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Reading *Ricci* and *Pyett* to Provide Racial Justice Through Union Arbitration

MICHAEL Z. GREEN*

I have asserted a firm conviction . . . that working together we can move beyond some of our old racial wounds, and that in fact we have no choice if we are to continue on the path of a more perfect union. For the African-American community, that path . . . also means binding our particular grievances . . . to the larger aspirations of all Americans—the white woman struggling to break the glass ceiling, the white man whose been laid off, the immigrant trying to feed his family In the white community, the path to a more perfect union means acknowledging that what ails the African-American community does not just exist in the minds of black people; that the legacy of discrimination—and current incidents of discrimination, while less overt than in the past—are real and must be addressed.¹

* Professor of Law and Associate Dean for Faculty Research & Development, Texas Wesleyan University School of Law. I would like to thank Professor Kenneth Dau-Schmidt for inviting me to participate in the Symposium *Labor and Employment Law Under the Obama Administration: A Time for Hope and Change?* as part of a specific panel to discuss “Employment Law: Antidiscrimination Law under a Black President in a ‘Post-Racial’ America?” held at Indiana University Maurer School of Law on November 12–13, 2010. The comments from the participants in that Symposium and those offered by assigned readers Deborah Widiss and Kevin Brown provided a rich perspective for me to explore the issues herein. Also, I am very grateful to have received very insightful suggestions from Sarah Rudolph Cole and Ann Hodges that helped me immensely in improving key components of this Article. I also benefitted by receiving many helpful comments from workshop participants when I raised this issue previously at the following programs: Fourth Annual AALS Dispute Resolution Section Works-in-Progress in October 2010; Third National People of Color Scholarship Conference in September 2010; Law and Society Annual Meeting in May 2010; Third Annual AALS Dispute Resolution Section Works-in-Progress Conference held in November 2009; SEALS Annual Meeting in August 2009; ABA Annual Meeting Dispute Resolution Section Program in August 2009; AALS Midwinter Work Law Meeting in July 2009; and the Second Annual Labor and Employment Scholars Colloquium in 2007, where I first proposed the idea of exploring better opportunities for unions to provide racial justice through arbitration of statutory discrimination claims. I appreciate the financial support provided by the Texas Wesleyan University School of Law and the student research assistance from Rachel Hale, Amy Herrera, Keena Hilliard, Jillian Munoz, Robyn Murrell, Stephanie Rodriguez, Anne Sontag, and Kristen vanBolden. I dedicate this Article in memory of my champion, Margaret Green, and in honor of what she believed would never happen in her lifetime but she did live to see—the first black U.S. president.

1. Senator Barack Obama, *A More Perfect Union* (Mar. 18, 2008) (transcript available at <http://my.barackobama.com/page/content/hisownwords>).

INTRODUCTION: RESOLUTION OF WORKPLACE RACISM THROUGH UNION
ARBITRATION AS INTEREST-CONVERGENCE

The above-quoted words from President Barack Obama about creating “a more perfect union” can have two meanings.² First, these words suggest the power of a more perfect union in our society to address the racial problems that exist. But these words can also suggest what labor unions can do to pursue racial harmony in the workplace on behalf of their members.³ The concept of joining forces with others—and consolidating concerns of racism with broader societal concerns—that President Obama so eloquently captures above appears to resemble the interest-convergence theory Professor Derrick Bell espoused many years ago.⁴

Under this theory, issues concerning race in our society cannot be addressed adequately unless the interests of the subordinated racial group converge with the interests of the majority.⁵ Specifically, Professor Bell argues in his interest-convergence thesis⁶ that regardless of the level of “racial hostility and discrimination” blacks face in our society, no “meaningful relief” has ever occurred “until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern.”⁷ In applying this interest-convergence theory to employment discrimination concerns⁸ of African American workers under

2. *Id.*

3. *Id.* Other authors have suggested coalitions involving organized labor. *See, e.g.*, LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 75–82, 101–03 (2002) (describing problems while advocating broad-based coalitions between white and black workers); Leroy D. Clark, *Movements in Crisis: Employee-Owned Businesses—A Strategy for Coalition Between Unions and Civil Rights Organizations*, 46 *HOW. L.J.* 49 (2002) (identifying the struggles in creating coalitions between labor and civil rights movements and the problems they both face).

4. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”); Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 *HARV. C.R.-C.L. L. REV.* 369, 371 (2002) (noting “an impressive insight by Derrick Bell that gains for blacks coincide with white self-interest and materialize at times when elite groups need a breakthrough for African Americans, usually for the sake of world appearances or the imperatives of international competition”). In reflecting upon the death of Professor Bell shortly before the final stages of editing, the Author hopes that this Article and others will continue to highlight the enduring legacy of Professor Bell’s profound insights as developed through his interest-convergence analysis.

5. Bell, *supra* note 4, at 523.

6. *See* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 *NW. U. L. REV.* 149, 150 n.10 (2011) (referring to interest-convergence framework as either a theory or a thesis while refusing to use the more “loaded” term of “dilemma” despite Professor Bell’s description of it as a dilemma).

7. *See* Derrick Bell, *Diversity’s Distractions*, 103 *COLUM. L. REV.* 1622, 1624 (2003).

8. Driver, *supra* note 6, at 154 n.27 (describing the application of interest-convergence in employment discrimination law scholarship); *see also* Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 *HOW. L.J.* 937, 940 (2005) (asserting that the interest-convergence theory

current statutory schemes such as Title VII of the Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act of 1967 (ADEA), or the Americans with Disabilities Act of 1990 (ADA),⁹ any successful proposal must represent a win-win opportunity by also resolving broader workplace concerns for other primary stakeholders. This Article explores how the interest-convergence theory may be employed through the use of arbitration¹⁰ in the workplace to resolve racial problems for an employee represented by a union. African American employees seeking racial justice can form a more perfect union by converging their interests with key stakeholders, including employers, unions, and other employees who all desire effective and productive measures to resolve workplace disputes.¹¹

can be employed to address racial discrimination in the workplace through alternative dispute resolution).

9. Most statutory employment discrimination laws are enforced by the Equal Employment Opportunity Commission (EEOC). *See Laws Enforced by the EEOC*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/statutes/index.cfm> (referring to the following laws, among others, that the EEOC enforces: Title VII (EEOC enforcement authority codified at 42 U.S.C. §§ 2000e-4, e-5, e-12 (2006)); ADEA (EEOC enforcement authority codified at 29 U.S.C. § 628); and Title I of the ADA (EEOC enforcement authority codified at 42 U.S.C. § 12116)).

10. “Typically [a] more formal [version of dispute resolution] than mediation, arbitration involves the submission of a dispute to a third party (or a panel of third parties) who acts as a fact-finder and renders a decision after hearing arguments, including opening and closing statements, and reviewing evidence.” Donna Shestowsky & Jeanne Brett, *Disputants’ Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 66 n.2 (2008). In full disclosure, I admit that I am a labor arbitrator who is a member of the American Arbitration Association’s and Federal Mediation Conciliation Service’s labor arbitrator panels. However, my reasoning for using labor arbitration as a key tool to resolve statutory discrimination claims as described in this Article evolved years before I became a labor arbitrator.

11. In this Article, I focus on seeking racial justice for black employees in terms of discrimination in the workplace given the significant inequalities and disparities that have existed and continue to exist for black laborers. *See generally* SYLVIA ALLEGRETTO & STEVEN PITTS, CTR. FOR LABOR RESEARCH & EDUC., RESEARCH BRIEF: THE STATE OF BLACK WORKERS BEFORE THE GREAT RECESSION (2010), available at http://laborcenter.berkeley.edu/blackworkers/blackworkers_pre recession10.pdf (describing systemic disparities in wages for black workers from a review of 2007 wages). For consistency, I use the term “black” interchangeably with “African American” when addressing race, especially when quoting or referring to other sources. I recognize that overall concerns about race are not two-dimensional and should not be limited by a black/white binary. *See* Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 10 LA RAZA L.J. 127, 134 (1998) (criticizing the black/white binary paradigm in discussing race from an outsider perspective as a Latino, neither white nor black). Because this binary can be helpful in providing general understanding, I have used it in this Article. *See* Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 215 n.16 (2002) (“[S]ome believe that the racial identity of all groups has been politically and legally defined by the line between Blackness and whiteness.”). This binary usage continues a practice from a prior article where I used the same paradigm to assess racial justice in the workplace involving unions. *See* Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 57 n.3 (2004).

With the current political climate regarding racial issues, any positive gains in resolving race discrimination claims in the workplace cannot come from new legislation through the Obama administration.¹² Instead, those gains will have to come from within the workplace. Unions and their employee members must work together and with employers to resolve those disputes. Specifically, in this Article, two high-profile employment discrimination cases decided by the Supreme Court during President Obama's first year in office—*Ricci v. DeStefano*¹³ and *14 Penn Plaza LLC v. Pyett*¹⁴—help identify a framework whereby employees with racial

12. The first legislation that President Obama signed after his inauguration was the Lilly Ledbetter Fair Pay Act, which addressed the statute of limitations in pay discrimination cases and resulted as a congressional response to reverse a prior Supreme Court decision. See Richard Leiby, *A Signature with the First Lady's Hand in It*, WASH. POST, Jan. 30, 2009, at C1 (describing President Obama's signing of the Lilly Ledbetter Fair Pay Act); see also Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 539–40 (2009) (describing President Obama's signing of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), and reversal of *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007)). Whatever President Obama's plans may have been with respect to advocating for pro-union and pro-antidiscrimination legislation when he first entered office, it is likely that the Lilly Ledbetter Fair Pay Act may represent the only legislation of this type that will pass during his four-year term. When republican Scott Brown was elected in January 2010 to take over the U.S. Senate seat from Massachusetts, previously held by democratic senator Edward Kennedy, President Obama lost the opportunity to push through any desired pro-labor or employment discrimination legislation. See Paul Kane & Karl Vick, *Republican Wins Kennedy's Seat: Upset Shakes Democrats Result Could Derail Party Agenda*, WASH. POST, Jan. 20, 2010, at A1. With Brown seated, the Democrats could no longer overcome any republican efforts to stop such legislation by calling for a filibuster supported by the now forty-one republican senators. See *id.*; see also Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful*, 60 CASE WES. RES. L. REV. 629, 629 (2010) (suggesting the election of President Obama in 2008 along with a democratic takeover of Congress and a “theoretically filibuster-proof majority in the Senate” had inspired “organized labor and other traditional Democratic supporters” to seek the enactment of significant workers' rights legislation). Whatever workplace legislation, if any, that may pass during the rest of President Obama's term will likely focus on creating jobs, rather than addressing workplace discrimination, given the record levels of unemployment in the United States. See Marion Crain, *Work Matters*, 19 KANSAS J. L. & PUB. POL'Y 365, 370 (2010) (describing overwhelming “[p]ublic demand for a governmental response to the unemployment problem”); Michael Z. Green, *Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action?* 42 CONN. L. REV. 1139, 1146–47 & n.23 (2010) (identifying “jobs crisis” as top priority for the Obama administration and civil rights and labor organizations). Even more difficulties occurred when the Democratic Party lost control of the House of Representatives in the November 2010 midterm elections. See John Fritze, *Hurdles Ahead for White House Agenda in Second Half of Term: Economic Concerns Shift Power to GOP*, USA TODAY, Nov. 3, 2010, at 1A (describing comments from a congressional scholar from the Brookings Institution, Thomas Mann, who asserted that the midterm November 2010 elections will stymie chances for President Obama to pursue his agenda and “will [make it] hard for lawmakers to reach agreements on almost everything” now that Republicans control the House of Representatives).

13. 129 S. Ct. 2658 (2009).

14. 129 S. Ct. 1456 (2009).

discrimination claims against their employers may work with their unions to effectively resolve their disputes through arbitration. This solution requires the union to make every effort to deal fairly and directly with all members of the union. The union will have to focus especially on working through these disputes with those members of different races than the claimants and those who may view the claims as invalid or even as a threat to their own employment gains. The key objective for all those involved is to find an interest-convergence when resolving race-based disputes through final arbitration.

In Part I, this Article examines the current barriers to developing mechanisms to address race discrimination in our society and particularly in the workplace. Part II offers the historical development of arbitration in the union setting, so-called labor arbitration, and compares and contrasts this history with the separate and more recent development of arbitration of statutory employment discrimination claims in the non-union setting, so-called employment arbitration. This history frames the legal landscape as it existed leading up to the Supreme Court's decisions in *Ricci* and *Pyett*. This history also explains how and why unions tended to avoid handling statutory employment discrimination matters by keeping them out of labor arbitration. In Part III, this Article discusses the details of the *Ricci* and *Pyett* cases and examines how each union involved in those disputes responded to the discrimination claims at issue.

Part IV identifies the potential problems involved with creating a clear and unmistakable union waiver of an employee's statutory right to pursue discrimination claims in court as occurred in *Pyett*. Part IV explains why these waivers should be allowed as long as employees can be provided with a fair arbitration forum to effectively vindicate their statutory rights as a form of interest-convergence that addresses all the dilemmas for employers, employees, and especially unions when resolving statutory discrimination matters in arbitration. Part IV also establishes the analysis that should be used when assessing whether and how unions and employers can agree to these waivers. Part V concludes that by establishing the criteria in which these waivers will create an arbitration process to allow effective vindication of statutory rights, employers, unions, and mostly employees, will now have clarity and fairness in merging labor disputes with employment discrimination disputes. This interest-convergence merger can result in an appropriate arbitration process as allowed by *Pyett* and as circumvention of the type of court resolution process that arose in *Ricci*.¹⁵

I. IDENTIFYING RACIAL JUSTICE CONCERNS IN THE CURRENT WORKPLACE

Workplace discrimination claims based on race filed at the Equal Employment Opportunity Commission (EEOC) have reached record highs within the last three years.¹⁶ Even with the last two Supreme Court appointments made by President

15. See *infra* Part IV.A–D.

16. See Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Reports Job Bias Charges Approach Hit Record High of Nearly 100,000 in Fiscal Year 2009 (Jan. 6, 2010), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-6-10.cfm> (describing the EEOC workplace discrimination statistics for 2009 as including 93,277 workplace discrimination charges with race discrimination and retaliation being the most frequently filed charges and

Obama, the Court, as led by Chief Justice Roberts, provides little hope for those seeking a judicial remedy for racial discrimination as such claims have received little traction.¹⁷ As the interest-convergence theory suggests, African American employees will have to identify dispute resolution actions that will appeal to

how the EEOC's enforcement, mediation, and litigation programs recovered more than \$376 million and these numbers for 2009 were only slightly lower than the all-time high numbers reached in 2008 for charges). "More than 47,000 people filed discrimination claims with the Equal Employment Opportunity Commission in the first two quarters of its 2010 fiscal year—an 8% increase compared with the same period a year earlier." Nathan Koppel, *U.S. News: Claims Alleging Job Bias Rise with Layoffs*, WALL ST. J., Sept. 24, 2010, at A6. Even more recently for 2010, race discrimination charges, which have "[h]istorically . . . been the most frequently filed charges since the EEOC became operational in 1965," continue along with retaliation charges to be the leading areas of complaints filed with the EEOC. See Press Release, U.S. Equal Emp't Opportunity Comm'n, *supra* (referring to EEOC workplace discrimination statistics for 2010 as including an all-time high of 99,922 discrimination charges with retaliation charges of 36,528 slightly surpassing race charges of 35,890 as the most frequent type of charge filed).

17. See Henry L. Chambers, Jr., *The Wild West of Supreme Court Employment Discrimination Jurisprudence*, 61 S.C. L. REV. 577, 577 (2010) (arguing that the Supreme Court's recent decisions in employment discrimination law indicate that these laws are being radically reshaped because "everything we thought we knew about employment discrimination is being rethought"); Erwin Chemerinsky, *Court's Conservatives Hold Sway in Employment Cases*, 45 TRIAL, Sept. 2009, at 52, 52 (describing the first four terms of the Roberts Court as offering very little help for employees as the Court, in various five to four majorities that are not likely to change anytime soon, has repeatedly "favor[ed] employers over workers in employment discrimination cases" and "imposed significant new barriers to workers' ability to get redress for discrimination"); Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 413, 419–23 (2009) (describing how the Court's five to four majorities moved employment discrimination "in the conservative direction" in 2009); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009) (finding from an empirical study of federal courts that "[j]obs cases proceed and terminate less favorably for plaintiffs than other kinds of cases" and those who "appeal their losses or face appeal of their victories again fare remarkably poorly in circuit courts"); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 253 (2009) (asserting that decisions in the Supreme Court's 2008–09 term "suggest that the Court's conservative majority is willing in fact to be quite radical" as it "reshaped the law that governs the workplace – or more specifically the law that governs whether and how employees will be permitted to access the courts to litigate workplace disputes"); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 515–16, 553 (2003) (noting from a study of "every California employment law jury verdict reported in one or more of the state's three major jury verdict reporters for the years 1998 and 1999" (internal citation omitted) that "[t]his study and many that preceded it, demonstrate that juries favor employers over employees in employment discrimination cases and are particularly skeptical of race discrimination claims by African Americans"); Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209, 210–11 (2011) (finding from a review "of 102 jury trials and 10 bench trials" that "African Americans and Latinos claiming race discrimination have the lowest jury win rates").

broader interests inside the workplace and also respond to the pervasive levels of race discrimination that still exist as evidenced by the increasing number of complaints.

A. *Workplace Racism in a Climate of Growing Resentment*

The landmark 2003 affirmative action decision in *Grutter v. Bollinger*,¹⁸ authored by then-Supreme Court Justice Sandra Day O'Connor, referred to a future time (possibly twenty-five years after the *Grutter* decision) when race would no longer matter.¹⁹ However, O'Connor did acknowledge that in 2003, "race unfortunately still matters."²⁰ In a rush to reach Justice O'Connor's prediction only five years after the *Grutter* decision, some commentators have claimed the existence of a colorblind and post-racial society as a result of the election of an African American president.²¹ These impetuous declarations about the end of racism create suspicion that these assertions themselves may be rooted in racism as a form of backlash against any racial justice gains in our society.²² Accordingly, any efforts aimed at aspiring to a colorblind or post-racial society further exacerbate racial discord regarding the handling of current issues of racism.

The current resentment toward policies aimed at eradicating racial discrimination has evolved as part of a comprehensive challenge to the racial progress achieved by federal employment discrimination laws.²³ Specifically, a group of "social conservatives" have been "actively developing a cultural and legal

18. 539 U.S. 306 (2003).

19. *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.")

20. *Id.* at 333 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.")

21. See Bridgette Baldwin, *Colorblind Diversity: The Changing Significance of "Race" in the Post-Bakke Era*, 72 ALB. L. REV. 863, 869-71 (2009) (exposing the flaws in trying to ignore race by asserting that actions should be colorblind); andré douglas pond cummings, *The Associated Dangers of "Brilliant Disguises," Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 IND. L.J. 1277, 1277-78 (2010) (describing attempts at focusing on a color-blind constitutionalism as a "subtle affront" to affirmative action); see also Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 968 (2010) (explaining that "post-racial" ideology as "vividly demonstrated in the 2008 election of the first African-American President" involves the "belief in the declining significance of race in the United States" and it describes as a whole "a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America's and Americans' pronounced racial progress").

22. See Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1141-43 (2010) (referring to the "present attraction to post-racialism" as establishing a form of post-racial discrimination that removes the disparate impact theory of discrimination from further consideration and diminishes the gains that arose from and could continue to accrue from the development of that theory).

23. *Id.*

movement to reverse the gains of the civil-rights movement.”²⁴ This planned backlash towards continued racial progress resembles what President Obama has referred to as efforts to capitalize on the “anger” that exists in white communities where “opportunity comes to be seen as a zero sum game, in which your dreams come at my expense.”²⁵ Those who have started to assert that we should ignore current issues of racism in our society have made it easier to “open[] the floodgates of white resentment when confronted with previously accepted and unquestioned civil rights inequities.”²⁶ This concerted backlash in response to racial progress has also resulted in what President Obama referred to as the acts that “helped shape the political landscape for at least a generation” as “[t]alk show hosts and conservative commentators built entire careers unmasking bogus claims of racism while dismissing legitimate discussions of racial injustice and inequality as mere political correctness or reverse racism.”²⁷

Despite the attempts to assert that race no longer matters, a host of current events demonstrate ongoing racial problems in our society.²⁸ In what the authors have referred to as “an exploratory empirical study of federal workplace racial harassment cases,” Pat K. Chew and Robert E. Kelley Jr. found the race of the judge matters.²⁹ Specifically, in reviewing over 400 federal workplace harassment cases between 1981 and 2003, Chew and Kelley concluded that “African American judges held for the plaintiffs much more often than White judges.”³⁰ Their findings

24. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1591 (2009).

25. Obama, *supra* note 1.

26. Cho, *supra* note 24, at 1596.

27. Obama, *supra* note 1. The ongoing narrative of conservatives who attack modern efforts to respond to discrimination in our society has been couched in an antidiscrimination rhetoric that assumes blacks and others who gained from the civil rights era have now attained equality. See Jeffrey R. Dudas, *In the Name of Equal Rights: “Special” Rights and the Politics of Resentment in Post-Civil Rights America*, 39 LAW & SOC’Y REV. 723, 724–25 (2005) (describing how conservative activists have channeled backlash and resentment efforts against social changes derived from the civil rights era over the last fifty years). In pursuing this narrative, any proactive attempts aimed at continuing to eradicate discrimination in our society provide undeserved “special rights” to groups based on race and gender at the expense of white males which, itself, results in inequality and discrimination. *Id.* at 724 (referring to conservative assertions that equal rights and nondiscrimination principles are now being trampled upon by groups seeking “special rights” such as “women, African Americans, the physically and mentally disabled, Native Americans, and gays and lesbians”).

28. See Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election ’08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 674, 676, 678, 681 (2010) (highlighting the use of racial messages in political campaigns from Nixon to Obama, and in particular, the significant degree of messages in the 2008 Obama campaign including suggesting that he was “too black,” that he resembled a “primate[],” direct racial slurs, claims that he was “unpatriotic, un-American, and even a foreigner,” and suggestive use of “interracial sexual taboo”).

29. See Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1117, 1146 (2009) (finding that “the logistic regression indicates that judges’ race in general is clearly associated with case outcomes”).

30. *Id.* at 1147.

suggest very explicitly that “African Americans and Whites apparently subscribe to different worldviews.”³¹ Their study also identified several examples of racist behavior occurring during the Obama presidential campaign, which further indicated that despite some societal growth in race relations, “racial harassment and discrimination continue to pervade American life.”³²

Other recent polls highlight how divided the country remains on race. For example, on August 28, 2011, the country prepared to explore its pride in improved race relations since civil rights demonstrations led by Dr. Martin Luther King Jr. in the 1960s by dedicating the erection of a thirty-foot-plus sculpture of Dr. King in Washington as a memorial near similar monuments for Presidents Abraham Lincoln and Thomas Jefferson.³³ Nevertheless, at the same time of this planned historic event, a USA Today/Gallup poll of 1319 adults from August 4–7, 2011, divided significantly by race over the questions of whether new civil rights laws are needed, whether the government should take an active role in improving social and economic positions for blacks, and whether job discrimination against blacks is persistent.³⁴ Blacks consistently felt more strongly than whites about the continued existence of discrimination and the need for government and laws that address it.³⁵

Finally, as further evidence that racial problems still exist in our country, there is the somewhat recent example of the arrest of a prominent African American Harvard Professor, Henry “Skip” Gates Jr. in his Cambridge, Massachusetts, home by a white police officer on July 16, 2009.³⁶ Issues of racial misunderstanding were highlighted during this incident.³⁷ Harvard Law Professor Charles Olgetree, who

31. *Id.* at 1157.

32. *Id.*

33. See Susan Page & Carly Mallenbaum, *Poll: Racial Divisions Remain*, USA TODAY, Aug. 18, 2011, at 1A; see also Susan Page, *Views Differ on Degree of Change Since MLK*, USA TODAY, Aug. 18, 2011, at 4A. The dedication ceremony for the Martin Luther King Monument was delayed until Sunday, October 16, 2011, because of health and safety concerns for those in Washington presented by Hurricane Irene on the date initially planned for the dedication of August 28, 2011. See Melanie Eversley, *Fewer Expected for King Site Dedication*, USA TODAY, Oct. 14, 2011, at 3A.

34. Page & Mallenbaum, *supra* note 33, at 1A (noting that “[s]ix in 10 blacks say the government should take a major role in trying to improve the social and economic position of blacks” when only “one in five whites agree”; how “52% of blacks say new civil rights laws are needed” as “compared with 15% of whites”; and “nearly eight in 10 whites say blacks have an equal chance in their community to get any kind of job for which they are qualified” and in contrast “six in 10 African Americans say job discrimination remains persistent”).

35. *Id.*

36. See Martin Finucane, *Review: Gates Arrest Was ‘Avoidable,’* BOS. GLOBE (June 30, 2010), http://www.boston.com/news/local/breaking_news/2010/06/review_finds_bo.html.

37. See generally Elayne E. Greenberg, *Dispute Resolution Lessons Gleaned from the Arrest of Professor Gates and “The Beer Summit,”* 25 J. CIV. RTS. & ECON. DEV. 99, 106–12 (2010) (asserting that the racial misunderstanding from the Gates incident highlighted ongoing conflicts in our society regarding racial profiling while the incident also resulted in suggesting the benefits of mediation in resolving these conflicts); see also Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 6–12 (2010) (describing details of the Gates

represented Gates, has written a book about the arrest³⁸ and asserted that the incident demonstrated how much our society is still struggling with racism.³⁹ Ogletree and Johanna Wald have also explained that:

Racial inequality is perpetuated less by individuals than by structural racism and implicit bias. Evidence of structural inequality is everywhere: in the grossly disproportionate numbers of young black men and women in prison; in the color of students shunted into remedial and special education tracks; in the stubborn segregation of our neighborhoods and schools; in the lack of recreational and academic opportunities for children of color in poor communities; in the inferior medical treatment people of color receive; and in the still appallingly small numbers of men and women of color in law firms, corporations and government.⁴⁰

B. Informal Resolution of Workplace Race Problems Without Bias

As employers concentrate on resolving employment discrimination claims based on race, they will likely consider broader workplace goals aimed at removing barriers to worker productivity as an informal response to the pervasive level of these complaints.⁴¹ Employers could recast the resolution of these race

controversy).

38. See CHARLES J. OGLETREE, JR., *THE PRESUMPTION OF GUILT, THE ARREST OF HENRY LOUIS GATES, JR., AND RACE, CLASS, AND CRIME IN AMERICA* (Palgrave Macmillan ed., 2010).

39. See Tracey Jan, *Q&A: Charles Ogletree on Gates' Arrest, One Year Later*, BOS. GLOBE (June 30, 2010, 4:44 PM), http://www.boston.com/news/local/breaking_news/2010/06/_by_tracy_jan_g.html (describing Ogletree's view that race still trumps class and how Harvard black law students report that they are "still suspected of committing crimes they did not commit" which proves that a "presumption of innocence doesn't really exist for black males" and this is a "very disappointing and very painful" reality that "[w]e have not arrived").

40. See Charles J. Ogletree, Jr. & Johanna Wald, Editorial, *Race: The Discussion We Avoid*, WASH. POST, July 25, 2010, at A19. For a recent study highlighting the significant racial discrimination that occurs in law firm hiring, see Monica R. Payne-Pikus, John Hagan & Robert L. Nelson, *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 LAW & SOC'Y REV. 553 (2010). Further proof of racial discrimination is indicated from a 2011 Pew Research Center study that shows the median wealth of white households is now twenty times that of black households, the highest this gap has ever been since the government began reporting this information twenty-five years ago. See PAUL TAYLOR, RAKESH KOCHHAR, RICHARD FRY, GABRIEL VELASCO & SETH MOTEL, PEW RESEARCH CTR., *WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS: TWENTY-TO-ONE 1* (2011), available at http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

41. See Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 508, 511-12, 519 (1993) (describing how employers' efforts to adopt informal grievance procedures to resolve employment discrimination complaints do attempt to address legal concerns while they also subsume the legal concerns in support of management's interests as well as they "minimize the intrusion of law on the smooth and efficient functioning of the organization"). There is a host of long-supported psychological

discrimination issues in favorable management terms related to: “developing rapport between employees and supervisors”; rectifying ‘management problems’ or ‘poor work assignments’; reassigning people to avoid ‘personality clashes’; and ‘improving communication.’”⁴² Also, any analysis of dispute resolution options for racial discrimination claims (other than those in formalized court systems) must make certain that these options will not represent a form of second-class justice only relegated to racial minorities who seek final resolution of their claims.⁴³

In a landmark 1985 article, Professor Richard Delgado and his coauthors⁴⁴ attacked the increasing use of alternative dispute resolution (ADR) to resolve disputes for persons of color because of the risks of prejudice from informal resolutions.⁴⁵ Using social science research, the authors argued that the informality of these methods of dispute resolution provided a negative impact on persons of

analysis that suggests that workers are more productive and happy when they are given some “voice” to resolve workplace disputes. See Thomas A. Kochan, *Rethinking and Reframing U.S. Policy on Worker Voice and Representation*, 26 A.B.A. J. LAB. & EMP. L. 231, 233 (2011); see also Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy*, 94 MARQ. L. REV. 765, 805 (2011) (referring to “a variety of theories suggesting” the value of “giving workers a say in the workplace”). But see Joshua C. Polster, Note, *Workplace Grievance Procedures: Signaling Fairness but Escalating Commitment*, 86 N.Y. U. L. REV. 638, 638–40 (2011) (asserting that notions of improved overall worker productivity as a result of offering fair grievance procedures comes at a cost of exacerbating workplace conflict by creating incentives for employees to become more committed to pursuing the grievance if it is initially denied, a result referred to as escalation which decreases worker productivity).

42. Edelman et al., *supra* note 41, at 530 n.26 (referring to comments made by management representatives who handle internal dispute resolution claims of employment discrimination and how they view the purposes behind their efforts to resolve those claims).

43. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (referring to concerns where a dispute resolution system such as the courts may have the perception of an unjust system that is designed only for the “haves” in our society to the exclusion of the “have-nots”).

44. Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; see also Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 PEPP. DISP. RESOL. L.J. 211, 243 (2009) (stating Delgado’s hypothesis has “support from social scientific studies on decision-making and emotion”); Stephan Landsman, *Nobody’s Perfect*, 7 NEV. L.J. 468, 478 (2007) (acknowledging that “[i]n a number of different settings ADR processes have proven themselves hostile to the poor, the weak, and the one-shot players”). Maybe, these issues relate to concerns about race in negotiations. See Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 110 & n.3 (1995); Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC’Y REV. 767, 778–80 (1996) (describing findings concluding that female and male claimants of color received less in mediation than similarly situated white claimants); Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLIN J. PUB. L. & POL’Y 211 (1999) (describing data analyzing the disparate outcomes in bargaining for ethnic minorities, women and those with limited bargaining power in mediation).

45. Delgado et al., *supra* note 44, at 1388–89.

color.⁴⁶ According to Delgado and his coauthors, being forced to pursue alternatives to the court system denies persons of color the application of certain norms and rules of procedure available in a court trial including “the flag, the black robes, the ritual—[to] remind those present that the occasion calls for the higher, ‘public’ values, rather than the lesser values embraced during moments of informality and intimacy.”⁴⁷ Under this analysis, the “formality of adversarial adjudication deters prejudice,” because it counters “bias among legal decisionmakers and disputants” and it “strengthen[s] the resolve of minority disputants to pursue their legal rights.”⁴⁸ More recently, Professor George Martinez described the same concerns as Delgado regarding the purported difficulties that racial minorities may face when asserting their rights in arbitration and other forms of ADR as follows: “minorities should avoid extra-legal/private associations such as alternative dispute resolution (ADR) which operate outside of the state’s legal system” because “[m]inorities do less well in less formal ADR settings.”⁴⁹

Although lack of formality may represent a concern for employees of color who want to address racial discrimination through arbitration and other forms of ADR, recent social science behavioral studies support the premise that if you want to reduce prejudice in the workplace, you should not suppress the identification of racial issues.⁵⁰ Instead of pushing resolution of these racial issues to the courts or making prouder pronouncements that race no longer matters, effective human resource policies that encourage internal acknowledgement of these issues, while providing a fair resolution, would help better address workplace prejudice. With the current racial divide, employers, employees, and unions should be proactive in developing dispute resolution systems to converge their interests and resolve workplace disputes based on race. Despite his earlier racial prejudice criticisms of private dispute resolution, Delgado has also acknowledged that increasing concerns regarding the attainment of racial justice in the courts as a result of a “right-wing surge [in] this country . . . over the last few years” may demonstrate that “[t]he equation of ‘higher’ values with the public sphere is . . . not necessarily[] true” because “[m]any conservative judges and mean-spirited laws have been put in place.”⁵¹ If the public resolution of workplace discrimination through the courts

46. *Id.* at 1402–03 (asserting that a key concern is that an entity with “high status” will pursue unfettered prejudices against someone of “low status” when formalism does not act as a check on that prejudice and this prejudice can stop claims from being “energetically” pursued).

47. *Id.* at 1388.

48. *Id.* at 1388–89. Delgado and his coauthors declared: “Formal rules also counter decisionmaker bias or consideration of extraneous issues.” *Id.* at 1400 n.307.

49. See George A. Martinez, *Race, American Law and the State of Nature*, 112 W. VA. L. REV. 799, 826–29 (2010) (internal citation omitted).

50. See Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 401–12 (2008).

51. See Richard Delgado, *Alternative Dispute Resolution: Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1391 n.1, 1399–1400 (1997) (quoting both Delgado and his alter ego Rodrigo). But see Phyllis E. Bernard, *Minorities, Mediation and Method: The View from One Court-Connected Mediation Program*, 35 FORDHAM URB. L.J. 1, 4–13 (2008) (disagreeing with Delgado’s original concerns about informality in alternatives to the court and asserting that those concerns are not valid). While being

does not represent a fair option, then the private resolution of these disputes in arbitration may offer a viable option of interest-convergence for employees, employers, and unions.⁵²

II. THE MERGER OF LABOR AND EMPLOYMENT ARBITRATION

In the pursuit of interest-convergence regarding the handling of statutory employment discrimination claims in the union workplace, the merger of two previously unique forms of arbitration, labor arbitration (which exists only in a union setting) and employment arbitration (which had primarily existed only in a non-union setting until *Pyett*), must be explored. While having some similar components because they involve the resolution of worker disputes through arbitration, labor arbitration and employment arbitration do differ significantly.

A. Labor Arbitration

Historically, labor peace, an important policy goal under the National Labor Relations Act (NLRA),⁵³ has been advanced by fostering support for collective bargaining agreements between employers and unions.⁵⁴ This labor law policy clearly applies when employers and unions agree to resolve their disputes through final and binding arbitration.⁵⁵ Pursuant to section 301 of the Labor Management Relations Act, 1947 (“Section 301”),⁵⁶ which amended the NLRA, the Supreme Court has developed a significant level of jurisprudence endorsing the resolution of labor disputes pursuant to collective bargaining agreements with binding arbitration as the final step.⁵⁷

concerned about the informalities of using ADR, George Martinez has also recognized the great difficulties with pursuing race discrimination claims in court. *See* Martinez, *supra* note 49, at 829–30.

52. *See* Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1, 16–17 (1999) (discussing the benefit of using mediation as part of the labor grievance arbitration process when handling a discrimination charge as better serving a union than trying to avoid any responsibility for addressing the matter in the grievance process); *see also* St. Antoine, *supra* note 12, at 641 (describing arbitration benefits for employers in avoiding unpredictable juries and employees in better representing themselves and vindicating their statutory discrimination claims than in the courts).

53. *See* National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

54. Specifically, section 1 of the NLRA acknowledges one of the findings that warranted the passage of the NLRA was the failure of employers to “accept the procedure of collective bargaining,” which “lead to strikes and other forms of industrial strife or unrest.” *Id.* § 151.

55. *See generally* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455–56 (1957) (finding that the employer’s agreement to arbitrate acted as a quid pro quo for the employees’ agreement not to strike and avoid industrial strife).

56. Pub. L. 101, tit. 3, § 301, 61 Stat. 136, 156 (codified as amended at 29 U.S.C. § 185 (2006)).

57. Three decisions issued by the Supreme Court in 1960 (and all involving the Steelworkers Union) have become known as the “Steelworkers Trilogy.” *See* Julius Getman, *Was Harry Shulman Right?: The Development of Arbitration in Labor Disputes*, 81 ST.

Supreme Court cases decided pursuant to analysis under the Federal Arbitration Act (FAA)⁵⁸ have consistently enforced agreements to arbitrate statutory employment discrimination claims when applied in a non-union setting.⁵⁹ However, in the labor union setting, the Supreme Court has addressed the issue of arbitrating statutory employment discrimination claims solely as a matter under Section 301, while recognizing similarities with that analysis when compared with its analysis under the FAA.⁶⁰ In an important case decided more than thirty-five years ago, *Alexander v. Gardner-Denver Co.*,⁶¹ the Supreme Court found an individual employee could pursue a statutory discrimination claim in court even if the underlying dispute had been addressed in grievance arbitration pursuant to the terms of a collective bargaining agreement.⁶² The Court also suggested that a union

JOHN'S L. REV. 15, 18 (2007). Those decisions made clear the federal labor policy pursuant to Section 301 of preferring the resolution of labor disputes through the collectively bargained grievance and arbitration process rather than using methods that cause industrial strife such as strikes. *See* *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car. Corp.*, 363 U.S. 593 (1960).

58. 9 U.S.C. §§ 1–16 (2006).

59. *See* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Supreme Court further expanded the scope of its FAA jurisprudence regarding arbitration of statutory discrimination claims by allowing the parties to require the arbitrator, as opposed to the courts, decide the merits of challenges to arbitrate including whether the arbitration agreement is unconscionable under state law. *See* *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779–81 (2010); *see also* David Horton, *Arbitration As Delegation*, 86 N.Y.U. L. REV. 437 (2011) (asserting that the Supreme Court has erroneously allowed the parties to delegate a lot of the key decision making about the scope of the FAA to the arbitrator instead of the courts as exemplified by its ruling in *Jackson*). The Court has recently expanded its limitations on the ability to challenge the validity of an agreement to arbitrate as unconscionable by preempting state laws that find it unconscionable to prohibit class arbitration claims. *See* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750–53 (2011). For a broader discussion of the FAA's enforcement of agreements to arbitrate statutory claims and preemption matters, see Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233 (2011); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 (2011). For a more recent discussion of the Supreme Court's overall FAA analysis and a positive assessment of the value of providing arbitration as a dispute resolution device for employees and consumers, see Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUST. L. REV. 457 (2011).

60. Most recently, the Supreme Court has attempted to articulate some consistent analysis of its jurisprudence regarding enforcement of arbitration agreements under federal arbitration law via the FAA for non-labor cases versus enforcement of arbitration agreements under federal labor law via Section 301 for labor cases. *See* *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2859 n.6 (2010) (describing how “precedents applying the FAA . . . employ the same rules of arbitrability that govern labor cases”); *see also* *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (finding the FAA does not apply to labor contracts “but the federal courts have often looked to the [FAA] for guidance in labor arbitration cases”).

61. 415 U.S. 36 (1974).

62. *Id.* at 50 (finding “[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual

could not agree to waive an individual employee's future pursuit of statutory rights in court.⁶³

The law as established by *Gardner-Denver* had been consistently applied for thirty-five years until a change in 2009.⁶⁴ Although *Gardner-Denver* and its progeny had suggested a rule that a union could not agree to waive an employee's right to pursue a statutory claim in court,⁶⁵ the United States Court of Appeals for the Fourth Circuit rejected that interpretation. Instead, the Fourth Circuit applied the Supreme Court's more recent enforcement of agreements to arbitrate statutory claims under the FAA to find that a union could agree to a waiver.⁶⁶ This analysis left the issue of enforceability of union waivers as an unanswered question at least when looking at the conflict between the Fourth Circuit and other circuits.⁶⁷

On the other hand, an important component of the Court's concerns in *Gardner-Denver* separates contractual issues that arise in labor arbitration from purely individual statutory issues that arise in employment arbitration. Labor arbitration reflects a "majoritarian" process pertaining to collective contractual rights, as opposed to the statutory employment discrimination rights of individual members.⁶⁸ Under labor law, unions operate pursuant to the majority rule principle.

occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums").

63. *Id.* at 51. The Court subsequently suggested that prospective waivers by a union of an individual employee's rights under other statutes would also not be enforceable. *See McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (suggesting that unions could not agree to prospective waivers of an employee's right to pursue claims under 42 U.S.C. § 1983 in court); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (suggesting that a union could not agree to prospective waivers of an employee's right to pursue statutory claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–19 in court). More recently, the Supreme Court has clarified that any suggestions from wording in *Gardner-Denver*, *McDonald*, and *Barrentine* that a union could not effectuate a prospective waiver of an individual employee's statutory right to pursue those claims in court was dicta and an expansive misunderstanding of the Court's holding in *Gardner-Denver*. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1469 n.8 (2009).

64. *See Eric Sposito, 14 Penn Plaza v. Pyett: Into the Abyss Between Judicial Process and Collectively Bargained Agreements to Arbitrate Individual Statutory Claims*, 38 RUTGERS L. REC. 173, 173 (2010) ("The Court's opinion in *14 Penn Plaza v. Pyett* overturned 35 years of jurisprudence, grounded in *Alexander v. Gardner-Denver Co.* . . .").

65. *See supra* note 63 (discussing the suggestions from *Gardner-Denver*, *McDonald*, and *Barrentine* that a union could not agree to a prospective waiver of an employee's pursuit of a statutory claim in court and how *Pyett* eventually rejected that suggestion).

66. *See Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir. 1996); *see also Ann C. Hodges, Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPL. RTS. & EMP. POL'Y J. 123, 123–24 (1998) (noting that the "Fourth Circuit is the only circuit thus far to have dismissed employee discrimination claims on the basis of an employee's failure to arbitrate using a collectively bargained arbitration procedure" as "other circuits that have addressed the issue have refused to find that arbitration provisions in collective bargaining agreements bar judicial litigation of federal statutory claims" (internal citation omitted)).

67. *See Hodges, supra* note 66, at 130–40 (describing the conflict with the Fourth Circuit and other circuits).

68. *See Gardner-Denver*, 415 U.S. at 51–52 (implying that a union may waive certain

The collective strength of the members who selected the union becomes the focus, and the will of the majority may be imposed upon individual bargaining unit members despite their protests or superior individual positions.⁶⁹ A key limitation on this concept of majority rule is that a union must fairly represent all the members in the bargaining unit including those who may not have voted for the union or agree with its actions.⁷⁰ Nevertheless, a union may choose legitimately not to pursue some grievances to the final step of arbitration out of a concern for the general costs the entire union membership will incur both in terms of the financial impact and any detriment to the overall collective bargaining relationship.⁷¹ In recognizing the dilemmas a union must face when considering the disparate interests of its members who must all be fairly represented, the Court has found that a union's exercise of discretion within its duty of fair representation may only be challenged for arbitrary actions.⁷²

employee rights, like the right to strike, as part of a collective bargaining process to benefit the majority of its members, but a union may not waive prospectively employee rights to pursue a statutory employment discrimination claim which “concerns not majoritarian processes, but an individual’s right to equal employment opportunities”); *see also* Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker’s Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000) (asserting the general concerns with giving unions the opportunity to waive the rights of their union members to pursue statutory discrimination claims and especially the concerns that unions may misuse this process to effectuate further discrimination). *See generally* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 91–94 (1996) (describing labor arbitration).

69. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 338–39 (1944) (explaining how majority interests can bind a dissenting employee to the terms of the collective bargaining agreement as individuals may not pursue their interests at the expense of the group’s interests); *see also* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 64 (1975) (finding that considerations of the national policy against workplace discrimination do not trump the concept of majority rule because “[i]n vesting the representatives of the majority with this broad power, Congress did not, of course, authorize a tyranny of the majority over minority interests” because individual employees’ minority interests still have protections through democratic union procedures, the limits of what the law deems to be an appropriate bargaining unit, and the limitations on union actions imposed by their duty of fair representation).

70. *See generally* *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (finding that because a union is the exclusive representative, it is charged with a duty to represent fairly each of the employees as bargaining agent regardless of the majority members’ biases and decided under the Railway Labor Act); *see also* *Syres v. Oil Workers Int’l Union, Local No. 23*, 350 U.S. 892 (1955) (finding the same duty of representation exists under the NLRA).

71. *See* *Vaca v. Sipes*, 386 U.S. 171, 191–192 (1967) (finding a union may not “arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion” and noting the need for “union discretion to supervise the grievance machinery and to invoke arbitration” provided that “both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved” while it prevents an individual employee from undermining the union and greatly increasing the costs of the grievance process so that arbitration would not function successfully).

72. *See* *Marquez v. SAG, Inc.*, 525 U.S. 33, 45–46 (1998) (finding a union needs “room

The question of whether an individual employee's statutory discrimination claim represents the kind of dispute that may be collectively bargained to seek resolution through the grievance arbitration process involves a number of complex issues under both labor law and federal arbitration law. Some of the rationale for the Court's finding in *Gardner-Denver*, including the inability of arbitrators to handle statutory employment discrimination claims, has subsequently been rejected by the Supreme Court in its FAA jurisprudence addressing employment arbitration in the non-union setting.⁷³

B. Employment Arbitration

Employment arbitration, a process that has grown out of the Supreme Court's approval of resolving an individual employee's statutory employment discrimination claims in the non-union setting, works quite differently from labor arbitration. Unlike labor arbitration, which operates as a substitute for industrial strife, employment arbitration merely operates as a substitute for the judicial forum.⁷⁴ This focus on providing a substitute for a judicial forum has allowed the development of employment arbitration under the FAA to follow the same path as commercial arbitration, which differs from labor arbitration.⁷⁵ In enforcing agreements to arbitrate a statutory employment discrimination claim in the non-union setting, and distinguishing this situation from a labor agreement to arbitrate, the Supreme Court has focused on the individual litigation aspects of what the arbitral forum offers as a substitute.⁷⁶

to make discretionary decisions and choices, even if those judgments are ultimately wrong"); see also Marion Crain & Ken Matheny, "Labor's Divided Ranks": *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1562-66 (1999) (describing the duty of fair representation and its potential for exploiting black workers' rights to the exclusion of white male dominated unions); Green, *supra* note 11, at 79-80 (identifying the origins of the duty of fair representation as a concern about unions abusing the power of the majority to make discriminatory and racist decisions).

73. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (finding no concern with agreeing to use an arbitrator to resolve a statutory employment discrimination claim based on age and citing Supreme Court cases allowing parties to arbitrate statutory disputes under other federal laws including the Sherman Act, the Securities Act, the Exchange Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO)).

74. See Albert Y. Kim, Comment, *Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations*, 65 U. CHI. L. REV. 225, 238 (1998); Janet McEneaney, *Arbitration of Statutory Claims in a Union Setting: History, Controversy and a Simpler Solution*, 15 HOFSTRA LAB. & EMP. L.J. 137, 139-40 (1997); see also *Gilmer*, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim [an employee] does not forego the substantive rights afforded by the statute [and] only submits to their resolution in the arbitral, rather than a judicial, forum." (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

75. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) ("In the commercial case, arbitration is the substitute for litigation. Here [a labor case] arbitration is the substitute for industrial strife.").

76. *Gilmer*, 500 U.S. at 28 (finding the arbitration agreement should be enforced to apply to a statutory employment discrimination claim "[so] long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" (second

Specifically, most of the judicial decisions involving enforcement of agreements to arbitrate statutory employment discrimination claims have focused on whether an employee can “effectively vindicate” his or her claim in the arbitral forum.⁷⁷ The question of effective vindication has also led to concerns about the availability of discovery, remedies, and class actions along with issues about the costs of the arbitrator’s fees.⁷⁸ These matters, and others addressing rights normally available in the judicial forum, call into question whether the arbitral forum provided so differs from the judicial forum that these distinctions create a substantive change rather than a mere procedural variation in the forum.⁷⁹

C. Keeping Labor and Employment Arbitration Separate Until *Pyett*

Before *Pyett*, labor arbitration focused on the ongoing relationship of the parties, the union and the employer, and the prevention of industrial strife by insuring that employers have “just cause” before taking disciplinary action against employees. Although statutory employment discrimination claims and legal standards under those laws including issues regarding statutes of limitation, attorney’s fees, discovery, and punitive damages often arise in employment arbitration, those matters are addressed very rarely in labor arbitration if at all. With *Gardner-Denver*⁸⁰ controlling, unions could simply assert they could not waive employees’ rights to pursue their claims in court. This posture allowed the union to continue to distance itself from statutory discrimination matters by keeping those disputes separate from labor arbitration. By asserting that it could not waive employees’ rights to go to court, a union could also relieve itself of any worries about breaching its duty of fair representation if it chose not to pursue a statutory discrimination claim in arbitration. Nevertheless, employers seeking to resolve statutory discrimination claims in a single arbitral forum would desire an agreement from the union to waive the employees’ right to pursue the claim in court.

alteration in original) (quoting *Mitsubishi*, 473 U.S. at 637)).

77. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 397–98 (2006) (referring to the “effectively vindicate” doctrine as a creature of the court’s application of the FAA to allow statutory claims to be arbitrated); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 269–73 (2006) (describing the “effectively vindicate” doctrine along with its origins and applications); see also *Gilmer*, 500 U.S. at 28 (finding that arbitration is an adequate substitute forum to handle statutory discrimination claims as long as the employee “effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function” (alteration in original) (quoting *Mitsubishi*, 473 U.S. at 637)); Michael Z. Green, *Ruminations About the EEOC’s Policy Regarding Arbitration*, 11 EMPLOY. RTS. & EMP. POL’Y J. 154, 181–84 & n.198 (2007) (describing same).

78. Green, *supra* note 77, at 181–184 & n.198; see also Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 429–31 (2000).

79. See *Gilmer*, 500 U.S. at 28–29 (describing the right to pursue and effectively vindicate the same substantive rights in an arbitral forum versus a judicial forum is all that agreements to arbitrate accomplish and they do not change substantive rights).

80. 415 U.S. 36 (1974).

The question of whether *Gardner-Denver* prohibited unions from agreeing to arbitrate via a waiver of employees' individual statutory discrimination claims in the courts was uncertain, and labor practitioners and scholars hoped the Supreme Court would answer it in 1998.⁸¹ Unfortunately, in *Wright v. Universal Maritime Service Corp.*,⁸² the Court failed to answer that question. Instead, the Court, in *Wright*, specifically refused to decide whether a union could ever agree to such a waiver.⁸³ The Court acknowledged that if a union could agree to a waiver of an employee's right to pursue a statutory claim in court, the waiver would have to be clear and unmistakable.⁸⁴ Because the provision in the collective bargaining agreement in *Wright* failed to establish a "clear and unmistakable waiver," the Court resolved the matter without specifying what elements would be necessary to establish this type of waiver.⁸⁵

After *Wright*, most courts found that a union may not waive an employee's statutory right to pursue employment discrimination claims in court.⁸⁶ However, by

81. See Martin J. Oppenheimer & John J. Fullerton III, *The Role of the Union in the Arbitration of Statutory Employment Claims*, 55 DISP. RESOL. J., May–July 2000, at 70, 72 (noting that "the Supreme Court surprised many scholars and practitioners by expressly declining the invitation to hold that a union's waiver of an employee's right to a federal forum was never enforceable").

82. 525 U.S. 70 (1998).

83. *Id.* at 77 ("[W]e find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred.").

84. *Id.* at 80 (finding that the standard for enforcing a "union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination" is that the waiver must be "clear and unmistakable").

85. *Id.* at 82 ("We hold that the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. We do not reach the question whether such a waiver would be enforceable.").

86. See, e.g., *Plumley v. S. Container, Inc.*, 303 F.3d 364, 373–74 (1st Cir. 2002) (statutory rights cannot be consigned to the grievance process); *Rogers v. N.Y. Univ.*, 220 F.3d 73, 75–77 (2d Cir. 2000) (per curiam) (finding that a clear and unmistakable waiver can occur only when the collective bargaining agreement: (1) contains a provision whereby employees specifically agree to submit all federal causes of action arising out of employment to arbitration, or (2) language explicitly incorporating the statutory anti-discrimination laws into the agreement to arbitrate); *Albertson's Inc. v. UFCW*, 157 F.3d 758, 760–62 (9th Cir. 1998) (statutory rights can never be prospectively waived through collective bargaining agreement); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363–65 (7th Cir. 1997) (the union cannot agree to assign statutory employment discrimination rights to the grievance process); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525–27 (11th Cir. 1997) (statutory rights may not be waived through grievance process); see also *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008) (finding that most courts since *Wright* have found that while an individual worker can waive his right to a judicial remedy, a union cannot do so on his behalf); Mary K. O'Melveny, *One Bite of the Apple and One of the Orange: Interpreting Claims That Collective Bargaining Agreements Should Waive the Individual Employee's Statutory Rights*, 19 LAB. LAW. 185, 197 (2003) ("In considering statutory claims raised by employees subject to collectively bargained grievance remedies post-*Wright*, most courts have continued to follow the *Gardner-Denver* paradigm, holding that

2007 a clear conflict had arisen in the federal courts. The United States Court of Appeals for the Fourth Circuit has consistently applied *Wright* to find that language in a collective bargaining agreement banning discrimination in the workplace can constitute a clear and unmistakable waiver of an employee's right to pursue a statutory claim in court.⁸⁷ On the other hand, the United States Court of Appeals for the Second Circuit applied *Wright* and found that a union can never agree in a collective bargaining agreement to waive an employee's statutory right to pursue a discrimination claim in court.⁸⁸

When addressing important questions regarding arbitration of statutory employment discrimination claims, the Court has a practice of sidestepping controversial issues to allow further development before returning to clarify those matters a decade later.⁸⁹ By granting certiorari in *Pyett*, the Court appeared ready to close the gap it left open ten years earlier in *Wright*. In *Pyett*, the Court finally decided that a union could waive an employee's right to pursue a claim in court through an arbitration clause in a collective bargaining agreement.⁹⁰ It was hoped that *Pyett* might also explain how the merger of principles under the NLRA regarding group concerns pertaining to labor arbitration can be reconciled with the broad principles under the FAA encouraging employment arbitration of individual statutory discrimination claims.⁹¹ Several scholarly commentators have lamented

the contractual grievance machinery was insufficient to establish a 'clear and unmistakable waiver' . . ." (internal citations omitted).

87. See, e.g., *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 307 (4th Cir. 2001) (per curiam) (finding that parties' provision in the collective bargaining agreement to "abide by all the requirements of Title VII" and that "unresolved grievances arising under this [provision] are the proper subjects for arbitrations" was enough to waive employees' statutory right to pursue employment discrimination claims in court); see also *Aleman v. Chugach Support Serv., Inc.*, 485 F.3d 206, 215–18 (4th Cir. 2007) (finding a "clear and unmistakable waiver" in the following language: "The parties expressly agree that a grievance shall include any claim by an employee that he has been subjected to discrimination under Title VII . . . and/or all other federal, state, and local antidiscrimination laws" even if the employees did not understand the language in the agreement because they did not speak English).

88. See *Pyett v. Penn. Bldg. Co.*, 498 F.3d 88 (2nd Cir. 2007), *rev'd sub nom.* 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456 (2009).

89. For example, in the 1991 *Gilmer* decision, the Supreme Court ruled for the first time that employees could be required to arbitrate their statutory employment discrimination claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991). However, the Court in *Gilmer* sidestepped the issue of whether the FAA excluded employment agreements from coverage by finding that the actual agreement to arbitrate in the case was not an employment agreement, and the Court would leave the question of whether the FAA excluded employment agreements from its coverage for "another day." *Id.* at 25 n.2. Then in 2001, the Supreme Court answered that question in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), by finding the FAA's employment agreement exclusion was limited to employment agreements involving transportation workers and all other workers' employment agreements are covered by the FAA. *Id.* at 119.

90. 129 S. Ct. 1456, 1473–74 (2009) (finding that a clear and unmistakable waiver of the employees' right to pursue their statutory claims in court had been agreed to by the union and the employer).

91. Several commentators have recently addressed the key impacts of the *Pyett* decision and its acceptance of the merger of employment discrimination disputes into labor arbitration. See, e.g., Steven C. Bennett, *Arbitration of Employment Discrimination Claims:*

the Court's ruling in *Pyett* as it treads upon the generally understood principle from the last thirty-five years whereby employees could pursue statutory discrimination claims without being compelled to raise those claims through their union representatives in arbitration.⁹² In reviewing *Pyett* along with the Court's decision in *Ricci*,⁹³ one may be able to discern a way to develop an effective merger of principles from labor arbitration with principles from employment arbitration to provide a successful resolution of race-discrimination claims in the union workplace.

Impact of the Pyett Decision on Collective Bargaining, 42 TEX. TECH L. REV. 23, 28–32 (2009) (reviewing the practical implications of *Pyett* for employers, unions, and employees); Mark Berger, *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55 (2009) (exploring the reasoning behind *Pyett* and addressing how potential qualifications in *Pyett* may be dealt with in the future); Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective*, 25 A.B.A. J. LAB. & EMP. L. 227, 228 (2010) (discussing advantages and disadvantages of mandatory employment arbitration from an employer's perspective); Brendan D. Cummins & Nicole M. Blissenbach, *The Law of the Land in Labor Arbitration: The Impact of 14 Penn Plaza LLC v. Pyett*, 25 A.B.A. J. LAB. & EMP. L. 159 (2010) (examining the reasoning, analyzing the practical application, and addressing unanswered questions from *Pyett*); Kenneth G. Dau-Schmidt & Todd Dvorak, *Review of Labor and Employment Decisions from the United States Supreme Court's 2008–2009 Term*, 25 A.B.A. J. LAB. & EMP. L. 107, 135–38 (2010) (addressing the unanswered legal questions from *Pyett*); Roger B. Jacobs, *Supreme Court Tips Against Individual Rights—Again*, 27 HOFSTRA LAB. & EMP. L.J. 267, 278–310 (2010) (discussing the likely effect of *Pyett* on individual rights); Mark S. Mathison & Bryan M. Seiler, *What 14 Penn Plaza LLC v. Pyett Means for Employers: Balancing Interests in a Landscape of Uncertainty*, 25 A.B.A. J. LAB. & EMP. L. 173 (2010) (contending that *Pyett* “does not radically change the calculus for employers as to the advisability of seeking an agreement from a union to arbitrate statutory claims”); Carrie Menkel-Meadow, *The NLRA's Legacy: Collective or Individual Dispute Resolution or Not?*, 26 A.B.A. J. LAB. & EMP. L. 249, 259 (2011) (describing the results from the *Pyett* decision and stating that the “inclusion of statutory rights within collective bargaining agreements with arbitration clauses” will now “make the use of labor grievance arbitration processes look close to fully merged with [employment discrimination] contractual arbitration”); Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 826 (2010) (asserting that *Pyett* demonstrates how the Court is willing to “disregard[] a statute's text, its legislative history,” and judicial precedent to fashion a law to “suit its own policy preferences”).

92. See, e.g., Kenneth M. Casebeer, *Supreme Court Without a Clue: 14 Penn Plaza LLC v. Pyett and the System of Collective Action and Collective Bargaining Established by the National Labor Relations Act*, 65 U. MIAMI L. REV. 1063 (2011); Alan Hyde, *Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO STATE J. ON DISP. RESOL. 975 (2010); Michael H. LeRoy, *Irreconcilable Differences? The Troubled Marriage of Judicial Review Under the Steelworkers Trilogy and the Federal Arbitration Act*, 2010 J. DISP. RESOL. 89.

93. 129 S. Ct. 2658 (2009).

III. RICCI AND PYETT: WHAT THEY TELL US ABOUT UNION RACIAL JUSTICE

Firefighters and their unions seem to pose unique and interesting issues regarding racial divisions.⁹⁴ In reviewing the *Ricci v. Destefano* decision,⁹⁵ and its handling of the racial divisions in the New Haven, Connecticut fire department, one can understand a lot about the difficulties of addressing race discrimination in the courts. Also, the *Ricci* decision highlights the problems for unions when their members become divided over race discrimination complaints. On the other hand, the *Pyett* decision and the Court's approach to dealing with union agreements that waive employees' rights to pursue statutory discrimination claims in court⁹⁶ provides a framework to understand how a union could help its employee members avoid the harsh results of the court system through arbitration. But the specific components of a waiver that would effectively remedy a statutory race discrimination claim through an agreement to arbitrate, while also addressing the union's duty of fair representation, will have to be developed through lower court decisions interpreting *Pyett*.

A. The Decisions in Ricci and Pyett

1. Ricci

In *Ricci*, the Court found that the City of New Haven had engaged in intentional racial discrimination under Title VII by refusing to certify the results of a promotion test it believed had a disparate impact on black firefighters.⁹⁷ Justice Kennedy borrowed from constitutional law involving affirmative action to create a new statutory standard, "strong basis in evidence," for defending against this type

94. See Green, *supra* note 11, at 87–92 (describing unique racial problems and divisiveness involving African American and white Chicago firefighters and their union). Even within the New Haven, Connecticut fire department, where the *Ricci* dispute originated, there was a long history of discrimination against African Americans and Latinos. See Michael Selmi, *Understanding Discrimination in a "Post-Racial" World*, 32 CARDOZO L. REV. 833, 848 n.40 (2011). However, firefighter unions are not the only unions that still have to address major concerns regarding discrimination within their own ranks. See generally Emily White, Comment, "Not Our Problem:" *Construction Trade Unions and Hostile Environment Discrimination*, 10 N.Y. CITY L. REV. 245, 245–46 & nn.4 & 6 (2006) (citing various Susan Eisenberg articles in *WE'LL CALL IF WE NEED YOU: EXPERIENCES OF WOMEN WORKING CONSTRUCTION* 21, 49–50 (Cornell Univ. Press 1998)) (describing concerns with discrimination in construction trade unions who have historically sought to exclude women and minorities from membership by employing various tactics); see also Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 30 & n.95 (1995).

95. 129 S. Ct. at 2674 (finding that the City of New Haven discriminated against several white and one Hispanic firefighters by refusing to certify promotion exam results in order to avoid disparate impact discrimination claims by black firefighters).

96. See 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009) ("We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of law.").

97. 129 S. Ct. at 2674.

of discrimination claim under Title VII.⁹⁸ In 2003, the City administered a written test as part of its selection process to determine which firefighters were eligible for promotion.⁹⁹ The test constituted sixty percent of the promotion process and the other forty percent was based on an oral exam. Any successful firefighters had to be chosen from among the top three scorers on the list, which would remain valid for two years.¹⁰⁰ Seventy-seven firefighters completed the examination for promotion to lieutenant and forty-one firefighters completed the examination for promotion to captain.¹⁰¹

For the lieutenant position, thirty-four firefighters passed the test.¹⁰² Twenty-five were white, six were black, and three were Hispanic.¹⁰³ The relative pass rates on the test were 58.1% for white test takers, 36.1% for black test takers, and 20% for Hispanic test takers.¹⁰⁴ Because the City had to take the top three scorers on an exam, the ten firefighters eligible for promotion to lieutenant were all white.¹⁰⁵ Twenty-two firefighters passed the captain examination.¹⁰⁶ Sixteen were white, three were black, and three were Hispanic.¹⁰⁷ On this exam, the pass rate for white test takers was 64%, while the pass rate for black and Hispanic test takers was 37.5%.¹⁰⁸ The nine candidates eligible for promotion included seven white and two Hispanic firefighters.¹⁰⁹ These numbers presented a racially adverse impact sufficient to make out a prima facie case of disparate-impact discrimination against the black firefighters under Title VII.¹¹⁰

As soon as the exam results were made publicly available, several of the participants became divided about the results.¹¹¹ Some argued the tests should be discarded because the results showed the test to be discriminatory.¹¹² Others threatened that a discrimination lawsuit could be imminent if the City made promotions based on the tests.¹¹³ Yet, others asserted the exam was fair and the results should be certified.¹¹⁴ Fearing there was a significant disparate impact based on race in the test results, the City refused to certify the results.¹¹⁵ Because of the City's refusal to certify the test results, several firefighters, including seventeen white firefighters and one Hispanic firefighter, filed the suit in *Ricci* charging race

98. *Id.* at 2664.

99. *Id.* at 2666.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 2678.

105. *Id.* at 2666.

106. *Id.*

107. *Id.*

108. *Id.* at 2678.

109. *Id.* at 2666.

110. *Id.* at 2677; *see also id.* at 2692 (Ginsburg, J., dissenting).

111. *Id.* at 2667 (majority opinion).

112. *Id.*

113. *Id.* at 2664.

114. *Id.* at 2667–70.

115. *Id.* at 2671.

discrimination and alleging violations of their rights under the Constitution and under Title VII.¹¹⁶

The City argued that its good-faith belief that certifying the exam would expose it to liability for disparate impact racial discrimination against the black firefighters shielded the City from liability for disparate treatment towards the *Ricci* plaintiffs.¹¹⁷ The *Ricci* plaintiffs argued that the City's good-faith belief was not a valid defense to their disparate treatment claims.¹¹⁸ The district court granted summary judgment for the City and noted that "motivation to avoid making promotions based on a test with a racially disparate impact" could not constitute discriminatory intent against the *Ricci* plaintiffs.¹¹⁹ The Second Circuit affirmed the decision of the district court.¹²⁰

The Supreme Court reversed, granted summary judgment to the *Ricci* plaintiffs, and found that the City of New Haven had intentionally discriminated against them on the basis of race by deciding not to certify the exam results.¹²¹ One commentator found this grant of summary judgment after creating a new rule and applying it in the case to be a "startling departure from the Court's usual practice" of remanding the case and allowing the lower courts to apply the new rule.¹²² Apparently, "[t]he *Ricci* majority was unwilling to allow . . . normal litigation processes to play themselves out in this case or even to explain why such an unusual course of action might have been appropriate in this circumstance."¹²³

The overall racially divisive issues for firefighters at New Haven continue despite the Supreme Court's ruling. In *Briscoe v. City of New Haven*,¹²⁴ a case filed after the *Ricci* decision, a black firefighter sued the New Haven fire department claiming its promotion tests had a disparate impact on minorities.¹²⁵ The *Briscoe* case was previously dismissed for failure to state a claim as the district court concluded that Briscoe's suit was precluded by the *Ricci* decision's suggestion that a claim of disparate impact based on the same test scores at issue in *Ricci* would be unsuccessful.¹²⁶ In Briscoe's appeal, the United States Court of Appeals for the Second Circuit found that the *Ricci* decision, and its favorable ruling for the plaintiffs in that case which has now settled, did not preclude Briscoe from seeking relief based on disparate impact as long as Briscoe's relief does not "interfere with the relief—present and future—afforded to the *Ricci* plaintiffs by the certification

116. *Id.*

117. *Id.* at 2671.

118. *Id.*

119. *Id.* (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006)).

120. *Id.* at 2672.

121. *Id.* at 2681.

122. Hart, *supra* note 17, at 257.

123. *Id.*

124. No. 3:09-cv-1642 (CSH), 2010 WL 2794212, at *1 (D. Conn. July 12, 2010), clarified on reconsideration by No. 3:09-cv-1642 (CSH), 2010 WL 2794231 (D. Conn. July 12, 2010), vacated, 654 F.3d 200 (2d Cir. 2011).

125. *Id.*

126. *Id.* at *5–*7 (citing *Ricci*, 129 S. Ct. at 2681 and referring to language in that decision stating that "[i]f . . . the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability").

of the exam results.”¹²⁷ Regardless of the final resolution in the *Briscoe* case, all that has occurred so far demonstrates the convoluted effect when neither the employer nor the union sought a convergence-of-interest resolution to the racially divisive promotion process used for firefighters at the City of New Haven.

2. *Pyett*

On April 1, 2009, the Supreme Court issued its long-awaited decision in *14 Penn Plaza LLC v. Pyett*.¹²⁸ In a five to four majority opinion (authored by Justice Clarence Thomas, joined by Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, and Antonin Scalia), the Court held that a union can agree to waive individual employees’ statutory rights to pursue age discrimination claims in court.¹²⁹ Dissenting opinions were filed by Justice John Paul Stevens and by Justice David Souter, who was joined by Justice Stevens, along with Justices Stephen Breyer and Ruth Bader Ginsburg.¹³⁰ According to the Court, a clear and unmistakable waiver of court access can be achieved by agreeing explicitly to resolve statutory discrimination claims under the arbitration process covered within a collective bargaining agreement (CBA).¹³¹ The plaintiffs were three employees, all over forty years of age, who worked as night lobby watchmen and in other positions for Temco Services Industries, a maintenance service contractor.¹³² They sued Temco for age discrimination when they were reassigned to less desirable and lower paying jobs after a new security company was hired at their work location.¹³³ Temco is part of a management association of contractors and business owners, the Realty Advisory Board, which negotiated a CBA with the union, Local 32BJ of the Service Employees International Union (SEIU Local 32BJ).¹³⁴ SEIU Local 32BJ initially processed the age discrimination claims to arbitration but then withdrew the claims because it had consented to the placement of the new security firm at the employees’ work location.¹³⁵ The specific CBA in *Pyett* provided clear language stating:

§ 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other

127. See *Briscoe v. City of New Haven*, 654 F.3d 200, 209 (2d Cir. 2011); see also Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 190–91 (2011) (criticizing the lower court decision in *Briscoe* as “confer[ring] binding application to pure dicta” in *Ricci* in an effort to preclude a black employee “whose interests were not remotely represented by any party” from pursuing litigation on disparate impact issues that were never addressed in the *Ricci* decision).

128. 129 S. Ct. 1456 (2009).

129. *Id.* at 1460, 1474.

130. *Id.* at 1474, 1476 (Souter, J., dissenting).

131. *Id.* at 1466 (majority opinion).

132. *Id.* at 1461–62 & n.3.

133. *Id.* at 1461–62.

134. *Id.* at 1461.

135. *Id.*

characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.¹³⁶

In addressing this matter, the Court had to navigate complex issues regarding the merger of principles under three different statutory regimes: the FAA, the ADEA, and the NLRA.¹³⁷ The Court in *Pyett* rejected the lower court's finding that the decision in *Gardner-Denver* forbids enforcement of judicial forum waivers in a CBA.¹³⁸ In *Pyett*, the Court reviewed the specific CBA language authorizing resolution of statutory discrimination claims pursuant to the arbitration process.¹³⁹ Given the Court's indications in *Wright* that a union waiver might be possible,¹⁴⁰ the clear language from the CBA provision stating that "[a]ll such [discrimination] claims shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy . . . [whereby] [a]rbitrators shall apply appropriate law,"¹⁴¹ and the Court's prior decisions broadly endorsing the use of arbitration to resolve statutory claims as a strong policy of the FAA,¹⁴² the Court's finding in *Pyett* that a clear and unmistakable waiver existed should not have presented much of a surprise.

Without relying on *Wright*, the *Pyett* case rejected as "dicta" the longstanding concern from *Gardner-Denver* about balancing the conflict between majoritarian principles under labor law with individual principles embodied in statutory discrimination law.¹⁴³ The Court also found that this conflict-of-interest concern was not a limit to be read into the ADEA.¹⁴⁴ As Justice Thomas suggested, the failure to focus on *Wright* and its similar reasoning for requiring a clear and unmistakable waiver appeared to be aimed at the Court's desire to circumvent thirty-five years of precedent without expressly overruling *Gardner-Denver*:

Wright . . . neither endorsed *Gardner-Denver*'s broad language nor suggested a particular result in this case. . . .

136. *Id.*

137. *Id.* at 1469–1473.

138. *Id.* at 1463.

139. *Id.* at 1461, 1469 (identifying the specific arbitration language in the CBA regarding discrimination claims and finding this "arbitration provision expressly covers both statutory and contractual discrimination claims").

140. *See Wright v. Universal Maritime Servs. Corp.*, 525 U.S. 70, 77 (1998) ("[W]e find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred.").

141. *Pyett*, 129 S. Ct. at 1461.

142. *Id.* at 1469–70.

143. *Id.* at 1469 & n.8.

144. *Id.* at 1472.

Because today's decision does not contradict the holding of *Gardner-Denver*, we need not resolve the *stare decisis* concerns raised by the dissenting opinions. . . . But given the development of this Court's arbitration jurisprudence in the intervening years, . . . *Gardner-Denver* would appear to be a strong candidate for overruling if the dissents' broad view of its holding . . . were correct.¹⁴⁵

Ironically, in suggesting that *Gardner-Denver* should be overruled if its broad prospective waiver ban was correct, Justice Thomas quoted a case for support where the Court had overruled longstanding precedent and changed the interpretation of another antidiscrimination law.¹⁴⁶ But shortly after that decision, Congress stepped in and reversed the Court's action.¹⁴⁷ So while the Court in *Pyett* seemed focused on rejecting longstanding precedent without explicitly overruling *Gardner-Denver*, it failed to confront the concern that a union could waive an individual employee's right to court access on one hand and then on the other hand decide not to pursue that same claim in arbitration within the limits of the NLRA's duty of fair representation analysis.

Would a union's decision to not pursue a claim through arbitration prevent an individual employee's statutory claim from being effectively vindicated? The Court called it "speculation" to resolve this issue because of factual disputes that had not been fully briefed or covered in earlier proceedings.¹⁴⁸ In his dissent, Justice David Souter asserted the *Pyett* decision may have no impact due to its failure to address this issue: "On one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees'

145. *Id.* at 1469 nn.7–8 (emphasis in original) (internal citations omitted).

146. *Id.* (asserting "that it is appropriate to overrule a decision where there 'has been [an] intervening development of the law' such that the earlier 'decision [is] irreconcilable with competing legal doctrines and policies'" (alteration in original) (quoting *Patterson v. McClean Credit Union*, 491 U.S. 164, 173 (1989))).

147. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72 (creating language pursuant to section 101 that reverses the *Patterson v. McClean* Supreme Court decision limiting the scope of coverage under 42 U.S.C. § 1981); *see also* *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 384 (2004) ("The 1991 [Civil Rights] Act overturned *Patterson* . . ."); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 305–14 (1994) (discussing how section 101 of the Civil Rights Act of 1991, which created new section 42 U.S.C. § 1981(b), was enacted to reverse the Court's prior decision in *Patterson*); H.R. REP. NO. 102-40 (I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 540; H.R. REP. NO. 102-40 (II), at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694–695 ("The Act overrules the Supreme Court's 1989 decision in *Patterson v. McClean Credit Union* . . . and restor[es] the broad scope of Section 1981.").

148. *Pyett*, 129 S. Ct. at 1474 ("Respondents also argue that the CBA operates as a substantive waiver of their [statutory] rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. . . . [W]e are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from 'effectively vindicating' their 'federal statutory rights in the arbitral forum,' . . . [as] [r]esolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation." (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000))).

claims in arbitration . . . which ‘is usually the case.’”¹⁴⁹ Given the Court’s history of leaving an arbitration question unanswered for several years until the lower courts have fleshed it out, Justice Souter is likely correct in asserting that *Pyett* may ultimately have little effect other than establishing that a union may agree to a clear and unmistakable waiver.

Important policy considerations warrant against enforcement of an arbitration agreement when the agreement in practice precludes an employee from effectively vindicating his or her statutory discrimination claims in labor arbitration because the agreement to arbitrate subsumes the substantive statutory right to relief.¹⁵⁰ After the *Pyett* decision, a few cases filed in the federal district court in New York suggest that if the union controls the right to present the claim and does not pursue the claim in arbitration, the employee may still be able to pursue the claim in court. For example, in *Morris v. Temco Serv. Indus., Inc.*, a case involving the same union, SEIU Local 32BJ, the same service employer, Temco Industries, and the same agreement language as in *Pyett*, the union did not pursue the employee’s discrimination claim.¹⁵¹ The court decided not to compel Morris to arbitrate her discrimination claim because SEIU Local 32BJ prevented her from arbitrating the claim by not pursuing it.¹⁵² The court found under those circumstances the arbitration provision need not be enforced and Morris was free to pursue her discrimination claim in federal court.¹⁵³

A similar result occurred in *Kravar v. Triangle Services, Inc.*¹⁵⁴ The employer’s motion to compel arbitration was dismissed because the union (SEIU Local 32BJ) refused to arbitrate the claim, and the CBA expressed that only the union could file a grievance and pursue arbitration of that grievance.¹⁵⁵ As the rulings in both *Morris* and *Kravar* establish, when a union agrees to a *Pyett* waiver but chooses to

149. *Id.* at 1481 (Souter, J., dissenting) (internal citation omitted) (quoting *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984)).

150. *See* *Brady v. Williams Capital Grp., L.P.*, 928 N.E.2d 383, 387 (N.Y. 2010) (referring to a “strong state policy favoring arbitration agreements and the equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum”). The court in *Brady* recognized that the strong state policy of invalidating agreements to arbitrate that precludes an employee from vindicating statutory rights is derived from the Supreme Court’s analysis in *Gilmer* requiring that a “prospective litigant [must be able to] effectively . . . vindicate [his or her] statutory cause of action . . .” *Id.* (third alteration in original) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

151. No. 09 Civ. 6194(WHP), 2010 WL 3291810, at *4 (S.D.N.Y. Aug. 12, 2010).

152. *Id.* at *5–6.

153. *See id.*

154. No. 1:06-cv-07858-RJH, 2009 WL 1392595, at *3 (S.D.N.Y. May 19, 2009). Other cases involving the same or similar contract language as in *Pyett* also indicate that if the union does not pursue the claim, the employee may take the statutory discrimination claim into court. *See, e.g.,* *Borrero v. Ruppert Hous. Co.*, No. 08 CV 5869(HB), 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009) (“Should [plaintiff]’s attempts to arbitrate his claims be thwarted by the Union, the CBA will have operated as a ‘substantive waiver’ of his statutorily created rights and he will have the right to re-file his claims in federal court.”).

155. *See* F. Ryan Van Pelt, Note, *Union Refusal to Arbitrate: Pyett’s Unanswered Question*, 2010 J. DISP. RESOL. 515, 517.

not pursue an employee's statutory discrimination claim through arbitration, the employee may still pursue these claims in court.

B. A Tale of Two Different Unions in Ricci and Pyett

When looking at the role of unions in assisting their employees to develop employment discrimination claims, it is helpful to understand the nature of the conflict and the union's duty to fairly represent all the members of the union. United States Supreme Court Justice Lewis Powell explained the complexities of this duty in 1987: "Like other representative entities, unions must balance the competing claims of [their] constituents. A union must make difficult choices among goals such as eliminating racial discrimination in the workplace, removing health and safety hazards, providing better insurance and pension benefits, and increasing wages."¹⁵⁶

When discrimination disputes place one union member at odds with another union member, the question becomes "what role should the union play?"¹⁵⁷ Other than trying to figure out how to adequately and impartially represent all the members involved, the union has few options.¹⁵⁸ The Supreme Court's holding in *Gardner-Denver* and the subsequent application of that holding until the *Pyett* decision allowed unions a clear option to wash their hands of any role in the handling of a statutory discrimination claim.¹⁵⁹

156. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 688–89 (1987) (Powell, J., concurring in part and dissenting in part).

157. *See* Alleyne, *supra* note 52, at 4–8 (describing the potential conflicts for unions in sexual harassment disputes between employees and describing duty of fair representation issues for unions in processing sexual harassment claims that pit one union member (the female complainant) against another union member (the alleged male harasser)); Sally E. Barker & Loretta K. Haggard, *A Labor Union's Duties and Potential Liabilities Arising out of Coworker Complaints of Sexual Harassment*, 11 ST. LOUIS U. PUB. L. REV. 135, 141–45 (1992) (describing overall complexity of conflicts regarding a union's role in processing sexual harassment claims and conflicts pitting members against each other including promotions and fights); Crain, *supra* note 94, at 32 nn.104–05 (describing how claims of sexual harassment by one union member against another divides the union); McEneaney, *supra* note 74, at 159–60 (describing a case where a claim of religious discrimination accommodation pitted one member against others due to seniority, and the union still took the case to arbitration (citing *Breech v. Ala. Power Co.*, 962 F. Supp. 1447 (S.D. Ala. 1997))).

158. *See* Barker & Haggard, *supra* note 157, at 145 (noting that a "union may avoid DFR liability if it represents all alleged wrongdoers impartially").

159. It is generally understood that unions try to avoid the filing of discrimination claims in the grievance process that will pit one union member against another. Crain, *supra* note 94, at 14 & n.15 (describing the author's survey of hostile environment discrimination cases in the union setting that found that unions tend to discourage female members from filing charges of sexual harassment against male union members); *see also* Crain & Matheny, *supra* note 72, at 1552–53 (describing Crain's survey study and also highlighting specific instances of union failure to pursue discrimination grievances brought by female union members at a Mitsubishi plant); McEneaney, *supra* note 74, at 171 ("Unions would avoid potential conflicts of interests and suits for breaches of the duty of fair representation; in fact, unions would need only point the way to the nearest EEOC office.").

This pre-*Pyett* hands-off approach by the union presented a “win-win” result for the union and the employee. In convincing an employee to pursue a discrimination claim in court, the union benefits by circumventing a duty of fair representation challenge or a direct claim of discrimination against the union regarding how it handled the statutory discrimination claim in arbitration. The employee also benefits by being able to pursue the discrimination claim for full relief in the courts on his or her own terms without having to defer to the decisions of the union. However, employers do not benefit by having to resolve related disputes in multiple forums with the potential for conflicting results and ongoing concerns about large jury verdicts and litigation costs.¹⁶⁰

On the other hand, employers may benefit from offering their employees arbitration as an option to resolve statutory discrimination claims if employees have a positive perception of the fairness of that process, and the employer can resolve all disputes in the arbitral forum.¹⁶¹ Likewise, unions may see the benefits of embracing arbitration of statutory discrimination claims for their members, as SEIU Local 32BJ did when it entered into the agreement at issue in *Pyett*. Key Supreme Court discrimination cases, including a statutory ADA claim in *Wright*¹⁶² and a statutory Title VII retaliation claim in *Burlington Northern & Santa Fe Railroad Co. v. White*,¹⁶³ involved employee grievances where the union apparently could

160. See St. Antoine, *supra* note 12, at 641 (asserting that arbitration offers employers “fewer devastating jury verdicts and lower litigation costs”); Erica F. Schohn, *The Uncertain Future of Mandatory Arbitration of Statutory Claims in the Unionized Workplace*, 67 LAW & CONTEMP. PROBS. 321, 334 n.92 (2004) (identifying that “employers accept settling a greater number of minor disputes in exchange for avoiding a major suit that settles for seven figures before a sympathetic jury”); see also Hoyt N. Wheeler, *Unions and the Arbitration of Statutory Rights*, 14 PERSP. ON WORK, Summer 2010/Winter 2011, at 26, 28 (asserting the benefits for unions and employers in pursuing arbitration as employers are not subject to multiple forums and the “tender mercies of a jury” and unions can use the arbitration agreement as an organizing tool when it finds a more amenable employer willing to work with a union on such issues). But see David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment*: 14 Penn Plaza v. *Pyett*, 19 CORNELL J.L. & PUB. POL’Y 429, 456 (2010) (asserting that “employers pleased with the unitary, integrated result achieved in *Pyett* may come to rue the day” when they did not have to worry about statutory claims in labor arbitration).

161. See, e.g., Suzette M. Malveaux, *Is It the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 108–21 (describing human resource benefits of offering a one-way binding arbitration process for statutory discrimination claims and how the fairness of Coke’s dispute resolution program has led to positive perceptions of the employer by its employees and outsiders).

162. 525 U.S. 70, 74 (1998) (describing how the employee was told by the Union to file an ADA claim with the EEOC instead of a grievance).

163. 548 U.S. 53, 58 (2006) (referring to use of a grievance procedure to address initial suspension). The employee in *White* was covered by a collective bargaining agreement and represented by a union, the Brotherhood of Maintenance of Way Employees, in a suspension hearing that could have resulted in “subsequent steps, including arbitration.” See Brief of the Am. Fed’n of Labor & Congress of Indus. Orgs. & the Bhd. of Maint. of Way Emps. Div., Int’l Bhd. of Teamsters as *Amicus Curiae* in Support of Respondent at 15, *Burlington N. & Santa Fe R.R. v. White*, 548 U.S. 53 (2006) (No. 05-259). Although it was clear that the

have pursued the matter in arbitration instead of the employee pursuing the underlying discrimination claims through the courts.

But this approach allows unions to sidestep the difficult challenges and ignore the intra-union issues when members are pitted against each other over a discrimination matter. This failure to address the underlying issues has only exacerbated the racial divide in unions.¹⁶⁴ Although Professor Deborah Widiss suggests that opening up disputes through more *Pyett*-type agreements will present opportunities for many more conflicts that unions will have to navigate,¹⁶⁵ this

employee in *White* had to file a grievance under the terms of a collective bargaining agreement as required to protect her job when she was suspended and a union member represented her in that hearing about the suspension, the case does not reflect any union involvement in her underlying sexual harassment claim or subsequent retaliation claim other than the union's brief filed in support with the Supreme Court. *See id.*; *see also* Brief for Respondent at 3, *Burlington N. & Santa Fe R.R. v. White*, 548 U.S. 53 (2006) (No. 05-259) (describing union involvement in representing White in grievance about her suspension).

164. Crain & Matheny, *supra* note 72, at 1603–04 (describing the union's failures in addressing sexual harassment in a particular case involving Mitsubishi and explaining how the union's missteps created more discrimination problems by focusing on job security and ignoring the discrimination complaints); *see also* Jill Maxwell, *Unifying Title VII and Labor Law to Expand Working Class Women's Access to Non-Traditional Occupations*, 11 GEO. J. GENDER & L. 681, 693–705 (2010) (discussing the difficulties for employees in pursuing discrimination claims when a union fails to pursue those claims within its duty of fair representation). The circumstances in *Ricci* also highlight how a union's poor choices in resolving a statutory discrimination claim that pits one member against another can exacerbate the racial divisions. *See infra* Part III.B.1.

165. Deborah Widiss, *Divergent Interests: Union Representation of Individual Employment Discrimination Claims*, 87 IND. L.J. 421, 429 (2012) (asserting that if *Pyett* were in place, the union in *Ricci* would have been forced to take sides). Professor Widiss asserts that the union in *Ricci* would have to take a position on the validity of the test in question if it agreed to arbitrate statutory discrimination claims. *Id.* However, that assertion is not completely true as evidenced by the procedures that William Gould has suggested, where the union makes sure that the employees have a fair process with legal representation, rather than taking a side in the dispute. *See infra* notes 232–40 and accompanying text; *see also infra* notes 168–70 and accompanying text (describing procedures suggested by Max Zimny that also protect employees as they pursue claims in arbitration while not forcing the union to pick sides). *Pyett* allows the union to take a more informed and collaborative role rather than trying to put its head in the metaphorical sand and ignore the divisiveness involving its members over race or even take sides with one of the groups in conflict with the other group. And, although union members could be the source of the discrimination, if a union does cavalierly undermine an employee's case in support of the discrimination, the employee can pursue duty of fair representation claims. While it is imprudent to assume that union members will not discriminate against fellow members, as Professor Widiss suggests, this Article asserts that, in those instances where a union has a true conflict, the unions should actively seek to provide all of its members who are embroiled in the conflict with a fair arbitration process to resolve it. Then, rather than washing their hands of the dispute and praying that it can be resolved in the courts without any union involvement, the union can responsibly play a role. This Article also asserts that if the union chooses to not bring a claim of discrimination in arbitration, then the claimants should have the right to bring the claim, and the concerns that Professor Widiss has highlighted about union discriminatory abuse and conflicts will be ameliorated. *See Widiss, supra*, at 429 (asserting that unions will find that all the conflicts of interest will present a Pandora's box that they will choose not to open).

Article asserts that it is better for a union to be proactive and seek ways that can provide a quick and fair opportunity for resolution rather than picking sides or ignoring the dispute. And if a union is truly presented with a conflict of interest, it should withdraw from the dispute while using its resources to make sure the members with competing interests can both fairly and quickly obtain a resolution.

Obviously, a union can pick sides in the dispute if it clearly investigates the matter. However, that action seems counterproductive and an unwise choice when it involves assessing a complaint that pits one member against another, especially in a statutory discrimination matter.¹⁶⁶ Another option would involve the union working with its members to find a fair solution for all involved, possibly through the union pursuing the matter through labor arbitration.¹⁶⁷

Overall, I acknowledge the concerns that Professor Widiss raises regarding the challenges that unions face if they arbitrate statutory employment discrimination claims and possible difficulties for employees if unions fail in managing this important responsibility. Nevertheless, I have focused my concerns on the interests of the racial minorities who are discriminated against in the workplace and have seen their unions search for every way to opt out of handling their statutory claims.

166. Unions clearly have to make choices on other issues that involve non-statutory matters and non-disciplinary grievances, such as promotion entitlements based on seniority, which, if successful, operate to the favor of one employee member and to the detriment of another employee member. See Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 171–76 (1992) (describing three examples where a union had to decide on processing grievances pitting one member against another). Nevertheless, the union “must fairly represent both groups of employees and may take a position in favor of one group only on the basis of informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement.” *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1237 (8th Cir. 1980). This Article suggests that, when issues of statutory discrimination arise, the union should not even consider favoring one member versus another and should instead seek a fair process for the employees involved that provides all members effective vindication of statutory discrimination claims.

167. This is not a Pollyanna-ish comment as unions have a long history of neutrally resolving conflicts among union members by choosing not to pick sides and fairly representing all of the employees. See Barker & Haggard, *supra* note 157, at 143–45; Crain, *supra* note 94, at 58–59. But see Michael C. Harper & Ira C. Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1211, 1268 (1985) (asserting that an approach of asking the union to remain neutral when dealing with conflicting interests of employee members requires that the union abandon and “forsake its role as advocate for its bargaining unit”). Furthermore, there are examples of comprehensive attempts by employers to work with all of those involved to resolve workplace discrimination through offering arbitration as a fair process for employees. See, e.g., Malveaux, *supra* note 161, at 78–80, 98–108 (describing how Coke developed its one-way binding arbitration program as a response to major race discrimination lawsuits and through the guidance of an outside taskforce of leading human resource experts); Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and the Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 901–03 tbl.31 & nn.234–35 (2004) (describing Shell’s Resolve program allowing mediation, then arbitration, and the opportunity to then go to court and obtain legal representation throughout as part of an overall CPR Institute for Dispute Resolution survey of how companies manage employment disputes).

A prominent union attorney, Max Zimny, proposed several years ago that unions and employers develop a comprehensive arbitration procedure to address statutory discrimination claims.¹⁶⁸ Zimny's comprehensive procedure would allow an employee to make the decision to pursue a claim in arbitration after a dispute arose while still providing the employee with rights to discovery, the fair ability to select the arbitrators, the protection of statutes of limitation with respect to filed grievances, and the provision of legal counsel, either through the union or privately.¹⁶⁹ The goal of such a procedure would be to provide a "plan by which statutory rights are preserved, the needs of all parties are considered, and the individual employee does not contend alone and unarmed with the mightier employer and union."¹⁷⁰ As a result, Zimny's comprehensive procedure appears to join the interests of all the key stakeholders, similar to Bell's interest convergence theory.

However, if the effort to represent the interests of all the employees fails because of the difficult choices a union must make,¹⁷¹ then the union should support all of its members in seeking a resolution that allows effective vindication of all rights without picking sides and creating further divisiveness. That resolution may occur through various methods, including mediation, arbitration involving legal representation with or without the union's involvement, or court resolution without union involvement.¹⁷² As we return to the *Ricci*¹⁷³ and *Pyett*¹⁷⁴ decisions,

168. McEneaney, *supra* note 74, at 171 (citing Max Zimny, *Arbitration of Statutory Employment Disputes Under Collective Bargaining Agreements*, in PROCEEDINGS OF NYU ANNUAL CONFERENCE ON LABOR 175, 178 (Samuel Estreicher ed., 1996)) (describing assertions by union attorney, Max Zimny, that there should be a separate procedure from the labor arbitration process that now resembles employment arbitration under *Gilmer* when processing statutory discrimination claims); *see also* George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177, 197 n.114 (1998) (describing Zimny's proposal); Mitchell H. Rubinstein, *Assignment of Labor Arbitration*, 81 ST. JOHN'S L. REV. 41, 74 (2007) (asserting that the union should be able to assign the right to arbitrate to an individual employee which will insure the employee has "his or her day in court" and this assignment also protects the union from duty of fair representation challenges).

169. McEneaney, *supra* note 74, at 171–72.

170. *Id.* at 171.

171. As Professor Ann Hodges has eloquently explained, it is not an easy decision for a union to agree to handle a discrimination matter in the grievance process when a union cannot pursue every claim through final and binding arbitration:

A decision not to arbitrate a discrimination claim has political implications for the union officers, who may be accused by the members of discrimination. Member dissatisfaction may lead to political defeat of the officers or even decertification of the union. Furthermore, the union may be sued for breach of the duty of fair representation or charged with violating discrimination laws for failing to arbitrate a discrimination grievance.

Hodges, *supra* note 66, at 163–64 (internal citation omitted).

172. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 56, 56–58 (arguing that parties to an arbitration agreement should design the arbitration process as part and parcel of an overall conflict management process that includes negotiation, mediation, and specific procedures designed to effectuate the choices of the parties that would not be possible in the court system).

we can learn something from how the unions involved in those disputes decided to address internal conflicts over the handling of statutory discrimination claims.

1. Union in *Ricci* Picks Sides in the Dispute and Sues to Support One Group of Its Members Against Another Group

All the New Haven firefighters involved in the *Ricci* dispute were represented by New Haven Firefighters Local 825 of the International Association of Firefighters Union (“Local 825”).¹⁷⁵ In the dispute about certifying exams for promotions, which placed black firefighters against mostly white firefighters and eventually led to the Supreme Court decision, Local 825 chose to support the *Ricci* plaintiffs (in other words, the mostly white firefighters) openly and publicly.¹⁷⁶ Further, only six days after the *Ricci* plaintiffs had filed their own lawsuit against the City of New Haven, Local 825 filed a separate lawsuit against the City of New Haven Civil Service Commission that was removed to federal court on July 15, 2004.¹⁷⁷ Local 825’s lawsuit sought to get the exam results at issue in the *Ricci* case certified by the New Haven Civil Service Commission.¹⁷⁸ Local 825 voted to pursue this action despite objections by African American members of Local 825.¹⁷⁹ Some of the African American members considered filing state agency complaints against the union while also trying to withdraw from the union because Local 825, by deciding to take legal action to certify the exam results, was taking their dues for membership but not pursuing their interests.¹⁸⁰

It is unclear why Local 825 filed a lawsuit supporting the interests of the mostly white members who wanted the exam results certified while going against the interests of its African American members who were concerned about indicators of an illegal discriminatory impact from the exam results.¹⁸¹ Perhaps, the leadership of Local 825 did not care about the objections of its African American members and just focused on what the majority of its leadership decided. What is surprising is that Local 825 did not see how its role of representing all the firefighters’ interests would be compromised by taking sides. Regardless, in dismissing Local 825’s lawsuit against the City of New Haven Civil Service Commission, federal judge Mark R. Kravitz found that “it is clear from the face of the Union’s complaint that there is a deep and divisive conflict between the interests of its members.”¹⁸² Judge

173. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

174. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

175. *See New Haven Firefighters Local 825 v. City of New Haven*, No. Civ.3:04CV1169(MRK), 2005 WL 3531465, at *2 n.2 (D. Conn. Dec. 22, 2005).

176. *See William Kaempffer, Race Divides Fire Test Issue*, NEW HAVEN REG. (May 11, 2004), <http://www.nhregister.com/articles/2004/05/11/import/11622902.txt> (discussing the eight to three vote by the fire union board to pursue legal remedy to certify test results at issue in the *Ricci* case).

177. *See New Haven Firefighters Local 825*, 2005 WL 3531465, at *1.

178. *Id.*

179. William Kaempffer, *Minority Firefighters Set to Sue Union*, NEW HAVEN REG. (May 28, 2004), <http://www.nhregister.com/articles/2004/05/28/import/11814108.txt>.

180. *See id.*

181. *See New Haven Firefighters Local 825*, 2005 WL 3531465.

182. *Id.* at *1–3.

Kravitz also explained some of the parameters of this divisiveness: “A potential conflict also exists between minority applicants—against whom there was a fear of adverse impact that prompted Defendants not to certify the results—and non-minority applicants who claim to have been discriminated against.”¹⁸³

In reviewing the actions of Local 825, it appears evident that, despite knowing the existence of this divisive conflict, Local 825 picked sides and supported the *Ricci* plaintiffs by filing its own lawsuit and thereby unnecessarily antagonizing its African American members. The court reached a pragmatic resolution based upon concerns about the conflicts of interest presented that Local 825 should have recognized in the first instance. Specifically, the court dismissed Local 825’s lawsuit and found that “the interests of a significant subset of the Union’s members are diametrically opposed to the interests of another significant subset—precisely the sort of conflict that makes individual participation by aggrieved members necessary.”¹⁸⁴

Moreover, Local 825 used its membership-driven finances to file a suit even when “the Union’s counsel could provide the Court with no reason that *Ricci* [—a case brought primarily by the white firefighters—], which has progressed to a nearly identical stage of litigation, would not be a better vehicle for resolution of these issues.”¹⁸⁵ The court essentially focused on “[p]rudential reasons” as to why it should dismiss Local 825’s lawsuit and allow these matters to be addressed within the *Ricci* lawsuit.¹⁸⁶ The *Ricci* lawsuit focused on the claims of individual union members who had allegedly been harmed. Whereas, the “representative action” brought by the union involved issues for which the union obviously had a “substantial conflict of interest.”¹⁸⁷

2. Union in *Pyett* Chooses to Support All Members in Seeking a Court Resolution Due to Conflict in Pursuing Arbitration

In contrast to the actions of Local 825 in *Ricci*, another union involved in a major discrimination dispute where potential conflicts of interest arose acted quite differently. With respect to the *Pyett* dispute, as mentioned, all the workers were represented by SEIU Local 32BJ. Some outsiders, at first view, may question why SEIU Local 32BJ would agree to terms as specific as those in the *Pyett* agreement that could be read as effectuating a clear and unmistakable waiver of the employees’ right to pursue their discrimination claims in court.¹⁸⁸ However, there was a long history of good-faith bargaining between SEIU Local 32BJ on behalf of its members and with the employer association, the Realty Advisory Board.

183. *Id.* at *2.

184. *Id.* at *3.

185. *Id.*

186. *Id.*

187. *Id.*

188. See Sarah Rudolph Cole, *Let the Grand Experiment Begin: Pyett Authorizes Arbitration of Unionized Employees’ Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861, 880–82 (2010) (discussing the assertion that a union is “selling out” and rebuking those claims when the union agrees to waive its employees’ right to pursue statutory discrimination claims in court).

This history of bargaining included well-defined provisions supporting a broad resolution of disputes through the arbitration process. Article VI of their agreement provides for “a Contract Arbitrator to decide all differences arising between the parties as to interpretation, application or performance of any part of th[e] Agreement and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement.”¹⁸⁹ Section 30 of Article XIV of their agreement also provides that “[t]here shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law.”¹⁹⁰ Section 30 also adds that discrimination claims, “including . . . claims made pursuant to . . . the Age Discrimination in Employment Act, . . . or any other similar laws . . . shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations.”¹⁹¹ “Section 30 concludes by directing that ‘[a]rbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.’”¹⁹²

The standard no-discrimination clause in the SEIU Local 32BJ/Realty Advisory Board collective bargaining agreement in *Pyett* was previously amended in 1999 to take account of the Supreme Court’s decision in *Wright*, which suggested that the parties could waive the employees’ right to pursue the claim in court if the waiver was clear and unmistakable.¹⁹³ Specifically, the parties’ agreed provision vested the contract arbitrators with the authority to decide discrimination claims and allowed SEIU Local 32BJ to seek full relief for any discrimination claims that SEIU Local 32BJ may bring to arbitration. Also, due to the provision in the arbitration clause making “the award of the Arbitrator . . . final and binding upon the parties and the employee(s) involved,” the employer was ensured, to the extent allowed by law, that any statutory discrimination claim pursued by SEIU Local 32BJ and decided by a Contractor Arbitrator could not be litigated again in court by SEIU Local 32BJ or by the employee-grievant.¹⁹⁴

What is clear from the appendix to the SEIU Local 32BJ Supreme Court brief filed in support of the employees in *Pyett* is that SEIU Local 32BJ agreed to these specific terms as a waiver so that it could help process discrimination claims for full relief of its members when possible. Obviously, SEIU Local 32BJ never thought that an employee could be compelled to arbitrate when SEIU Local 32BJ

189. Brief of the Serv. Emps. Int’l Union, Local 32BJ as Amici Curiae in Support of Respondents at 6–7, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581) (alteration in original) (quoting language from the CBA in Petitioner’s Appendix at 43a).

190. *Id.* at 9 (alteration in original) (quoting Petitioner’s Appendix at 48a).

191. *Id.* (alterations in original) (quoting Petitioner’s Appendix at 48a).

192. *Id.* (alteration in original) (emphasis omitted) (quoting Petitioner’s Appendix at 48a).

193. *Id.* at 13.

194. *Id.* (alteration in original) (quoting Petitioner’s Appendix at 45a). This goal of avoiding litigation in multiple forums regarding the same underlying disputes appears to be a prime value for the employer in negotiating *Pyett* agreements, especially if it may avoid unpredictable juries. *Id.*

chose not to pursue the case in arbitration. And the subsequent lower court decisions in *Morris*¹⁹⁵ and *Kravar*¹⁹⁶ support this belief.¹⁹⁷

What SEIU Local 32BJ seemed to gain in exchange for these terms was an agreement by the employer to provide fairer arbitration procedures for its diverse membership regarding the selection of arbitrators to hear these statutory discrimination claims:

This agreement was based on our joint commitment to diversify the panel of arbitrators to better reflect the Union's membership, to develop procedures appropriate for such cases, and to evaluate our experience in connection with these claims at the conclusion of this agreement and in light of any subsequent court decisions.¹⁹⁸

195. *Morris v. Temco Serv. Indus., Inc.*, Case No. 09 Civ. 6194(WHP), 2010 WL 3291810, at *4 (S.D.N.Y. Aug. 12, 2010).

196. *Kravar v. Triangle Serv., Inc.*, Case No. 1:06-cv-07858(RJH), 2009 WL 1392595, at *3 (S.D.N.Y. May 19, 2009).

197. Regardless, there is not a lot of optimism that the Supreme Court will agree with these findings that the employee can file in court if the union chooses not to pursue the claim in arbitration given the *Pyett* decision and questions raised during oral argument. See Transcript of Oral Argument at 17–18, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-581.pdf (identifying questions of Supreme Court Justices Antonin Scalia and Anthony Kennedy suggesting the view that after *Pyett* at bottom, the union's failure to process a claim in arbitration would require the individual employee to arbitrate the claim, and at top, the union's decision to not process the claim in arbitration functions as a screen of "frivolous claims" that should just be dismissed as otherwise an "employer hasn't gotten very much"); see also Gregory & McNamara, *supra* note 160, at 453–54 (discussing the oral argument transcript in *Pyett* and referring to the "possibilities" of forcing a unionized employee into arbitration if the union refuses to arbitrate as "stunning" and "could utterly transform labor arbitration in deeply problematic ways").

198. Brief of the Serv. Emps. Int'l Union, Local 32BJ as Amici Curiae in Support of Respondents, *supra* note 189, at 4A app. B (quoting Letter from Michael P. Fishman, SEIU Local 32BJ, to James Berg, Realty Advisory Board (April 19, 2000)); see also Larry Engelstein & Andrew Strom, *Now That the Court Has Spoken, What's Next?*, 5 N.Y.U. LAB. & EMP. L. NEWSL. Fall 2009, at 5, 5–6 (offering comments from SEIU Local 32BJ representatives asserting that its agreement with the Realty Advisory Board in *Pyett* does not act as a clear and unmistakable waiver, that court decisions since *Pyett* show that employees may still go to court if the union does not pursue the case in arbitration, and identifying one benefit of pursuing discrimination claims in labor arbitration is that "low-wage workers often have trouble finding employment discrimination specialists who are willing to take their cases to court"). Since the *Pyett* decision, it appears the employer association in *Pyett* and SEIU Local 32BJ have agreed to a process that would allow the employee to take a dispute to arbitration independently if the SEIU Local 32BJ chose not to pursue the dispute in arbitration. See William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, in ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50: PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 35, 72 n.151 (Paul D. Staudohar & Mark I. Lurie eds., 2010) (describing Agreement and Protocol between SEIU 32BJ and the Realty Advisory Board entered into February 17, 2010). Pursuant to this subsequent agreement of the parties in *Pyett*, individual

As a result, SEIU Local 32BJ should be applauded for offering its members with race discrimination complaints an opportunity not usually provided in the court system—a forum where their complaints can be heard by a diverse decision maker¹⁹⁹ while being provided legal representation²⁰⁰ and a much better chance of a favorable resolution.²⁰¹ Accordingly, in an agreement like the one agreed to by SEIU Local 32BJ, the interests of employees in vindicating their race discrimination claims can converge with their union’s interest in fairly representing all their members’ workplace concerns and their employer’s interest in having a productive mechanism to resolve race discrimination complaints.

employees may pursue arbitration of statutory discrimination claims when the union chooses not to pursue the claims; Local 32BJ will not be a party to these arbitrations, the arbitrator may not award relief that would require amendment of the CBA, and any award made pursuant to this Protocol would not have any precedential value under the CBA. *Id.*

199. *See generally* Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4 J. AM. ARB. 1 (2005) (describing benefits and fairness of arbitration system when employees of racial minorities know that there is a fair chance that their disputes may be decided by members of their own race); *see also* Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1215–16 (2004) (describing the benefits for minority employees in having minority arbitrators available to hear their disputes); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 275 (1999) (describing the difficulties that cultural minorities face in a system where “the substantive merit of their legal claims is at risk of being subjugated to majoritarian values, through a process that relies on members of the majority culture to vindicate the substantive rights at issue”); E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1067–69 (1999). *But see* Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 1002 n.40, 1037, 1041 (1999) (recognizing some level of bias against minority cultures in the court system and legitimate distrust by minority cultures of judicial decision making while also suggesting these concern are somewhat “overstated” beliefs about bigotry in the court system).

200. Green, *supra* note 11, at 100–16 (describing the benefits of legal representation through union involvement as a major benefit for employees pursuing statutory discrimination claims and limited opportunities that employees have in obtaining legal representation in the courts). The value of legal representation is significant and influenced significantly by the wealth of the litigants. *See* Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649 (2010); *see also infra* text accompanying note 216. Accordingly, “low-wage employees whose cases involve relatively small sums of money will nevertheless have legal counsel available” to them in pursuing their claims through union arbitration. Wheeler, *supra* note 160, at 27–28 & n.6.

201. Wheeler, *supra* note 160, at 27–28 & n.6 (describing how employees win only about 12% of “discrimination cases in Federal courts” and asserting that opportunities for legal and union representation coordinated by the union as in the *Pyett* case would provide “a powerful form of conflict insurance for employees”).

IV. WHY ARBITRATION OFFERS A VIABLE OPTION FOR RACE CLAIMS IF UNIONS
TAKE THE LEAD

Organized labor, mostly through its black leadership, has played a significant role in addressing race discrimination in America.²⁰² Unfortunately, a great deal of organized labor's history does not represent a positive civil rights record. In the early part of the twentieth century many unions practiced overt racism.²⁰³ Despite the fact that unions continue to decrease in numbers, the ones that still have a key presence can take a more active role in addressing current racial discrimination matters as black workers are currently "more likely to be union workers" than their "white, Asian, or Hispanic" coworkers.²⁰⁴

Unfortunately, class conflicts have exacerbated the issue and divided organized labor's focus as white male leadership has concentrated on class justice, and black and other identity groups within the unions have emphasized racial justice.²⁰⁵ In

202. See E.J. Dionne Jr., *Why Labor Matters; A Movement Expanded Rights and Prosperity*, WASH. POST, Sept. 6, 2010, at A15 (describing the role of the United Auto Workers Union in the 1963 landmark civil rights march on Washington held in August 1963).

203. See Steven H. Kropp, *Deconstructing Racism in American Society—The Role Labor Law Might Have Played (But Did Not) in Ending Race Discrimination: A Partial Explanation and Historical Commentary*, 23 BERKELEY J. EMP. & LAB. L. 369, 380, 384, 389 (2002); Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121, 162 & nn.167–68 (2001) ("Up until the New Deal, and in some cases even after, unions widely practiced overt exclusion of minorities, women and immigrants" and before then "almost all labor unions engaged in race discrimination, ranging from complete exclusion to internal segregation."); see also Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 404 (1993) (explaining the lack of fair representation for black employees working for the railroads prior to *Steele v. Louisville Nashville Railroad*); Michael Jordan, *The NLRB Racial Discrimination Decisions, 1935–1964: The Empiric Process of Administration and the Inner Eye of Racism*, 24 CONN. L. REV. 55, 58–63 (1991) (describing the pervasive level of discrimination against blacks within unions from 1935–1964); accord Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1346 (1997).

204. See Press Release, Bureau of Labor Stats., *Union Members—2010* (Jan. 12, 2011), available at <http://www.bls.gov/news.release/pdf/union2.pdf> (describing how union density for 2010 dropped to 11.9% and identifying ongoing black worker commitment to unions). Union density for 2009 was at 12.3% and it has been declining rapidly since the 1950s when it approached an all-time high of nearly one-third of the workforce. See Dionne, *supra* note 202, at A15 ("Only 12.3 percent of American wage and salary workers belong to unions, according to the Bureau of Labor Statistics, down from a peak of about one-third of the work force in 1955. A movement historically associated with the brawny workers in auto, steel, rubber, construction, rail and the ports now represents more employees in the public sector (7.9 million) than in the private sector (7.4 million)."); see also Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1767–68 (2001) ("Labor union density has been declining since the 1950s.").

205. See Crain & Matheny, *supra* note 204, at 1785–88 (describing the race and class conflict and how the historical problems and conflicts with unions and civil rights groups

referring to the solidarity efforts of three national unions, the United Food and Commercial Workers (UFCW), the SEIU, and her own union, Hotel Employees & Restaurant Employees Union (HERE), María Elena Durazo, the first Latina to head a major local union in Southern California, commented in 2006 that workers “should not be pitted against each other due to nationality, ethnicity, or race.”²⁰⁶ Instead, unions should capitalize on the increasing diversity in union membership rosters by providing a response to rectify organized labor’s poor history of race relations. Accordingly, the opportunity to help its black members pursue race discrimination claims would likely go a long way toward bridging the racial gap that unions must address.

On June 2, 2004, at a meeting of the National Academy of Arbitrators (NAA), former NAA president and former dean of the University of Michigan Law School, Theodore St. Antoine, asked a group of panelists why the Supreme Court’s decision in *Wright*²⁰⁷ should not be considered an opportunity for employers and unions to agree to waive employees’ rights to pursue discrimination claims in courts.²⁰⁸ St. Antoine wondered whether a union could be persuaded to waive those rights if the union could be given something of value in return due to the high costs of handling a discrimination case.²⁰⁹ An attorney representing employers, Robert Vercruyssen, responded to St. Antoine’s query by noting that he recommends to his clients that they not try to get waivers because court resolution allows a bad decision to be appealed.²¹⁰ In response to St. Antoine’s inquiry, Marilyn Teitelbaum, an attorney who represents unions, asserted that she tells unions to not seek such waivers and instead to only negotiate a general antidiscrimination provision because such a provision gives the employee two bites of the apple.²¹¹

St. Antoine’s suggestion of resolving statutory discrimination disputes through arbitration appeared interesting,²¹² especially as a viable option to the dismal results for plaintiffs in the courts.²¹³ However, it also appeared anecdotally given the

raises a concern, and questioning the resolve of organized labor to have a social justice focus rather than a class focus given a recent effort by organized labor to “put aside race and gender interests”); Green, *supra* note 11, at 90.

206. See María Elena Durazo, *Making Movement: Communities of Color and New Models of Organizing Labor*, 27 BERKELEY J. EMP. & LAB. L. 235, 241 (2006).

207. *Wright v. Universal Maritime Servs. Inc.*, 525 U.S. 70 (1998).

208. Ken May, *Arbitration: Panel Discusses Whether Unions Should Waive Employees’ Right to Sue for Bias*, 105 Daily Lab. Rep. (BNA) A6 (June 2, 2004).

209. *Id.*

210. *Id.* More than a decade ago, I also raised this pro-litigation stance as a reason why employers may consider not agreeing to arbitrate claims even with a predispute agreement. See Green, *supra* note 78.

211. May, *supra* note 208.

212. It was unclear at the time of St. Antoine’s query that an employer and union could even agree to a waiver as that question was not clearly addressed until the Court’s decision in *Pyett* on April 1, 2009. See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

213. See Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 887 (2008) (describing difficulties for employees in discrimination cases and finding that “the body of doctrine [used by the courts to assess violations of the law under Title VII] places tough requirements on employees to quickly ascertain and challenge any discrimination they encounter in the workplace” and “leaves very little allowance for difficulties perceiving and recognizing discrimination, hesitation in

responses from an attorney representing employers and an attorney representing unions that neither employers nor unions wanted anything to do with agreeing to take on statutory discrimination matters through the collective bargaining agreement arbitration process.²¹⁴

However, in reviewing a dispute like *Ricci* where the union decided that it had to pick sides in a racial dispute involving two groups of its firefighter members, does arbitration offer a better solution than the litigation option attempted? Also, does *Pyett* suggest a process where employers and unions could develop tools to resolve these racially charged and divisive employment disputes? Would this process put the employer and the union in a fair and possibly neutral framework that focuses on delivering an outcome that seeks racial justice for all employees? These questions could be addressed by bargaining a fair arbitral forum.²¹⁵ The

reporting and challenging it, and delay for the sake of pursuing other avenues first”); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 916 (2006) (asserting that only 27% of plaintiffs prevail in race and national origin discrimination cases); Parks & Rachlinski, *supra* note 28 (describing difficulties in proving and establishing employment discrimination under current statutory laws); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560–61 (2001) (describing how difficult it is for employees pursuing discrimination as employers prevail in 98% of federal court employment discrimination cases resolved and discussing how these cases tend to be resolved at the pre-trial stage in favor of employers). Another study of racial harassment also found that plaintiffs bringing these kinds of workplace discrimination cases tended to be black and their alleged harassers tended to be white, but plaintiffs succeeded in successfully bringing these cases only 21.5% of the time. *See* Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 54, 96–109 (2006).

214. May, *supra* note 208. *But see* Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL’Y 489, 499–500 (2001) (asserting that unions will benefit by having employees represent employees in arbitration of statutory discrimination claims). More recent assessments suggest that employers and unions may still not want anything to do with negotiating these waivers. Coleman, *supra* note 91, at 233–36 (assessing the costs of litigation as compared to arbitration which were provided to the author by an anonymous employer, and asserting that litigation may be cheaper than arbitration). However, a few of the academic commentators remain optimistic about the value of arbitrating employment discrimination matters. *See, e.g.,* Cole, *supra* note 188, at 861, 864 (contending that after *Pyett*, litigants will likely “achieve better results in labor arbitration than in traditional litigation” (emphasis omitted) and “*Pyett* creates an opportunity for unionized employees and their advocates to take advantage of the arbitration process to resolve their discrimination claims more quickly and cheaply with results similar to or better than litigation”); Ann C. Hodges, *Fallout from 14 Penn Plaza v. Pyett: Fractured Arbitration Systems in the Unionized Workplace*, 2010 J. DISP. RESOL. 19, 44–45 (suggesting opportunities for parties to address discrimination claims in union setting after *Pyett* if parties negotiate procedures to handle legal claims). *But see* Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 HOW. L.J. 45, 80–81 (2010) (asserting that arbitration, due to its private nature and inability to invoke public scrutiny of employers, will have little impact in addressing workplace discrimination because only a few cases result in great public scrutiny).

215. *See* Schohn, *supra* note 160, at 331–32 (suggesting the negotiation of fair procedures that would address concerns about arbitrating statutory discrimination claims in the union setting). A union attorney, Mary K. O’Melveny, has asserted: “Even if unions

bargain must recognize the unique issues that informal processes may create for participants of color who bring race discrimination claims in arbitration. This bargain must also find a balance between extremist²¹⁶ views that are pro-arbitration versus anti-arbitration regarding resolution of statutory discrimination claims.²¹⁷

A. Bargaining over a Fair Arbitral Forum for All Employees

Most behavioral research indicates that employees prefer a dispute resolution process that offers fair procedures.²¹⁸ Whether that process must be adjudicative (similar to the process that occurs in courts and arbitration), or not (similar to the process that occurs in mediation or negotiation), is unclear.²¹⁹ Because *Pyett* changes the landscape for offering labor arbitration to employees as a dispute resolution process when it involves a statutory discrimination claim, the opportunity to negotiate a fair arbitration forum provides new hope for racial justice in the workplace.²²⁰ Although *Pyett* makes it clear that employers and unions can bargain about these matters, whether an employer or union will seek to negotiate these waivers is a separate question.²²¹

could appropriately negotiate waivers, they would certainly have to bargain for an entirely separate dispute resolution process that would provide full statutory remedies and meaningful guarantees of procedural fairness sufficient to satisfy the minimum standards suggested in *Gilmer*.” O’Melveny, *supra* note 86, at 213.

216. I use the term “extremist” only to point out that there are those who appear extremely skeptical of arbitration for employees and those who are extremely passionate about its use for employees. Professor Mark Weidemaier refers to these groups as “[s]keptics and champions.” W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 69 (2007).

217. See, e.g., E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591 (2009) (describing legislative efforts to ban arbitration of employment discrimination disputes and seeking a balance to that approach by offering exemptions for high-level employees and small employers).

218. See Shestowsky & Brett, *supra* note 10, at 69 (discussing concept of procedural justice and how people have “preferences for procedures that allow them (as opposed to third parties) to control the development and selection of information that will be used to resolve the dispute”).

219. *Id.* at 91–106 (finding from a review of empirical data that disputants’ desire to have more control over dispute process varies by age and to the extent that older disputants prefer control before the dispute arises, the lack of control plays less of a role in final satisfaction with the process after a result has occurred whether through adjudication or non-adjudicative processes).

220. But see Martin H. Malin, *The Evolving Schizophrenic Nature of Labor Arbitration*, 2010 J. DISP. RESOL. 57, 69–79 (suggesting that the influx of law and employment discrimination into labor arbitration has been occurring for many years due to public policy arguments, the expansion of arbitration of statutory claims under the FAA, and overlapping rights under the Family and Medical Leave laws).

221. See Dennis R. Nolan, Disputatio: “Creeping Legalism” as a Declension Myth, 2010 J. DISP. RESOL. 1, 15–16 (asserting that very few employers and unions will enter into *Pyett* clear and unmistakable waiver agreements and therefore the *Pyett* decision will have little impact on labor arbitration); Wheeler, *supra* note 160, at 27 (“It is this writer’s view that, on balance, it is unlikely that such [*Pyett*] clauses will be widely adopted, in spite of their

The Court in *Pyett* stated in dicta²²² that waiving employee rights to pursue statutory claims in court through an agreement to arbitrate involves a condition of employment, one of the terms that is a mandatory subject of bargaining under the NLRA.²²³ If this is a mandatory subject, how persistent the parties may be in trying to seek a waiver while still meeting their obligations under the NLRA to bargain in good faith would primarily involve concerns about the employer causing a bargaining impasse by insisting upon a statutory arbitration provision.²²⁴ On the other hand, if the employer and union could bargain about the subject but neither could be compelled to the point of reaching a bargaining impasse, the issue would normally be a permissive subject of bargaining under labor law and attempting to bargain to an impasse would be bad faith.²²⁵ Accordingly, this distinction between a

advantages.”). One issue that must also be addressed if unions and employers seek to merge labor arbitration and employment arbitration involves the duty to bargain under labor law. If a union and an employer could not agree about waiving the statutory right to pursue a claim in court, then some authority exists to support the claim that the employer could unilaterally bargain with individual union workers about agreeing to arbitrate statutory claims. *See Air Line Pilots Ass’n Int’l v. Nw. Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999). This authority is somewhat limited and the National Labor Relations Board (NLRB), the federal agency charged with enforcing the NLRA, has not established a clear position on this issue. *See* ARTHUR F. ROSENFELD, OFFICE OF THE GENERAL COUNSEL, MEMORANDUM GC 05-03, at 8 (2005) (discussing *Air Line Pilots* case and stating “the waiver of an employee’s right to bring statutory claims to a judicial forum is not itself a mandatory subject of bargaining”); *see also* RICHARD A. SIEGEL, OFFICE OF THE GENERAL COUNSEL, MEMORANDUM OM 10-13(CH) 1 (2009) (recognizing the existence of the *Pyett* decision but only with respect to the NLRB’s policy on deferral regarding an arbitration decision). The NLRB has, however, noted that the grievance and arbitration process is a mandatory subject of bargaining and it cannot be unilaterally implemented by the employer. *See Util. Vault Co.*, 345 N.L.R.B. 79, 83 n.2 (2005). Most recently in late 2009, the NLRB published a new operations memorandum by its general counsel, which advised that “a new approach to cases involving arbitral deference” might be necessary in light of the *Pyett* decision. *See* Michael C. Harper, *A New Board Policy on Deferral to Arbitration: Acknowledging and Delimiting Union Waiver of Employee Statutory Rights*, 5 FIU L. REV. 685, 685–86 (2010) (describing the operations memorandum and suggesting the NLRB adopt a new approach when deferring to an arbitration decision regarding rights covered under the NLRA). For now, if there are questions as to whether the NLRB should defer to an arbitration decision in light of *Pyett*, those questions should be directed to the NLRB’s Division of Advice for input. *Id.*

222. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1459, 1464 (2009) (suggesting that the waiver involving an agreement to arbitrate employment discrimination claims “easily qualifies as a ‘conditio[n] of employment’” that is a mandatory subject of bargaining (alteration in original)). However, there was no dispute in *Pyett* about whether the parties had voluntarily agreed to the terms and no need to determine whether the waiver involved a mandatory subject of bargaining despite the Court’s statement in *Pyett* that it involved a mandatory subject. *Id.*

223. *Id.* at 1463–64 (citing 29 U.S.C. § 158(a)(5), (d)). *But see* Samuel Estreicher & Elena J. Voss, ‘Pyett’ Clears the Way for Agreements to Arbitrate Employee Statutory Claims, N.Y. L.J., May 22, 2009, at 4, 7 (asserting that *Pyett* “seemingly answered” the question of whether collective bargaining agreement waivers of statutory discrimination claims would constitute a mandatory subject of bargaining).

224. Estreicher & Voss, *supra* note 223, at 7.

225. *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348–49 (1958) (describing how the employer and the union are obligated to bargain in good faith regarding

permissive versus a mandatory subject of bargaining could present major implications.²²⁶

As a mandatory subject of bargaining, the compulsion of such an agreement by the employer could occur theoretically even if the union does not agree. Upon bargaining to an impasse on this issue, labor law generally allows the employer to implement the last offer on the table.²²⁷ However, it would appear peculiar to allow an employer to insist upon a court waiver to the point of causing a bargaining impasse and implement the waiver as a final offer because it involves matters that are solely within the control of the union in exercising its discretion to process grievances to arbitration.²²⁸ Furthermore, if an agreement to waive has occurred through implementing the employer's last offer without the union agreeing to it as part of an impasse, binding individual employees to pursuing statutory claims through labor arbitration would appear inconsistent with a clear and unmistakable action by the union.²²⁹

Even if such waivers were found to be mandatory subjects of bargaining, this Article asserts that in order to be enforced, a clear and unmistakable waiver must include some affirmative agreement by the union and the employer to provide the employee with representation through arbitration as final resolution.²³⁰ Such waivers would also prohibit the union and employer from settling the statutory grievance without approval from the individual employee.²³¹ Also, the employee

statutorily-defined mandatory subjects of bargaining which include wages, hours, and other terms and conditions of employment but only those subjects and they do not have to yield with respect to bargaining).

226. See generally Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513 (2001).

227. See *NLRB v. Katz*, 369 U.S. 736, 745 n.12 (1962); see also Sposito, *supra* note 64, at 177 n.31 (noting that an employer is free to unilaterally implement the changes in the terms and working conditions embodied in its final proposal after reaching a bargaining impasse).

228. Although outside the scope of this Article, my hope is that such waivers, while representing mandatory subjects of bargaining under the NLRA, could not be unilaterally implemented by the employer as that would frustrate the purposes of bargaining and usurp the union's role by obligating it to represent employees in disputes that the union had not actually agreed to represent the employees. See *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997) (finding that the NLRB recognizes certain exceptions to its rule that an employer may implement its final offer after reaching a good-faith impasse); see also Estreicher & Voss, *supra* note 223, at 7 (discussing *McClatchy* case).

229. See Sposito, *supra* note 64, at 188–89 (suggesting how imposition of an arbitration clause pursuant to a bargaining impasse would not be a “knowing and voluntary” waiver by the union or its members as the terms would not be “freely negotiated” nor involve terms “agreed to in exchange for other terms and conditions of employment”).

230. See Kim, *supra* note 74, at 247–54 (arguing for a two-tier system of handling grievances through labor arbitration where statutory discrimination claims provide for the grievant to decide whether the claim will go forward and employees are allowed procedural rights, legal representation, and remedies to effectively vindicate statutory claims through labor arbitration).

231. See William B. Gould IV, *Kissing Cousins? The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 627–28 (2006) (describing how the use of an attorney for the grievant and allowing the grievant to play an active role in the processing of

must still be allowed to pursue his or her own claim in court or in arbitration if the union chooses not to pursue it within the scope of its duty of fair representation. Finally, the waiver must insure the employee will be able to effectively vindicate the statutory claim through the arbitration process or have a court option if the arbitration process cannot effectively vindicate the claim.

Unlike what happened in *Wright* and *Pyett*, the Court should identify the key elements that must be present for a clear and unmistakable waiver of employees' rights to pursue future statutory discrimination claims. There are some statutory rights, including the right to strike²³² and the right of union officers to not be treated differently under labor law,²³³ wherein a union may effectuate a clear and unmistakable waiver as part of the collective bargaining process. However, waiving individual statutory rights to pursue a discrimination claim in court due to terms of a labor agreement's arbitration process should require even more particulars to address the union's ability to apply its discretion and not pursue the claim through arbitration. Only those agreements that provide an actual and fair forum for the employee to hear and vindicate her statutory claim would be required, regardless of whether the union decides to process the claim or not.²³⁴

William Gould has suggested a process where employees and unions could resolve their statutory discrimination claims in arbitration.²³⁵ Gould, the second black arbitrator to ever join the NAA when he became a member in 1970,²³⁶ has described the procedures in two arbitration cases where the parties agreed to arbitrate statutory discrimination claims before the Supreme Court's *Gardner-Denver* decision in 1974.²³⁷ Specifically, the unions in each case represented the employee through the contractual issues, but the employee was also represented by chosen outside counsel to handle the statutory discrimination claims.²³⁸ The arbitrator was given the same authority as a federal judge.²³⁹

Rather than focus on the language of the agreement as to whether it effectuates a clear and unmistakable waiver, Gould has asserted that the focus on fairness should shift to looking at the expertise of the arbitrators selected to handle the statutory

the statutory-related grievance is helpful).

232. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956) (discussing statutory right to strike and how any waiver must clearly address this type of right).

233. See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705–08 (1983) (discussing the authority of the union to secure the goods and benefits of the entire bargaining unit within a collective bargaining agreement by waiving the statutory rights of its officials to protection from differential treatment).

234. See Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 796–810 (2008) (arguing that a focus on fairness measures in arbitration of employment claims would create a good balance to the critics both for and against it).

235. Gould, *supra* note 231, at 624–56.

236. *Id.* at 624 n.59. Gould is also the former chairman of the NLRB and currently a professor at Stanford Law School.

237. *Id.* at 627 & nn.78–79 (citing *Weyerhaeuser Co. v. Int'l Woodworkers of Am.*, 78 Lab. Arb. (BNA) 1109 (1982) (Gould, Arb.) and *Basic Vegetable Prods., Inc. v. Gen. Teamsters*, 64 Lab. Arb. (BNA) 620 (1975)).

238. *Id.* at 627–28.

239. *Id.* at 628.

discrimination dispute.²⁴⁰ Gould argues quite persuasively that the arbitration of statutory discrimination claims is warranted in labor arbitration because: (1) arbitrators may rely on public law in making their decisions; (2) the courts do not provide an accessible option due to the expense involved and the need for legal representation; and (3) the appointment process of conservative federal judges.²⁴¹ Nevertheless, the arbitration process must remain fair by incorporating a “vigilant” effort to make sure the arbitrators selected will have the expertise to address statutory discrimination claims along with a pool of racially diverse arbitrators.²⁴² These appear to be the very concerns that led SEIU Local 32BJ to negotiate the waiver that led to the litigation in *Pyett*.²⁴³

B. Matters of Race Discrimination Can Be Fairly Addressed in Arbitration

The concerns expressed earlier about informal dispute resolution having a deleterious effect on people of color who seek justice must be addressed in pursuing arbitration as a final resolution.²⁴⁴ Unfortunately, this concern mistakenly assumes that fairness will occur in the court system with its public and formal values for those claimants seeking to resolve employment discrimination disputes based on race.²⁴⁵ But that assumption proves all too wrong when most of the analysis of employment discrimination claims comes forward.²⁴⁶ That data usually shows that employees tend to lose in court 90% of the time.²⁴⁷ And even greater percentages of employees who pursue such claims in court lack legal representation.²⁴⁸

240. *Id.* at 632–33.

241. *Id.* at 651.

242. *Id.* at 656–58 (describing the dearth of minority arbitrators and how this must be changed if arbitration is to provide a fair system for employees seeking vindication of their racial discrimination claims rather than equating a nearly all-white and male arbitration process with an all-white jury process and the perception of unfairness); *see also* Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 407–10, 419–20, 428–29 (1996) (criticizing the lack of diversity of arbitrator pools, the inability of individual discrimination claimants to have fair and mutual selection of the arbitrator for statutory claims because of employer domination of the arbitrator selection process and unchecked arbitrator bias).

243. *See supra* Part III.B.2.

244. *See supra* Part I.B.

245. *See Parker, supra* note 213, at 936–39 (describing how judges have adopted an anti-race plaintiff ideology as explanation for why these plaintiffs tend to lose at the summary judgment phase of most race-based employment discrimination cases).

246. *Id.*

247. Selmi, *supra* note 213, at 560–61.

248. *See generally* Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 FORDHAM URB. L.J. 273 (2010); Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381 (2010); *see also* Lisa B. Bingham, Kiwhan Kim & Susan Summers Raines, *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 359 (2002).

So the formalities of the court system and judges that Delgado seemed to support as providing more fairness and less racial prejudice than the informalities of ADR,²⁴⁹ do not ring true under our current court system's handling of racial discrimination claims.²⁵⁰ Given these concerns, we must explore whether "plaintiffs have a better venue option" when "[a]rbitration is a possibility."²⁵¹ With continued decisions by five to four majorities of the Supreme Court as in *Ricci* that send the message that certain claims of race discrimination don't matter,²⁵² almost any other system appears better than the courts.²⁵³ If the arbitration process seeks to provide levels of fairness and a racially diverse cadre of arbitrators to handle these claims, the system would offer more fairness than the courts.²⁵⁴ Employers and unions should look at developing an overall dispute system design that will provide for racial justice in the workplace through arbitration as consistent with Bell's interest-convergence thesis.²⁵⁵

249. Delgado, *supra* note 51, at 1402–04.

250. Parker, *supra* note 213, at 939–40 (suggesting that we not completely "turn away from the courts altogether in efforts to redress racial and ethnic employment discrimination" because "courts offer plaintiffs the value of a public forum in which to tell their stories"; however, we must realize that "race and national origin . . . cases are proving almost impossible to win in federal court" as they "settle at lower rates than employment discrimination cases as a whole" and "are also treated worse than gender employment discrimination cases").

251. *Id.* at 939 & n.227 (discussing the possibility that arbitration may be a better venue but only from "limited empirical work").

252. Chemerinsky, *supra* note 17.

253. This is not to suggest that the courts should be completely abandoned; rather, meaningful access to the courts should also be a component of the dispute resolution design system. See Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 *FORDHAM L. REV.* 1203, 1218–32 (2009) (asserting that system dispute resolution concerns should focus on power imbalances, agency costs, and especially barriers to court access as it relates to arbitration).

254. Gould, *supra* note 231, at 627–28 (describing two labor arbitrations involving racial discrimination where the grievant was provided separate representation and the arbitrator was given the same authority as a federal judge); Alleyne, *supra* note 242, at 407–10, 419–20, 428–29. Also, any concerns regarding institutional or repeat player arbitrator bias should be addressed. See Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 *ARIZ. L. REV.* 395, 416–27 (2010) (describing concerns of an "embedded" neutral in arbitration and possible issues of bias).

255. See Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker & Won-Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 *HARV. NEGOT. L. REV.* 1, 7–11 (2009) (describing comprehensive design systems for arbitration of workplace disputes). Clearly, the concern would be that the union and the employer must choose a system that values democratic values in the workplace including "[s]uch notions [as] fundamental values of political participation, legal and social capital, accountability, rationality, personal autonomy, and equality, which must be weighed against substantive expertise, informality, speed, and finality in the context of binding arbitration." *Id.* at 10. Given that this involves a union-negotiated system of fair dispute resolution, notions of "workplace democracy" should be of paramount concern and likely a normally understood component. See Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 *HARV. NEGOT. L. REV.* 11, 52, 67–

C. Balancing the Concerns of the Arbitration Extremists

When assessing the value of arbitration in resolving employment discrimination matters, most of the debate over the last twenty years has focused on the nature of waiving court resolution of statutory discrimination claims when employers use their bargaining power to make individual employees agree to the waiver as a condition of employment.²⁵⁶ As this debate has transpired, two extremist views have evolved. One view seems to look beyond just a romanticist notion of litigation and attacks every aspect of arbitration as being a nonstarter for resolving employment discrimination claims. One group, Public Citizen, a consumer rights-based organization, has taken this approach.²⁵⁷ There are academic commentators who also tend to have this view.²⁵⁸ Under this view, these commentators appear to see no possible scenario where arbitration could be a viable alternative for an employee seeking vindication pursuant to a statutory discrimination claim.²⁵⁹

To the opposite extremist view, some have taken the position that no real concern exists when an agreement to arbitrate between an employer and an individual employee was agreed to by the employee as a condition of employment without certain fairness issues being addressed because it is better for employees.²⁶⁰ One group that focuses on representing the interests of the business community, the Chamber of Commerce, seems to have taken this approach.²⁶¹ And there are academic commentators who appear to give great deference to the parties' purported agreement to arbitrate and short shrift to fairness challenges.²⁶² To

68 (2005).

256. See Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58, 59–60 & n.8 (2007).

257. See Employment Arbitration, FAIRARBITRATIONNOW.ORG, <http://www.fairarbitrationnow.org/content/employment-arbitration> (a Public Citizen-maintained website collecting stories and other items critical of arbitration imposed as a condition of employment); PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

258. See, e.g., David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009) (attacking essentially all arguments raised that may make arbitration more palatable as non-responsive to broader concerns about fairness for employees subjected to agreements to arbitrate).

259. *Id.* at 1335–41.

260. See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001).

261. See *Arbitration/ADR*, INSTITUTE FOR LEGAL REFORM (2010), http://www.instituteforlegalreform.com/component/ilr_issues/29/item/ADR.html (the Institute for Legal Reform is an affiliate of the U.S. Chamber of Commerce that collects information supporting the use of arbitration).

262. See, e.g., Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 272–74 (2008) (asserting that there are several items such as retirement-plan options and choice of insurance carriers that are imposed by employers and arbitration is just another such item); see also Thomas E. Carbonneau, “Arbitracide”: *The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT’L ARB. 233, 253, 261–62 (2007) (attacking efforts in Congress to address

achieve interest-convergence, the reality should find some compromise somewhere in the middle.²⁶³ Essentially, a fair arbitration process collectively bargained for and negotiated by employers and representative unions where employees have effective voice is what workers want anyway.²⁶⁴

These extremist views have dovetailed into a debate about pending legislation in front of Congress, the Arbitration Fairness Act (AFA).²⁶⁵ The AFA would make all predispute agreements to arbitrate statutory employment discrimination claims unenforceable, and the most recent version of the pending legislation would make enforcement of agreements by unions and employers to arbitrate statutory claims under *Pyett* unenforceable.²⁶⁶ Congress has already passed legislation, the Franken

fairness concerns for employees and consumers). To the extent that empirical studies have been able to address arbitration fairness, some of the results support the claims of fairness in mandatory arbitration. *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1578 (2005) (asserting that empirical studies of arbitration suggest that pro se employees will fare better in arbitration and most empirical data is insufficient to address broader questions of fairness in arbitration).

263. *See* Spitko, *supra* note 217; *see also* Malveaux, *supra* note 161 (discussing Coke's process that provides for arbitration and it is only binding on the company); St. Antoine, *supra* note 234 (arguing for due process concerns to help protect employee fairness in arbitration).

264. *See generally* WHAT WORKERS SAY: EMPLOYEE VOICE IN THE ANGLO-AMERICAN WORKPLACE 2–3, 23–24 (Richard B. Freeman, Peter Boxall & Peter Haynes eds., 2007) (finding from a survey of workers that they want more traditional-based union representation, they embrace employer-sponsored programs if they have a voice in issues that occur in the workplace); RICHARD B. FREEMAN, ECON. POL'Y INST., BRIEFING PAPER NO. 182: DO WORKERS STILL WANT UNIONS? MORE THAN EVER 2 (2007), *available at* <http://www.sharedprosperity.org/bp182/bp182.pdf> (finding that workers today want greater say at their workplace as much or more than in the 1990s); *see also* JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT 284–85, 363 (2010) (describing the benefits of final and binding labor arbitration as achieving the goals of employers and unions in reaching compromises the parties desire and would have negotiated if they had an opportunity to bargain the resolution and also explaining how the process of selecting labor arbitrators motivates them to be fair in deciding disputes because of the ongoing desire to “maintain acceptability” to both sides for future selection).

265. *See* Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011) (introduced by Senators Al Franken (D.-Minn.) and Richard Blumenthal (D.-Colo.)); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011) (Congressman, Hank Johnson (D.-Ga.)). A prior version of this Act was introduced in 2009 to the 111th Congress, the Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); *see also* Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82 (2007) (describing arguments for and against the Arbitration Fairness Act).

266. In the 2009 version of the Arbitration Fairness Act, the House version was proposed before the *Pyett* decision, and it had explicitly excluded collective bargaining agreements from its coverage. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009). That exclusion was likely due to the fact that before *Pyett*, it was assumed that union employees could not have their right to resolve their statutory discrimination claims in court waived based upon *Gardner-Denver* and its progeny. *See* Moses, *supra* note 91, at 825, 84 n.160. The most recent version of this pending legislation, the Arbitration Fairness Act of 2011, precludes mandatory arbitration waivers in collective bargaining agreements in both the House and Senate versions. *See* S. 987, § 4; H.R. 1873, § 4.

Amendment to the 2010 Department of Defense Appropriations Act, which prevents federal contractors with a contract of at least \$100,000 from entering into pre-dispute agreements to arbitrate statutory or tort claims involving sexual harassment or assault.²⁶⁷ Further attempts to ban arbitration may soon be addressed pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act,²⁶⁸ passed by Congress and signed by President Obama in 2010, which authorizes the Securities Exchange Commission to ban mandatory arbitration agreements in the securities industry involving customers and investor disputes.²⁶⁹

Accordingly, whether the proponents of arbitration like it or not, there are certainly concerns about mandatory arbitration and its fairness that Congress has been considering. But there are also concerns about litigation and its fairness, too. To the extent a collectively bargained arbitration process provides reasonable options to effectively vindicate statutory claims, employees whose unions fairly represent all of their interests should be able to use this arbitration process. Therefore, if the AFA is ever enacted into law by Congress, any approved language in the final terms of the statute that limits enforcement of agreements to arbitrate should exclude collective bargaining agreements from its coverage as had initially been done before *Pyett*. Any new statute created by the AFA should make it clear that employers cannot unilaterally implement collectively bargained agreements to arbitrate under the NLRA. Also, Congress should make it clear that if the employer and union choose to waive employees' rights to pursue statutory discrimination claims in court, the agreement must also provide a fair forum to effectively vindicate these claims through arbitration. Absent an agreement to effectively vindicate statutory rights, employees should still be able to pursue their claims through the courts.²⁷⁰

D. Developing a Cohesive Process to Address Unanswered Questions of Pyett Arbitrations

Union representatives have identified several unanswered questions about implementing *Pyett* waivers as follows: (1) What are the elements of a clear and unmistakable waiver?; (2) Does the existence of a clear waiver obligate the union to proceed to arbitration?; (3) What risks does the union face when it declines to arbitrate or alternatively, when it arbitrates a discrimination grievance?; (4) If the union declines to arbitrate, can the employee still proceed in court?; (5) What procedural safeguards should parties build into their grievance procedures if they intend to handle discrimination claims?; and (6) What level of deference should be

267. See Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454–55 (2009).

268. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376, 1841 (2010) (to be codified at 15 U.S.C. § 78o, 80b-5).

269. See Jill I. Gross, *The End of Mandatory Securities Arbitration*, 30 PACE L. REV. 1174, 1178 (2010).

270. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (agreement to arbitrate employment discrimination claim is enforceable “[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum” (second alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985))).

given to arbitrators' decisions?²⁷¹ Under Professor Gould's analysis, all claims (including statutory claims) fall within the just cause analysis and the employer has the burden to establish just cause.²⁷² But employment arbitration does not usually employ the just cause standard and tends to follow the same burden of proof in court by requiring the employee prove the statutory discrimination occurred.²⁷³

Professor and Labor and Employment Arbitrator Marty Malin has explained the nature of the different burdens in labor arbitration versus employment arbitration as follows:

In many grievances that may also implicate the grievant's statutory rights, the CBA is more employee-protective than the statute. For example, the typical CBA requires just cause for discipline and discharge, provisions that arbitrators have uniformly interpreted place on the employer the burden to prove its justification for the adverse action, whereas antidiscrimination and other statutes merely prohibit basing such adverse action on the employee's protected status or conduct and place the burden on the employee to prove the employer's improper motive. In discipline and discharge grievances with overtones of statutory rights' violations, arbitrators usually may concentrate on whether the employer proved just cause, regarding evidence of improper motive as impeaching the employer's purported justification. In such cases, the arbitrator need not delve into the minutia of statutory law.²⁷⁴

Accordingly, the issue of resolving a statutory discrimination claim in labor arbitration raises a concern about whether the just cause standard should be placed on the employer or whether the burden should be placed on the employee to show the employer's illegal motive pursuant to the statute. Without specificity by the parties, the arbitrator will have to decide this issue.

Employer representatives have identified several concerns regarding the drafting of *Pyett* waivers including: (1) making sure the waiver is clear and unmistakable; (2) identifying the specific claims that are not subject to being resolved in arbitration; (3) not modifying procedures and remedies that would be available in the courts; (4) specifying the authority of the arbitrator to decide the statutory claim; and a (5) and creating a choice of law provision.²⁷⁵ The Due Process Protocol, a collaboration of several constituency groups, developed procedures to be followed when an employee must arbitrate a statutory discrimination claims as a

271. Cummins & Blissenbach, *supra* note 91, at 170–72.

272. Gould, *supra* note 231, at 627–28; *see also* William B. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 58–65 (1969) (describing grievant's right to intervene in arbitrations that involve statutory race discrimination claims).

273. *See* Malin, *supra* note 220, at 78.

274. *Id.*

275. *See* Mark S. Mathiason & Bryan M. Seiler, *What 14 Penn Plaza LLC v. Pyett Means for Employers: Balancing Interests in a Landscape of Uncertainty*, 25 A.B.A. J. LAB. & EMP. L. 173, 191–97 (2010).

condition of employment.²⁷⁶ The Protocol provides some guidance on these issues by establishing the following requirements: (1) a jointly selected neutral arbitrator who knows the law; (2) sufficient discovery; (3) sharing of costs related to arbitrator neutrality; (4) the right to legal representation by a person of the employee's choice; (5) remedies that are equal to those provided under the law; (6) a written opinion and award explaining the reasoning; and (7) limited judicial review based upon legal requirements.²⁷⁷ The American Arbitration Association and JAMS (previously Judicial Arbitration & Mediation Services) have agreed to abide by the Protocol.²⁷⁸ Subsequent review and suggestions of commentators to further revise the Protocol have requested additional procedural protections including: (1) a ban on reducing the applicable statute of limitations; (2) fair scheduling of the arbitration hearing at times that are better for employees or their representation or witnesses to participate; (3) a ban on bringing class actions in arbitration; and (4) not making the arbitration process financially prohibitive in terms of filing and costs when compared to court fees.²⁷⁹ Certainly, the parties can choose to address these matters in their *Pyett* waiver agreements. However, it is more likely the arbitrator will have to resolve these questions and especially if neutral service providers do not offer any guidance either.

CONCLUSION: UNIONS AS LEADING CHANGE AGENTS REGARDING THE HANDLING
OF WORKPLACE DISPUTES OVER RACE

This Article has focused on establishing a balance or convergence of interests when dealing with the resolution of workplace discrimination claims based on race in the union setting. Certainly, employees and unions should learn from the *Ricci* case that they should not get embroiled in divisive pursuits when addressing racial discrimination claims that raise conflicts within the ranks of the union membership. Given that *Pyett* makes it clear that a union can waive an employee's right to pursue a statutory employment discrimination claim in court, one question left unanswered by *Pyett* was what should happen when a union decides not to process a claim and an employee has no forum to resolve the discrimination claim because of the waiver. Accordingly, any waiver should also make clear that the employee will be allowed a forum to effectively vindicate the claim even if the union chooses not to process it. If that forum is arbitration, it must offer fair procedures, remedies, legal representation, and opportunity for fair selection of a diverse arbitrator. Employers have already embraced arbitration as a viable tool and the employer in *Ricci* would have definitely benefited from a private and binding resolution of that matter.

When disputes involving race discrimination arise, the union must take a proactive approach that focuses on getting all union members enrolled in fairly resolving the dispute, regardless of their race. And if there are conflicts, the union should not take sides. Instead, the union should support all members involved and

276. See Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A. J. LAB. & EMP. L. 411, 421–22 (2010).

277. *Id.* at 421–23.

278. *Id.* at 423.

279. *Id.*

affected by the matter by helping them to obtain a fair resolution through either arbitration or the courts. The union should negotiate with the employer to provide a fair arbitration process that employees can pursue even when the union decides not to pursue a grievance in arbitration as allowed within its duty of fair representation.

As President Obama suggested at the beginning of this Article, unions must help their white employees—who believe they have been discriminated against and denied privileges and benefits to provide preferences to black employees—to seek greater understanding and appreciation regarding the continued existence of racial discrimination against black employees. Likewise, the union must also work with black employees to appreciate the positions of their fellow white employees who are struggling in this difficult economy to get ahead and are angry about the economic losses they are incurring. Bridging the gaps to seek mutual interests centered on economics and productivity will provide the kind of interest-convergence via arbitration that will help unions work with all their members and their employers in finding a transcendent resolution to workplace discrimination claims based on race.

