for Workers with EEOC and Courts Stretched*, 151 Daily Lab. Rep. (BNA) C-2 (Aug. 6, 1997); see also U.S. GENERAL ACCOUNTING OFFICE STUDY, MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7 (July 1995) (finding 90% of employers that had more than 100 employees and filed EEO reports in 1992 used at least one ADR approach to resolve discrimination complaints, although only 10% of employers surveyed used arbitration).

71. See *AAA Issues Revised Rules*, 102 Daily Lab. Rep. (BNA) D-14 (May 28, 1997).

statutory employment claims based on *Gilmer*.⁷² Of these fifteen decisions, nine compelled arbitration or enforced an arbitral decision.⁷³ Moreover, one of the decisions favoring arbitration over judicial process involved a question regarding arbitrability of statutory claims where a collective bargaining agreement is in place—an issue the Supreme Court squarely decided in favor of judicial process over exclusivity of arbitration in *Alexander v. Gardner-Denver*.⁷⁴

That the arbitral imperative is at work in the arena of statutory employment claims should come as no surprise. Much as the prohibitions in Taft-Hartley funneled *labor* into an arbitration paradigm, positive changes in Title VII law under the Civil Rights Act of 1991 allowing the award of compensatory and punitive damages, along with passage of the Americans with Disabilities Act and the Family and Medical Leave Act, have channeled *employers* into constructing alternative dispute schemes. The issues that dominate the debate about employment arbitration are virtually the same issues that governed discussions of labor arbitration almost a century ago. For example, numerous proposals for compulsory

72. See, e.g., *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997); *Wright v. Universal Maritime Serv. Corp.*, No. 96-2850, 1997 U.S. App. LEXIS 19299 (4th Cir. July 29, 1997), *cert. granted*, 66 U.S.L.W. 3570 (Mar. 2, 1998); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997); *Borg-Warner Protective Servs. v. Gottlieb*, No. 95-56153, 1997 U.S. App. LEXIS 15516 (9th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997); *Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Zandford v. Prudential-Bache Sec.*, 112 F.3d 723 (4th Cir. 1997); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, 118 S. Ct. 295 (1997), *and cert. denied*, *Tractor Supply Co., Inc. v. Pryner*, 118 S. Ct. 294 (1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Cosgrove v. Shearson Lehman Bros.*, No. 95-3432, 1997 U.S. App. LEXIS 392 (6th Cir.), *cert. denied*, 118 S. Ct. 169 (1997).

73. See *Miller*, 121 F.3d at 216, 219; *Wright*, 1997 U.S. App. LEXIS 19299 at 2, 5; *Gottlieb*, 1997 U.S. App. LEXIS 15516 at 2, 10; *O'Neil*, 115 F.3d at 276; *Patterson*, 113 F.3d at 837-38; *Zandford*, 112 F.3d at 730; *Peacock*, 110 F.3d at 234; *Cole*, 105 F.3d at 1485, 1488; *Cosgrove*, 1997 U.S. App. LEXIS 392 at 8.

74. See *Wright*, 1997 U.S. App. LEXIS 19299 at 5 (applying the Fourth Circuit's decision in *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875 (4th Cir. 1996), refusing to follow *Gardner-Denver* in light of its conflict with *Gilmer*). The Supreme Court granted certiorari in *Wright* and will have a chance to clarify some issues involved in the conflict between *Gilmer* and *Gardner-Denver*. A panel of the Third Circuit had also ruled that *Gilmer* should be followed over *Gardner-Denver*, but the decision was vacated pending en banc review, see *Martin v. Dana Corp.*, 114 F.3d 421 (3rd Cir.), *reh'g granted*, 124 F.3d 590 (3d Cir. 1997), and finally was reversed by the Third Circuit en banc. See *Martin v. Dana Corp.*, 135 F.3d 765, *reported in full* 75 Fair Emp. Prac. Cas. 871 (Dec. 16, 1997).

arbitration of labor disputes were made in the late nineteenth century.⁷⁵ An opponent to compulsory arbitration, Samuel Gompers, nevertheless favored voluntary arbitration "if workers had equal bargaining power with their employers"⁷⁶ The Erdman Act of 1898 failed in part because of issues related to the selection of a neutral.⁷⁷ As now, various combinations of mediation and arbitration were used in the 1910s and 1920s.⁷⁸ Likewise, today in employment arbitration as before in labor arbitration, possibly the most bitter dispute is over compulsory as opposed to voluntary arbitration.⁷⁹ In addition, in employment arbitration as before in labor arbitration, there are discussions regarding the bargaining power of the parties and the selection and qualification of arbitrators.⁸⁰

Another parallel between employment and labor arbitration is the role of institutional actors, that is, academics, arbitrators, and legal service organizations, in helping to fashion the law regarding arbitration of claims. Although at times their role has probably been overstated, arbitrators like Harry Shulman, George Taylor, and Benjamin Aaron, and academics like Archibald Cox and Neil Chamberlain no doubt influenced the Supreme Court and those writing briefs for the Steelworkers Union regarding what labor arbitration should look like in the late 1950s.⁸¹ Likewise, today with employment arbitration, academics like Ted St. Antoine and Sam Estreicher and arbitrators like Arnold Zack, concerned about the integrity of arbitration as a whole in the American workplace are probably helping to make arbitration of employment claims more acceptable by attempting to forge procedures that will make them fairer for employees.⁸² As a result, the American Bar Association, the Society of

75. See Nolan & Abrams, *supra* note 24, at 379-80.

76. *Id.* at 378.

77. See *id.* at 384.

78. See *id.* at 385-99 (describing attempts to mediate and arbitrate in key American industries).

79. See *id.* at 399 (discussing the dispute over compulsory versus voluntary labor arbitration in the years just prior to World War I); Estreicher, *supra* note 68, at 1348 n.16 (discussing the current debate over predispute agreements to arbitrate statutory claims); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1017 (1996) (illustrating the dispute over compulsory versus voluntary employment arbitration in the 1990s).

80. See generally Nolan & Abrams, *supra* note 24, at 378-400 (discussing the early reactions to arbitration); Stone, *supra* note 79, at 1036-49 (discussing the due process concerns surrounding arbitration).

81. See Stone, *supra* note 29, at 1515-16, 1516 n. 29.

82. See, e.g., Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117 (1996) (outlining proposals for labor law reforms designed by the Dunlop Commission); *Lawyers Urged to Consider Arbitration as Alternative in Employment Disputes*, 26 Daily Lab. Rep. (BNA) D12 (Feb. 8, 1996) (citing Arnold Zack's ad-

Professionals in Dispute Resolution, the National Academy of Arbitrators, the Federal Mediation and Conciliation Service, the National Employment Lawyers' Association, the American Civil Liberties Union, and the International Ladies Garment Workers' Union all participated through individual members in the drafting of a due process protocol entitled *National Rules for the Resolution of Employment Disputes*.⁸³

B. The Efficiency Hypothesis and the Future of Employment Arbitration

If the late 1990s is to employment arbitration what the mid-1950s were to labor arbitration in this country, we are about to witness the entrenchment of employment arbitration for the handling of statutory employment law claims. If an arbitral imperative in labor and employment law explains arbitral developments in both bodies of workplace law, what does it predict for employment arbitration? Retracing what has happened in labor arbitration allows some interesting predictions. The following might well be expected: first, the narrowing or even reversal of *Alexander v. Gardner Denver*;⁸⁴ second, a "broad-based" *Lincoln Mills*-type decision from the Supreme Court expanding *Gilmer* to cover employment contracts expressly; and finally, a series of judicial and agency decisions broadly deferring to arbitrator decisions based on contract language so long as there is no manifest disregard of the statutes involved.

In *Gardner-Denver* the Supreme Court held that an arbitration clause in a collective bargaining agreement that contained contract language prohibiting race discrimination was not a barrier to bringing a Title VII claim de novo in a court of law.⁸⁵ When *Gilmer* was decided, many

dress to ABA Section of Labor and Employment Law's Committee on State and Local Government); *Mandatory Arbitration Better for Workers with EEOC and Courts Stretched*, 151 Daily Lab. Rep. (BNA) C-2 (Aug. 6, 1997) (discussing Theodore St. Antoine address to ABA Section of Labor and Employment regarding advantages of mandatory arbitration); Thom Weidlich, *Storm Brews Over ADR*, NAT'L. L.J., Nov. 6, 1995, at A6 (regarding Arnold Zack's participation in due process protocol).

83. See Estreicher, *supra* note 68, at 1348 n.16 (discussing the development of the Due Process Protocol); Bompey, et al., *supra* note 64, at 32-34 (explaining the need for the protocol); Manuszak, *supra* note 66, at 415-19 (discussing the protocol's role in providing more procedural safeguards). The nature of each organization's involvement in the Protocol is obviously controversial. A remaining key and substantial area of dispute in the Protocol involves the issue of compulsory arbitration. I would be remiss if I did not report here Professor Clyde Summers's heartfelt reaction at the Taft-Hartley Symposium, and as a member of the National Academy of Arbitrators, regarding the unethical nature of arbitrator involvement in compulsory arbitral proceedings.

84. This may happen sooner than many thought. The Court's recent grant of certiorari in *Wright v. Universal Maritime Service Corp.* presents the opportunity for the Court to require deferral in all cases involving labor contracts with clauses that mirror statutory civil rights laws. See *supra* notes 72, 74.

85. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974).

speculated about its impact on *Gardner-Denver*, but because *Gilmer* did not involve a collective bargaining agreement, many felt the two decisions could be consistent. Construing labor contract language is not the same as construing statutory language.⁸⁶ While this distinguishes the two cases, a close analysis of *Gardner-Denver* reveals that the Court's concern was primarily with the arbitral process as a forum for deciding public law issues.⁸⁷ The Court was hostile to arbitration generally because of what it perceived as procedural deficiencies compared to the workings of the judicial process.⁸⁸ In addition, even though *Gardner-Denver* was decided before the Court's expansive favorable interpretation of the Federal Arbitration Act, the decision emphasizes that courts should consider according great weight to arbitral decisions reflecting processes that mirror those of the courts.

The Supreme Court is likely either to reverse *Gardner-Denver* or to issue a decision requiring broad deferral to arbitration decisions interpreting discrimination provisions of labor contracts. Why? The answer simply could be because of the arbitral imperative, but there are also other reasons. The Federal Arbitration Act, which after *Lincoln-Mills* is understood to include labor agreements, has now been given an expansive interpretation by the Supreme Court.⁸⁹ Consistency with *Gilmer* and other precedents favoring arbitration requires such a decision. The Supreme Court will find further fuel for its decision in the language of the Civil Rights Act of 1991 which requires favorable treatment of arbitration.⁹⁰ The Civil Rights Act's language regarding arbitration is tepid, but it is at least as strong as the Taft-Hartley Act's arbitration provisions which grew to become the centerpiece of national labor policy.⁹¹

The arbitral imperative likewise suggests that a *Lincoln Mills*-type decision will issue from the Supreme Court. And with federal circuits busily deciding *Gilmer*-like cases squarely involving employment contracts with arbitration provisions, that precedent may come soon. That precedent will surely require deference to arbitration based on the Federal

86. See Cole, *supra* note 38, at 598-99 (explaining why the two cases are consistent).

87. See *Gardner-Denver*, 415 U.S. at 57; see also Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1061-62 (1996) (highlighting the problems that arise when private entities interpret public policies).

88. See *Gardner-Denver*, 415 U.S. at 56-58; Corrada, *supra* note 87, at 1061-62 (discussing what the Court believed to be deficiencies).

89. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

90. See Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994).

91. See *supra* notes 11-15 and accompanying text (discussing Taft-Hartley § 301 and its subsequent interpretation by the Supreme Court).

Arbitration Act and the Civil Rights Act of 1991, if not based also on *Gilmer*. It may well declare a national policy favoring arbitration of workplace disputes. After this decision the Supreme Court could well hand down a *Trilogy* equivalent—a decision or decisions ensuring that courts will not be bogged down by claims seeking to overturn or modify arbitral decisions. Since these cases will involve deferral to arbitration regarding public law issues, the employment arbitration *Trilogy* will likely resemble the Board's deferral decisions—pre and post arbitral deferral doctrines aimed at unburdening the federal court docket.

Beyond these decisions, the Equal Employment Opportunity Commission (EEOC), an agency historically underfunded, but with an increasing responsibility for civil rights laws,⁹² will likely issue regulations increasing deference to arbitration. Although the agency has thus far consistently renewed its pledge against mandatory arbitration of civil rights disputes,⁹³ political and economic pressure is likely to change that stance.

The courts may help the EEOC as well. Incredibly, a federal judge in New York has ruled in *EEOC v. Kidder Peabody* that the EEOC cannot seek solely monetary damages on behalf of claimants covered by arbitration agreements, and therefore dismissed a pattern and practice age suit brought by the EEOC.⁹⁴ In *Gilmer*, the Supreme Court maintained that the EEOC's role would not be undercut by its decision in favor of arbitration because the EEOC would continue to bring actions seeking class-wide and equitable relief.⁹⁵ The judge in *Kidder Peabody* took *Gilmer*'s language of explanation to be language of limitation, meaning that the EEOC could not pursue monetary damages claims for individuals, but rather, was limited to seeking class-wide and/or equitable relief.

Finally, if the preceding developments occur we will eventually see a court precedent of the *Olin* variety—one that proclaims (full circle from *Gardner-Denver*) that interpretation of contract language will suffice to extinguish a review of a public law claim so long as the arbitral result is

92. See generally RICHARD A. BALES, COMPULSORY ARBITRATION 77-88 (1997) (setting forth the structure and procedures of the EEOC); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L. J. 1, 5-26 (1996) (discussing the structure of the EEOC). The pressure is already beginning. Gilbert Casellas, the recent Chair of the EEOC, recently predicted that the EEOC will eventually adopt a due process protocol deferring cases to private sector dispute resolution systems. See *Former EEOC Commissioner Sees Agency Deferring to ADR Programs*, 41 Daily Lab. Rep. (BNA) A4 (Mar. 3, 1998).

93. See EEOC POLICY STATEMENT ON MANDATORY BINDING ARBITRATION, EEOC Notice No. 915.002 (July 10, 1997).

94. See *EEOC v. Kidder, Peabody & Co.*, 979 F. Supp. 245, 247 (S.D.N.Y. 1997).

95. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (describing how the EEOC could still investigate and combat age discrimination claims).

not "palpably wrong."⁹⁶ In *Olin Corp.*, a pipefitter had been discharged from his employment for participating in a sick out in violation of an express provision of the collective bargaining agreement.⁹⁷ The union grieved the discharge through arbitration, and section 8(a)(3) and (1) charges were filed with the NLRB.⁹⁸ An Administrative Law Judge (ALJ), though failing to find a violation of the Act, refused to defer to an arbitral decision finding a contract violation.⁹⁹ The NLRB disagreed with the ALJ on the issue of deferral and questioned application of the Board's 1963 *Raytheon* decision, which held that in addition to the *Spielberg* requirements, there should be deferral only if the arbitrator considered the unfair labor practice issue as well.¹⁰⁰ In *Olin*, the Board modified precedent and held that it would defer to labor arbitration only if "(1) the contractual issue [in the case was] factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."¹⁰¹ In addition, the Board stated that, consistent with *Spielberg* and the policies of the Act, it would defer unless the arbitrator's award was "palpably wrong."¹⁰² Moreover, the Board shifted the burden to the party arguing against deferral in these cases to affirmatively show defects in the arbitral process and award.¹⁰³ Thus, the Board now defers to the post arbitral awards that have not even directly considered the unfair labor practice, that is, the statutory basis for a claim.

Could this happen under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave Act? Individual rights under these laws are no more sacrosanct than the statutory entitlements and prohibitions of the NLRA. Moreover, the EEOC is probably more burdened than the NLRB given the passage of new litigation over the last eight years within its jurisdiction. Arguments can be made that deferral by the NLRB to labor arbi-

96. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984) (presenting the factors that must be evaluated prior to deferral to an arbitration decision).

97. *See id.* at 573.

98. *See id.*

99. *See id.*

100. *See id.* at 573-74. In *Spielberg*, the Board held that it would only defer to arbitration if: (1) proceedings before the arbitrator were fair and regular, (2) all parties had agreed to be bound, and (3) the decision of the arbitration panel was not clearly repugnant to the purposes and policies of the NLRA. *See Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

101. *Olin Corp.*, 268 N.L.R.B. at 574.

102. *Id.*

103. *See id.*

trators is different from arbitration by courts to arbitrators. However, it seems relatively clear that much of the deferral impetus by the Board is related to the shifting of caseload burdens—a pure efficiency rationale. This rationale is reflected in the employment arena as well. Moreover, if a doctrine of heavy deference to labor arbitration was forged by the NLRB, a government agency specializing in the intricacies of the NLRA, how much more likely is a strong employment deferral doctrine to be crafted by federal judges who are not specialists in the law of status discrimination? That caseload must seem huge to federal judges: since 1971 the number of employment law cases filed in federal district court has increased by 430%,¹⁰⁴ and greater than ten percent of the federal court docket is comprised of employment law claims. Although some might argue that the NLRB's deferral doctrine is justified because worker rights are adequately secured by the unions representing them in arbitration, a variety of institutions in the employment law arena have used union-like leverage to pressure federal courts to ensure adequacy of process for employees, a fact that is likely to lead to greater deferral by courts. If plaintiffs' attorneys continue to succeed in their challenges to arbitration schemes that are too skewed in favor of employers, federal courts may well become increasingly more comfortable with the construction of these arbitral frameworks.

To anyone who practices in the area of Title VII and employment discrimination, this version of the future just outlined is scary indeed. Most commentators in this area have been more concerned with outlining arguments that would limit *Gilmer* to its facts, oblivious to concerns that *Gilmer* may be just the beginning. If *Gilmer* is indeed the trend and not the exception, then scholars should turn at least some of their attention to the work of modeling arbitral systems in employment law. Indeed, there may be opportunities to aid workers in a post-*Gilmer* reality by helping to shape the arbitration systems that may inevitably swallow their claims.

III. CONCLUSION

In May 1997, AFL-CIO President Sweeney refused to attend a super-conference on alternative dispute resolution.¹⁰⁵ He criticized mandatory arbitration of employment disputes as a condition of employment as a

104. See UNITED STATES DEPARTMENTS OF LABOR AND COMMERCE, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER MANAGEMENT RELATIONS 108-10 (1994); Manuszak, *supra* note 66, at 388.

105. See *Sweeney Criticizes ADR Conference; NAM President Calls ADR a Priority*, 83 Daily Lab. Rep. (BNA) A-5 (Apr. 30, 1997).

“farce,” but he seemed mostly to be upset that the conference provided no role for labor organizations.¹⁰⁶ While Sweeney’s position is understandable, it would be a shame if his stance ultimately inhibits transforming employment arbitration for the betterment of workers. After all, there is some potential for arbitration to provide better access, and thus more overall justice, for more workers, particularly those who are in the lower wage categories.¹⁰⁷ Labor organizations are uniquely positioned to make a difference for nonunion workers by providing information, and even representation, for workers who would use these processes. If the growth of nonunion arbitration occurs as has been outlined here, there will be a huge need for a major institution like the AFL-CIO to fill a gap that will undoubtedly be left in the plaintiffs’ employment bar. Indeed, what better way of gaining access to employees and becoming educated about particular workplaces? A broad campaign to offer arbitral services, a labor union specialty, may restore worker confidence in unions precisely where that restoration must take place. Nonunion arbitration may be just the foothold into organizing that unions now seek. So, Taft-Hartley at fifty—milestone or tombstone? Maybe it is still too early to tell.

106. *See id.*

107. *See generally* Corrada, *supra* note 87, at 1068-70 (describing possible outcomes under a system that includes more arbitration and private dispute resolution).