

2010

Disputatio: Creeping Legalism as a Declension Myth

Dennis R. Nolan

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Dennis R. Nolan, *Disputatio: Creeping Legalism as a Declension Myth*, 2010 J. Disp. Resol. (2010)
Available at: <https://scholarship.law.missouri.edu/jdr/vol2010/iss1/2>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

JOURNAL OF DISPUTE RESOLUTION

VOLUME 2010

NUMBER 1

SYMPOSIUM

Disputatio: “Creeping Legalism” as a Declension Myth

Dennis R. Nolan*

I. INTRODUCTION	1
II. PROCEDURAL LEGALISM: THE INTRODUCTION OF LEGAL PRACTICES	3
III. SUBSTANTIVE LEGALISM: THE INTRUSION OF STATUTORY LAW	7
IV. HYBRID LEGALISM: THE <i>PYETT</i> PANIC	12
IV. CONCLUSION	16

I. INTRODUCTION

The term “creeping legalism,” the topic of this symposium, applies to several different developments in labor arbitration. This essay examines each of those developments and explains why that pejorative term misses its mark.

The first generation of complaints about creeping legalism in labor arbitration occurred fifty years ago, when parties and commentators worried about then-recent trends toward the introduction of such pernicious legalisms as the use of lawyers and the citation of previous awards. I refer to this set of charges as *procedural legalism*.

The second generation began shortly after the passage of the Civil Rights Act of 1964. Commentators (but at this time not many parties) engaged in vigorous debate about the possibility that labor arbitrators might be asked to decide statutory issues affecting the administration of collective bargaining agreements. I refer to this set of criticisms as *substantive legalism*.

* Webster Professor of Labor Law Emeritus, University of South Carolina School of Law. This reflective essay contains judgments based on three decades of practicing labor arbitration as well as teaching and writing about it. I dedicate this paper to the late Tim Heinsz, my friend and co-author and former Dean at the University of Missouri School of Law.

The third generation is very recent indeed, born just after the Supreme Court's 2009 decision in *14 Penn Plaza LLC v. Pyett*.¹ *Pyett* simply held that a union could, if it wished, enter into legally enforceable agreements confining individual members' statutory claims exclusively to the contractual grievance procedure.² Critics of the decision worried that *Pyett* would deprive unionized employees of their right to sue for violations of federal and state labor laws.³ While this line of criticism is not yet fully developed, it seems to involve a blend of procedural and substantive concerns. For convenience, then, let us refer to those criticisms as *hybrid legalism*.

One factor linking all three versions of the creeping legalism complaint, I suggest, is that they are *declension myths*. Let me begin by explaining what I mean by that term. I will then apply it to each of type of legalism in turn. It is common for scholars to structure their analysis of an issue as a declension narrative—that is, as a story of the decline and fall of whatever it is. The most common declension myth, of course, is the story of Adam and Eve found in the Book of Genesis,⁴ although there were some earlier examples and innumerable later ones. So common is that structure, in fact, that it has become a veritable “meme,” a unit of cultural information passed on by repeated use.⁵

Declension narratives normally share a common multi-step format. Initially, they posit the existence of a prelapsarian paradise when all was in harmony: the lion lay down with the lamb, people were nice to one another, and justice reigned throughout the world. Next, they assert that some human sin caused our expulsion from that earthly paradise, forcing us to live in an imperfect world. Lastly, they argue that by some reformation—by repenting for our sins, for example—we can regain paradise. Later examples of declension myths are everywhere: the decline of Rome, the Rousseauian view of the decline of society since the primeval state of nature, and Marxist analysis of economic changes following primitive communities, to name just a few.

I'm not a theologian, so I will spare you my thoughts on the doctrine of original sin. As to the declension narrative of creeping legalism in labor arbitration, however, I find three flaws. One, the first analytical step is false. There was never a paradisiacal time for labor arbitration. It was always imperfect, even though we might have forgotten its flaws. Two, the second step is false. No human sins destroyed the Platonic ideal of labor arbitration. Rather, the contexts of labor arbitration and the parties' needs and expectations changed over the decades so that the older version became progressively outdated. Parties themselves adapted labor arbitration to meet their new needs. Three, the third step is also false. Nothing we can do will ever reverse the clock and make the earlier non-legalized version of labor arbitration suitable for our times. Even if we could, I am confident we would not want to do so.

1. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

2. *Id.* at 1474.

3. See Part IV, *infra*.

4. *Genesis* 3.

5. While thinking about this topic, I momentarily considered writing a book titled *The Decline and Fall of Practically Everything*—until a quick Google search of that title produced 442 hits, most notably to Joe Queenan's 1992 book, *IMPERIAL CADDY: THE RISE OF DAN QUAYLE IN AMERICA AND THE DECLINE AND FALL OF PRACTICALLY EVERYTHING ELSE*. Even the debunking of declension narratives has itself become a meme.

Let me turn now to explaining how the concept of declension myths applies to each of the generations of creeping legalism complaints.

II. PROCEDURAL LEGALISM: THE INTRODUCTION OF LEGAL PRACTICES

To appreciate the changes in labor arbitration that prompted the first creeping legalism charges, one must first recall how labor arbitration began.⁶ While some forms of labor arbitration have existed for more than a century, the earliest examples bear little similarity to modern arbitration. Industrial alternative dispute resolution arose to address disagreements over the terms of employment, particularly wages and hours—what today we term *interest disputes*. There were no collective bargaining agreements as we know them and thus there were few of what we would recognize as *rights disputes*, or grievances over the interpretation or application of a collective agreement.⁷ Even when a written agreement ended a strike, the terms of the agreement were usually so limited that any subsequent procedure required the parties or some outside decision-maker to supplement, rather than interpret, the original bargain.

In short, parties, government officials, and academics loosely and interchangeably described any use of third parties in the resolution of those early labor disputes as arbitration, conciliation, and mediation. We have a clear taxonomy of dispute resolution; our predecessors did not. That blurring of lines continued even after labor arbitration began to take something like its modern shape in the 1930s and 1940s. Just as the clothing workers and their employers appointed such legal figures as Louis Brandeis and Clarence Darrow as arbitrators but expected them to function more as mediators, so too the mid-century “umpires” in textiles, automobiles, and other industries used whatever tools they could find to solve pressing practical problems.

It would never have occurred to them or to the parties that appointed them that they should only read and apply an existing document. Rather, their mutually understood role was to mediate, negotiate, nudge, and persuade the parties to settle, and only as a last resort to issue a formal ruling. Even in that last resort, the ruling was more likely to set the terms of employment than to apply the words the parties had already negotiated. Because almost every case was a matter of first impression, there were no precedents. Because critical interest issues like wages were at stake, the parties’ representatives were typically the leaders of each organization, not their lawyers. Because the parties were still negotiating, there was seldom any need to examine and cross-examine witnesses. A fly on the wall at an early arbitration would have seen something much closer to bargaining than to litigation.

There are not many good reports of the conduct of those early arbitrations. They were, after all, informal and therefore not recorded. Some descriptions do appear in studies of early arbitrators like William Morris Leiserson⁸ and George

6. This description of the history of labor arbitration draws extensively on Dennis R. Nolan and Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 FLA. L. REV. 373 (1983) and *American Labor Arbitration: The Maturing Years*, 35 FLA. L. REV. 557 (1983).

7. On the distinction between interest disputes and rights disputes, see, e.g., ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 108-11 (6th ed. 2003).

8. See J. EISNER, *WILLIAM MORRIS LEISERSON: A BIOGRAPHY* (1967).

Taylor,⁹ and in histories of industries like clothing¹⁰ and coal mining.¹¹ One very useful collection, however, is Samuel R. Zack's *Arbitration of Labor Disputes: Cases From an Arbitrator's Files*.¹² Zack was a very busy New York arbitrator who—astonishingly—had a radio show about labor arbitration in New York and Washington for six years. No other arbitrator, before or since, ever commanded so much public attention. Each week Zack presented one of his labor arbitration cases. The book collects many of his stories.

Zack's stories have to be read to be appreciated, but they typically reveal the informality of the process at the time. The parties gather at the table with the arbitrator and state their positions, often with some back-and-forth and questioning. When Zack does not, like Perry Mason, ferret out some previously unknown but decisive fact, he negotiates with the parties to come up with a compromise. There is nothing wrong with using what we would today call med-arb in appropriate circumstances, but often it leads to solutions that carry their own flaws. In one dispute between competing unions in a plant, for example, the representation problem was complicated by the employer's hiring of new employees. Each competing union worried that new hires might join the other. To avoid upsetting the balance, Arbitrator Zack directed the parties to enroll new employees alternately in the opposing unions—one to the AFL affiliate, the next to the CIO affiliate, completely without consideration of the employees' wishes.

More importantly, Zack's stories reveal that the parties either had no collective bargaining agreement or that their brief agreement did not cover the problems that arose during its term. The arbitrator therefore created the rules as he worked. Quite frequently, the bargaining relationship itself was quite new. Again, creative, conciliatory dispute resolution can be useful in such a situation. That form of arbitration was certainly different from later models, but there is no reason to conclude that it was better in any absolute sense even in that setting, let alone today.

By the late 1950s, however, the process had begun to change, and those changes led to the complaints of creeping legalism. The first use of that term that I have found was in the title of a 1958 editorial in the *Arbitration Journal* of the American Arbitration Association (AAA).¹³ The editorial revealed the source of the new phrase when it quoted Professor Emanuel Stein as stating that "[a] frustrating kind of legalism has crept into labor relations because the arbitrator has come to function like a judge and the parties have come to treat arbitration like litigation, with all the canons of construction familiar to the law of contracts."¹⁴

9. INDUSTRIAL PEACEMAKER: GEORGE W. TAYLOR'S CONTRIBUTION TO COLLECTIVE BARGAINING (Edward B. Shils, et al., eds., 1979).

10. E.g., THE CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, THE CLOTHING WORKERS OF CHICAGO 1910-1922 (1922); RITA MORGAN, ARBITRATION IN THE MEN'S CLOTHING INDUSTRY IN NEW YORK CITY: A CASE STUDY OF INDUSTRIAL ARBITRATION AND CONFERENCE METHOD WITH PARTICULAR REFERENCE TO ITS EDUCATIONAL IMPLICATIONS (1940).

11. E.g., Waldo E. Fisher, *Bituminous Coal*, in HOW COLLECTIVE BARGAINING WORKS 229 (Harry A. Millis ed., 1942); T.D. Nicholls, *The Anthracite Board of Conciliation*, 36 ANNALS AM. ACAD. POL. & SOC. SCI. 366 (1910).

12. SAMUEL R. ZACK, ARBITRATION OF LABOR DISPUTES: CASES FROM AN ARBITRATOR'S FILES (1947).

13. *Creeping Legalism in Labor Arbitration: An Editorial*, 13 ARB. J. 129 (1958).

14. *Id.*

What was it about contemporary labor arbitration that bothered the AAA? One of the two examples the editorial provides was a contract-interpretation case in which both parties cited published awards and the arbitrator relied on one of them in making the ultimate holding.¹⁵ The other example was a discharge case in which the arbitrator cited numerous arbitration and court cases bearing on preliminary issues like the burden of proof, the definition of self defense, and so on.¹⁶ The editorial did not cite or quote the opinions,¹⁷ so readers of the journal have no way to determine whether the arbitrators' approaches were justified.

And that was it: creeping legalism seemed to refer to an arbitrator's citation of other awards.

To be sure, there was more to it than that. Citations were, in reality, just one aspect of procedural legalism that happened to catch the eye of the *Arbitration Journal's* editorial writer. There were many more. The best summary of the complaints, which came very late in that game, was a 1983 law review article by Anthony Bartlett.¹⁸ These included, among other things, the use of lawyers, objections to some testimony and exhibits, transcripts, and briefs.¹⁹ The lawyers, in other words, were the worm in the apple, the cause of labor arbitration's fall from grace. Let them in the room, the first critics of creeping legalism seemed to say, and soon the whole orchard is rotten.

If, in this declension myth, nascent arbitration was Paradise and lawyers caused the fall, how could we regain the Garden of Eden? Well, simple: just banish the lawyers and all their paraphernalia and go back to the earlier model.

Of course it really isn't that simple. Nor, I would contend, is it possible or even desirable. The reason for the changes derided by creeping legalism critics is not that lawyers burst unasked into the hearing rooms and took over the proceedings. Rather, two very distinct models of arbitration arose and competed, and the quasi-judicial model triumphed over the mediatorial model. One can follow the debate in the writings of two champions, George Taylor of the Wharton School, for the informal approach, and J. Noble Braden, a vice president of the American Arbitration Association, for the more formal approach. The two argued in various journals beginning in the late 1940s.²⁰ Taylor lost the debate—in fact, time had passed him by even as he wrote. Labor and management had already begun to formalize their arbitrations.²¹

As Richard Mittenhal explained in 1991, the parties had grown up.²² In the infancy of modern industrial relations, they needed outside help to learn how to

15. *Id.*

16. *Id.*

17. *Id.*

18. Anthony F. Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 OR. L. REV. 195 (1983).

19. *Id.* at 206-10.

20. Taylor's main writings on this subject were *The Arbitration of Labor Disputes*, 1 ARB. J. (n.s.) 409 (1946); *Effectuating the Labor Contract Through Arbitration*, 7 PROC. OF THE NAT. ACAD. OF ARB. 20 (1957) (reprinting a talk he delivered before the Second Annual Meeting of the National Academy of Arbitrators in 1949); and *Further Remarks on Grievance Arbitration*, 4 ARB. J. (n.s.) 92 (1949). Braden's contributions were *Problems in Labor Arbitration*, 13 MO. L. REV. 142 (1948); *Arbitration and Arbitration Provisions*, N.Y.U. 2ND ANN. CONF. ON LABOR 355 (1949); and *Current Problems in Labor-Management Arbitration*, 6 ARB. J. (n.s.) 91 (1951).

21. See Nolan & Abrams, *The Maturing Years*, *supra* note 6, at 611-13 (1983); Richard Mittenhal, *Whither Arbitration?*, 44 PROC. OF THE NAT. ACAD. OF ARB. 35 (1992).

22. See Mittenhal, *supra* note 21, at 39-40.

resolve their disputes without committing economic murder or suicide. As they grew, they developed “high levels of sophistication in collective bargaining” and “surrounded themselves with a battery of specialists.”²³ Collective bargaining agreements grew in length and detail. As Mittenthal explained:

The gaps have been filled; the generalizations have been made specific. Things are no longer left to chance. The parties realize they can generally do for themselves what they once expected arbitrators to do for them. They have made their agreements look more like contracts, less like a code or a constitution.²⁴

Given those changes, Mittenthal concludes, it is hardly surprising that parties grew dissatisfied with Taylor-model arbitrators and moved toward the Braden model.²⁵ As the older, Taylor-like umpires moved on, parties chose Braden-like private judges and used their lawyers—and their lawyers’ skills—to argue before the quasi-judicial arbitrators. Yale Law School Professor Harry Shulman was a Taylor-style umpire for Ford and the United Auto Workers between 1943 and 1955.²⁶ He exercised tremendous discretion when resolving grievances. When he died in 1955, however, the parties replaced him with Harry Platt and instructed Platt that they wanted him only to interpret and apply their contracts as written.²⁷ Indeed, says Mittenthal, the result was inevitable:

All the forces I have mentioned—the parties’ needs, their increasing sophistication, their more detailed agreements, the influence of lawyers, the use of precedent, the publishing of awards, the intrusion of law, and so on—have combined to make labor arbitration appear more and more like any other quasi-judicial proceeding. . . . In view of the forces that have been at work, I do not see how this competition between Braden and Taylor could have been resolved differently.²⁸

In fact, while the changes Mittenthal mentions certainly facilitated the triumph of the Braden model, the shift wasn’t really inevitable. Some parties happily retain the informal approach even today.²⁹ At any point they want, parties are free to reject formalized arbitration. Some do so in specific ways, for example, by choosing not to use lawyers, transcripts, or briefs, or by asking arbitrators for bench rulings or very quick summary rulings. However, those are individual cost/benefit decisions by parties to a specific bargaining relationship. They do not demonstrate the general superiority of informal over formal arbitration.

23. *Id.*

24. *Id.* (footnote omitted).

25. *Id.* at 36.

26. *Id.* at 40.

27. *Id.*

28. *Id.* at 46.

29. To give just one example, I serve as the permanent umpire for a major tobacco company that has followed the Taylor approach ever since the plant was organized. The parties have never even hinted that they would like to formalize their proceedings or limit the arbitrator’s power.

For the most part, however, Mittenhal is correct. Once the parties grew up, so to speak, the risks posed by an omnipotent arbitrator-king far outweighed the benefits.

That is the first declension myth. Before procedural legalism, arbitration was different and presumably satisfactory, but not necessarily better. The simple form of arbitration carried its own flaws, chiefly the inability to engage in the sort of fact-finding and fact-testing possible in a more legalized form of arbitration.

Nor was there any human sin that brought about the Fall. Instead, arbitration adapted to meet new circumstances and changed needs. Modern, legalistic labor arbitration suits the parties' current needs, just as the informal, mediatorial arbitration fulfilled the needs of their predecessors. Moreover, many of the practices detractors brand as legalism are simply routine litigation techniques designed to ensure effective presentation of evidence and arguments and, in discipline cases, to protect the rights of the disciplined employees.³⁰

Finally, there is no way to return to the pre-legalistic era. The parties' sophistication and gap-filling—their maturity, in other words—is not going away. Thus, a return to Paradise is not on the cards. Even banning lawyers from labor arbitration might not eliminate the legalism for which they are blamed. Human resources representatives and union business agents are almost as likely as their lawyers to use transcripts and briefs, to challenge evidence, and to cross-examine witnesses.³¹

III. SUBSTANTIVE LEGALISM: THE INTRUSION OF STATUTORY LAW

Until the mid-1960s, labor arbitrators needed only the ability to interpret collective bargaining agreements; in the less common cases of interest arbitration, they also needed to create portions of new agreements, or at least to choose between the parties' proposals. Those duties were even within the capabilities of nonlawyer arbitrators—a majority of the arbitration profession. Rarely did statutory issues find their way into labor arbitrations.

Soon after Congress passed the Civil Rights Act of 1964,³² however, tension between labor contracts and external law became inescapable. The simplest and earliest case of this tension involved the question of how an arbitrator should resolve a seniority dispute when the employer argued that the negotiated seniority clause was discriminatory in intent or in effect. Title VII forbids racial discrimination. An employer seeking to correct for past discrimination (or, more cynical-

30. J. David Andrews, *Legalism in Arbitration; Part II: A Management Attorney's View*, 38 PROC. OF THE NAT. ACAD. OF ARB. 191 (1986).

31. Cf. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? 163 (2d ed. 2004).

Every staff rep or BA [Business Agent] has to function like a lawyer. The entire labor movement is like a giant bar association of nonlicensed attorneys. I have seen them in their windbreaker and ties, going into arbitrations, but they could be divorce lawyers, or DUI lawyers, or street lawyers, the kind who hustle cases in traffic court: no, I think they are more like divorce lawyers, on the 14th floor of the County Building, the kind that enraged husbands pull out guns and shoot. This is the bottom of the labor movement, eight rungs below [union presidents]. But this is the cutting edge of labor. This is where we pick up first-step grievances and DUIs. Actually this is where I pick up some cases myself.

Id.

32. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in 21 U.S.C. (2006)).

ly, to avoid possible discrimination suits and create good public relations) might favor members of protected groups over others when making promotion and layoff decisions. Those actions often conflicted with collective bargaining provisions requiring the employer to select employees by seniority.³³ The problem was particularly acute for federal contractors. Federal government contracting rules required contractors to take “affirmative action” to ensure equality in hiring and promotion.³⁴ Unions naturally grieved employment decisions that rejected the negotiated seniority rules.

This presented a dilemma for arbitrators: applying the contract and ignoring the law would only propel the dispute into another forum, thereby delaying resolution and raising costs, but applying the law and ignoring the contract would require arbitrators to engage in statutory interpretation. That might well undermine the very basis for judicial deference to arbitration awards: arbitrators’ expertise in discerning and applying the common law of the shop. Parties selected arbitrators, Justice Douglas wrote in *Warrior & Gulf*, “because of their ability to bring to bear considerations which may be foreign to the competence of courts. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.”³⁵

But surely arbitrators could not claim to be better than “the ablest judge” at resolving statutory issues.

This tension between law and contract produced the first concern about substantive legalism in labor arbitration: if statutes applied in labor arbitration cases, arbitrators (particularly but not exclusively nonlawyer arbitrators) might not be capable of interpreting them accurately; if arbitrators botched that task, they would harm both parties subject to those laws and the labor arbitration process itself. That was no idle fear. A 1975 survey of members of the National Academy of Arbitrators by Harry Edwards, then-law professor, later a judge on the U.S. Court of Appeals for the D.C. Circuit, found that few experienced arbitrators followed developments in employment discrimination law or even understood that field’s basic concepts and terminology. Nevertheless, they felt competent to decide statutory issues arising in grievance arbitrations.³⁶

Just as the Taylor-Braden debate distilled the arguments about the procedural nature of labor arbitration, so a new debate did the same for substantive legalism. This time the principal debaters were Professor Bernard Meltzer of the University of Chicago Law School and Robert Howlett, a Michigan lawyer and arbitrator. Their dispute played out in the pages of the *Proceedings of the National Academy of Arbitrators* in 1967. What should an arbitrator do when a statute conflicts with a collective bargaining agreement? According to Meltzer, the arbitrator should “respect the agreement and ignore the law.”³⁷ Not so, replied Howlett: not only

33. Not until 1977 did the Supreme Court uphold the validity of most seniority plans challenged under Title VII. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

34. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965).

35. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

36. Harry Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, 28 PROC. OF THE NAT. ACAD. OF ARB. 59 (1976).

37. Bernard Meltzer, *Ruminations about Ideology, Law and Labor Arbitration*, 20 PROC. OF THE NAT. ACAD. OF ARB 1, 14-17 (1967).

should arbitrators apply *both* the contract and the law, he wrote, they should “probe” to determine whether a statutory issue is involved.³⁸ That is, even if neither party raised a legal issue, the arbitrator should, *sua sponte*, investigate to see if one might be there somewhere, and should then resolve the question the parties did not pose. Over the next few years, others occupied positions in the debate between those poles.³⁹

That arbitral divide played out in actual cases as well as at professional conferences. One remarkable example occurred in the late 1970s. In *International Paper Co.*,⁴⁰ Arbitrator F. Jay Taylor faced a seniority grievance when the employer awarded an apprenticeship to a junior black employee rather than to a senior white employee.⁴¹ The employer claimed that it was subject to Executive Order 11,246, which required it to take affirmative action to correct the underutilization of minority employees. The employer further argued that its affirmative action plan required it to award *this* apprenticeship to the junior employee.⁴²

The employer’s argument faced several hurdles. One was that the agreement stated that the arbitrator “shall have no power to add to or subtract from or modify any of the terms of this agreement.”⁴³ Another was that a settlement of an earlier Title VII suit declared that the agreement’s seniority provisions “are not racially discriminatory in their terms or operation.”⁴⁴ A third was that the company apparently did not provide the arbitrator or the union with a copy of the affirmative action plan on which it relied.⁴⁵ A fourth was that Taylor was not a lawyer and had no apparent familiarity with anti-discrimination law, let alone the legality of seniority systems or the impact of general affirmative action plans on specific promotion decisions.

Despite those problems, Taylor decided to plunge into the legal thicket, thus vindicating Harry Edwards’s fears about unqualified arbitrators making legal determinations. Taylor ruled that the unseen affirmative action plan trumped the seniority provisions that had been found lawful in the Title VII settlement.⁴⁶ “Not to so rule,” he wrote, “places the Company in an impossible position.”⁴⁷ With admirable humility, he admitted that he did not know what he was doing:

I shall not attempt to establish conclusively with any kind of final certainty the state of the present law on this complex issue. Nor could I do so if I were inclined. I can only make a reasonable, good-faith determi-

38. Robert G. Howlett, *The Arbitrator, The NLRB, and the Courts*, 20 PROC. OF THE NAT. ACAD. OF ARB 67, 92 (1967).

39. E.g., Richard Mittenenthal, *The Role of Law in Arbitration*, 21 PROC. OF THE NAT. ACAD. OF ARB 42 (1968); Michael Sovern, *When Should Arbitrators Follow Federal Law*, 23 PROC. OF THE NAT. ACAD. OF ARB 29 (1970); and Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 30 PROC. OF THE NAT. ACAD. OF ARB 29 (1977).

40. *Int’l Paper Co. v. S. Kraft Div., Bastrop Mill*, 69 Lab. Arb. Rep. (BNA) 857 (1977) (Taylor, Arb.).

41. *Id.*

42. *Id.* at 859-60.

43. *Id.* at 858.

44. *Id.*

45. *Id.*

46. *Id.* at 860.

47. *Id.* at 861.

nation that affirmative action on the Company's part was not only justified but demanded. . . .

These facts make it quite apparent that . . . the Company was particularly vulnerable to charges of discriminatory practices. To this Arbitrator this conclusion, which I deem valid, carries far more weight than the lengthy testimony produced at the Hearing and the dozens of court cases cited and analyzed by the advocates.⁴⁸

Contrast Arbitrator Taylor's bravery with another arbitrator's caution. David Feller was one of the premier labor lawyers of his generation, arguably the best labor lawyer of the last century. A superb advocate, he successfully argued the *Trilogy* cases for the Steelworkers and participated in *Lincoln Mills* and many other landmark cases.⁴⁹ As a law professor at the University of California-Berkeley, he wrote the most important article ever produced about the nature and role of collective agreements.⁵⁰ As an arbitrator, he rose to the top of his profession and served as president of the National Academy of Arbitrators. If ever there were a labor arbitrator qualified to address statutory questions, it was he.

Shortly after Taylor issued his award, Feller faced a grievance in which an employer (Evans Products) relied on the Fair Labor Standards Act to deny a dangerous job to a seventeen-year-old applicant.⁵¹ The collective agreement unequivocally forbade discrimination "on the basis of age."⁵² It also stated, in words very like those in *International Paper*, that the arbitrator had no authority to "modify or add to any of the terms and provisions of this Agreement, nor to make any decisions on matters not covered by specific provisions of this Agreement."⁵³ The employer naturally wanted him to apply the statute.⁵⁴ The union wanted him to consider only the agreement.⁵⁵

Feller declined the employer's invitation, expressly refusing to follow Taylor's path.⁵⁶ He held that his only authority under the contract was to decide whether the refusal to hire violated the "specific provisions of this Agreement."⁵⁷ He then found that the contract forbade all age discrimination and ordered the employer to hire and compensate the grievant.⁵⁸ He recognized that a court might nullify his order, and that is just what happened—a California court vacated his award on the basis of illegality.⁵⁹

Howlett's position was a radical departure from the way most arbitrators and parties viewed the arbitrator's role. When Howlett sought to apply his theory, he

48. *Id.*

49. COOPER, ET AL., *ADR IN THE WORKPLACE* 194 n.4(b) (2d ed., 2005).

50. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

51. *Evans Prods. Co. v. Johnson Lumber Co.*, 70 Lab. Arb. Rep. (BNA) 526 (1978) (Feller, Arb.).

52. *Id.*

53. *Id.* at 527.

54. *Id.*

55. *Id.*

56. *Id.* at 528.

57. *Id.* at 529.

58. *Id.*

59. *Evans Prods. Co. v. Millmen's Union No. 550*, 205 Cal. Rptr. 731, 732 (Cal. Ct. App. 1984).

did not fare well. In *Roadmaster Corp.*, he sustained a grievance believing that the employer's termination of a collective agreement violated the National Labor Relations Act.⁶⁰ The federal District Court overturned the award, holding that Howlett had exceeded the scope of the submission by relying on law rather than contract.⁶¹

One might have expected the Meltzer position to prevail. In fact, thirty years later, almost all labor arbitrators regularly face and decide legal questions, although not for the reasons Howlett gave or with Howlett's eagerness to probe for issues the parties chose not to raise. All that remains is, as Marty Malin has written, for the courts to declare Howlett the winner.⁶²

How did that surprising result come about? It wasn't because of Howlett's arguments. The courts have not accepted his assertion that all contracts automatically include all statutes or his prediction that the courts would not enforce arbitration awards if the arbitrator failed to consider all statutory issues. Far less have they held that arbitrators should search for and decide legal issues the parties did not raise. The explanation was, rather, a complex of external factors.

First, the enormous outpouring of laws regulating employment following the Civil Rights Act—the Employee Retirement Income Security Act, the Occupational Safety and Health Act, the Pregnancy Discrimination Act, and the Equal Pay Act, among others—made it almost impossible to avoid potential conflicts between contracts and external law.

Second, and far more importantly, the parties themselves incorporated statutory law into their agreements either expressly or impliedly.⁶³ In the federal sector, that was a statutory requirement: all federal sector collective bargaining agreements are subject to all applicable laws and regulations.⁶⁴ In the private sector, parties decided that because statutes would ultimately trump conflicting contract provisions, incorporating statutes into their collective bargaining agreements (or at least into their arbitrations) was less costly and more efficient.⁶⁵ Some contract provisions make certain laws part of the bargain. Others provide that contract provisions are to be read as consistent with relevant statutes. Still others borrow language and principles from laws—for example, prohibiting either party from discriminating on the basis of race, sex, and other protected categories. Regardless of the method of incorporation, once the agreement includes statutory principles and terms, interpreting those provisions becomes as much a part of the arbitrator's job as interpreting any non-statutory clause. In short, arbitrators no longer have the luxury of refusing to apply external law because the parties had internalized it.

Finally, the parties themselves began to argue legal questions even when their agreements did not clearly incorporate statutory law. It is one thing for an arbitra-

60. *Roadmaster Corp. v. Prod & Maintenance Employees' Local 504*, 655 F. Supp. 1460, 1464 (S. D. Ill. 1987).

61. *Id.*

62. Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is it Time for Courts to Declare Howlett the Winner?*, 24 LAB. LAW. 1, 26 (2008).

63. See, e.g., James Oldham, *Arbitration and Relentless Legalization in the Workplace*, 43 PROC. OF THE NAT. ACAD. OF ARB. 23 (1991).

64. 5 U.S.C. § 7122(a)(1) (2006) (allowing the Federal Labor Relations Authority to modify or overturn any labor arbitration award that is "contrary to any law, rule, or regulation").

65. See generally, Mittenthal, *supra* note 39; Oldham, *supra* note 63.

tor to decline one party's invitation to act as a judge when the other party objects, as Feller did in *Evans Products*.⁶⁶ It is almost impossible for the arbitrator to do so when *both* parties issue the invitation.

For all those reasons, arbitrators today—lawyers and nonlawyers alike—routinely address statutory issues in their cases. There is no evidence that their willingness to do so has resulted in unjust decisions or has harmed the labor arbitration process. If they had, one would have expected parties to forbid their arbitrators to decide those issues, or at least to refrain from presenting them to arbitrators. To the contrary, their continued and expanded use of arbitrators in such cases tells us that they are satisfied with the results.

So there is the second declination myth. There was no golden age of arbitration before substantive legalism. Arbitration before 1964 was different from current arbitration and presumably was satisfactory for the time. It was not necessarily better in any absolute sense, and that model is certainly not necessarily better for the modern, more highly regulated era. No human sin destroyed the older version of arbitration; the parties themselves simply decided to resolve statutory and contractual disputes in one forum rather than in two. Nor is there any way to put the genie back in the bottle. So long as arbitrators continue to address statutory questions to the satisfaction of labor and management, parties will continue to use their talents.

IV. HYBRID LEGALISM: THE *PYETT* PANIC

The most recent concern over the legalization of labor arbitration arose following last year's Supreme Court *Pyett* decision.⁶⁷ In order to appreciate that concern, one needs first to remember the background.

Employment—that is, nonunion—arbitration largely began in 1991 when the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*⁶⁸ that at least some individual agreements to arbitrate statutory disputes are enforceable under the Federal Arbitration Act (FAA).⁶⁹ That holding gained added force a decade later when the Supreme Court in *Circuit City Stores, Inc. v. Adams*⁷⁰ rejected the Ninth Circuit's position that the FAA exempted all employment contracts from its reach.

Employment arbitration, usually through compulsory arbitration plans promulgated by employers rather than through individually negotiated agreements, has grown enormously since *Gilmer*. It has proved quite different from labor arbitration. Lawyers almost always represent at least one and usually both parties. The lawyers in employment arbitrations usually come from litigation rather than labor law backgrounds, and they take seriously the Supreme Court's suggestion in *Gilmer* that arbitration is merely an alternative to litigation.⁷¹ As a result, they often import the full panoply of litigation procedures into the arbitration process: dis-

66. *Evans Prods. Co. v. Johnson Lumber Co.*, 70 Lab. Arb. Rep. (BNA) 529 (1978) (Feller, Arb.).

67. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

68. 500 U.S. 20, 26 (1991).

69. 9 U.S.C. §§ 1-14 (2006).

70. 532 U.S. 105, 109 (2001).

71. *Gilmer*, 500 U.S. at 26 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

covery schedules, depositions, dispositive motions, and evidentiary objections, among others. In addition, employment arbitration, by its very nature, involves substantive legal disputes. Employment arbitration is even more legalistic, both procedurally and substantively, than labor arbitration.

In *Alexander v. Gardner-Denver Corp.*, the Supreme Court held that an arbitration clause in a collective bargaining agreement did not bar an employee from suing for racial discrimination even after he lost in arbitration.⁷² *Gilmer* distinguished *Alexander* on the basis that the latter case involved an individual arbitration clause, not a collectively negotiated one, but it nevertheless rejected nearly all the anti-arbitration positions stated by the majority in the earlier case.⁷³ This led some to believe that *Gilmer* undercut *Alexander*—if it did not overrule it.

That was certainly the Fourth Circuit's understanding. In *Austin v. Owens-Brockway Glass Container Corp.*,⁷⁴ a divided Fourth Circuit panel held that an employee covered by a collective bargaining agreement containing both a nondiscrimination clause and a standard arbitration clause had to arbitrate his Americans with Disabilities Act claim.⁷⁵ The nondiscrimination clause of the agreement stated that "[a]ny disputes under this Article as with all other Articles of this Contract shall be subject to the grievance procedure."⁷⁶ The arbitration clause was conventional: "[a]ll disputes not settled pursuant to the [grievance procedure] may be referred to arbitration by a notice given to the company or the union by the other . . ."⁷⁷ In a brief opinion lacking any consideration of the differences between collectively and individually negotiated arbitration agreements, the court held that *Gilmer*, not *Alexander*, applied. Several other circuit courts quickly disagreed.⁷⁸

To resolve the circuit split, the Supreme Court granted certiorari in another Fourth Circuit case, *Wright v. Universal Maritime Service Corp.*⁷⁹ The circuit court in *Wright* relied exclusively on its *Austin* decision in concluding that a relatively standard labor arbitration clause obliged the employee to arbitrate his statutory claims.⁸⁰ The Supreme Court held that the arbitration agreement in *Wright* did not "contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination."⁸¹ While the Court reserved the question of whether a clear and unmistakable waiver *would* require employees to arbitrate such claims, this seemed to be its implication.⁸²

To force employees to arbitrate their statutory claims, the Fourth Circuit cases stretched routine arbitration provisions in ways the contracts' drafters could not have anticipated.⁸³ Because the Supreme Court's decision in *Wright* did not ex-

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

73. *Gilmer*, 500 U.S. at 34.

74. 78 F.3d 875 (4th Cir. 1996).

75. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 886 (4th Cir. 1996).

76. *Id.* at 879-80.

77. *Id.* at 880.

78. *See, e.g.*, *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363-365 (7th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997).

79. 525 U.S. 70 (1998).

80. *Id.* at 75.

81. *Id.* at 82.

82. *Id.*

83. As noted in the text, *Austin*'s arbitration provision simply stated that all unresolved disputes could be submitted to arbitration. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880

plain whether a clear and convincing waiver would be legally effective, the Fourth Circuit took the Court's ambiguity as a green light to continue forcing employees covered by *collective* bargaining agreements to arbitrate their *individual* statutory claims. In *Safrit v. Cone Mills Corp.*,⁸⁴ for instance, it interpreted a slightly different, but still routine, arbitration clause as "indubitably" constituting a clear and unmistakable waiver of the right to sue.⁸⁵

Only after the Second Circuit expressly rejected the Fourth Circuit's approach in *Pyett v. Pennsylvania Building Co.*, did the Supreme Court reenter the fray.⁸⁶ Unlike the Fourth Circuit arbitration clauses, the one in *Pyett* was about as clear and unmistakable as the *Wright* Court could have wished. After listing specific federal, state, and municipal anti-discrimination laws, the agreement provided that "*All such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.*"⁸⁷ Another article of the agreement stated that the arbitrator "shall . . . decide all differences arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement."⁸⁸ The Second Circuit did not challenge the clarity of the purported waiver.⁸⁹ Instead, it held, without qualification, that "arbitration provisions contained in a collective bargaining agreement, which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable"⁹⁰

Unimpressed with the Second Circuit's decision to ignore *Wright's* holding that only a clear and unmistakable waiver in a collective bargaining agreement could bar individual employees' statutory actions, the Supreme Court reversed.⁹¹ It went back to *Alexander* and noted that the arbitration clause in that case did not clearly waive an individual's statutory rights.⁹² Instead, it provided only for arbitration of differences "between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant."⁹³ After analyzing the "tension" between the *Alexander* and *Gilmer* lines of cases, the majority held that "a collective-bargaining agreement that clearly and

(4th Cir. 1996). The collective bargaining agreement in *Wright* covered "all matters affecting wages, hours, and other terms and conditions of employment" and another clause provided for arbitration of "Matters under dispute which cannot be promptly settled between the Local and an individual Employer." *Wright*, 525 U.S. at 73.

84. 248 F.3d 306 (4th Cir. 2001)

85. *Id.* at 308. The parties agreed to "abide by all the requirements of Title VII" and that "[u]nresolved grievances arising under this Section are the proper subjects for arbitration," *Id.* So confident was the court of its interpretation that it stated "it is hard to imagine a waiver that would be more definite or absolute." In fact, because the agreement did not even *mention* individual statutory claims, it is hard for an objective observer to conclude that it "indubitably" waived the right to litigate those claims.

86. *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 93 (2d Cir. 2007), *rev'd*, 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456 (2009).

87. *Id.* at 90 (emphasis added).

88. 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456, 1460 (2009).

89. *Pyett v. Pa. Bldg. Co.*, 498 F.3d at 94.

90. *Id.* at 93-94.

91. *Pyett*, 129 S. Ct. at 1460 (2009).

92. *Id.* at 1469.

93. *Id.* at 1466.

unmistakably requires union members to arbitrate [Age Discrimination in Employment Act] claims is enforceable as a matter of federal law.”⁹⁴

The Court’s decision led some commentators to fear that *Pyett* would make labor arbitration as substantively and procedurally legalistic as employment arbitration.⁹⁵ Although the *Pyett* legalism critics do not contend that pre-*Pyett* labor arbitration was perfect, they do view it as a lot better than the post-*Pyett* version they expect. They also regard the *Pyett* decision as promising another burst of legalism, just as did parties’ decisions to use lawyers in arbitrations and to incorporate external law in their agreements.⁹⁶

This is a false alarm. There is no realistic possibility that *Pyett*-like arbitration clauses will cover a large number of employees. Look first at the *Pyett* arbitration provision quoted above.⁹⁷ After identifying several statutes, it states unequivocally that “all” claims under those statutes will be resolved “exclusively” in the grievance and arbitration process.⁹⁸ Not only have I never seen an arbitration provision that comes close to that, I never even *heard* of one until this case. Even after the Supreme Court’s decision, I still haven’t run across another. It might very well be unique in the country.

Next, consider the parties’ bargaining goals and strategies. From a union’s perspective, there is no reason to seek or accept a waiver of employees’ statutory rights. Unions’ vehement reaction against the *Pyett* decision reflects their ideological antipathy to such waivers. If some local union were to consider adopting similar language, doing so would result in a political disaster once union members learned that their negotiators had deprived them of their legal rights to sue.

Moreover, agreeing to arbitrate statutory claims would pose an enormous financial burden on unions. Vastly increasing the scope of the arbitration clause would sweep in many more grievances. Discrimination cases, the most likely subject in these statutory cases, can be devilishly complex. At a minimum, they require a lawyer, not just for the hearing but for the discovery preceding the hearing. Important statutory issues could also require specially trained arbitrators, and they would likely be more expensive. These cases would require more hearing days, and pre-hearing arbitral work, fees, and out-of-pocket expenses would be far greater than in other arbitrations.⁹⁹

94. *Id.* at 1474.

95. This controversy does not fit my theme of declension narratives as closely as the others do, but it will suffice for a rhetorical device.

96. See, e.g., Anne C. Hodges, *Fallout From 14 Penn Plaza v. Pyett: Fractured Arbitration Systems in the Unionized Workplace*, 2010 J. DISP. RESOL. 19; Michael H. LeRoy, *Irreconcilable Defferences? The Troubled Marriage of Judicial Review under the Steelworkers Trilogy and the Federal Arbitration Act*, 2010 J. DISP. RESOL. 89. LeRoy emphasizes the problems that *Pyett* would cause for judges reviewing these hybrid labor/employment arbitration. Hodges predicts that the decision will lead to continued litigation and that negotiation of *Pyett*-like clauses will complicate arbitrations for unions.

97. *Pyett*, 129 S. Ct. at 1460-61.

98. *Id.*

99. Parties might find ways to moderate the financial impact. For example, unions might require individual grievants to pay all or some of the costs, but such an arrangement would be difficult to design and hard to implement. In a discharge case, for instance questions of discrimination and just cause are often inextricably intertwined. Because unions use grievance representation as a benefit to justify dues payments, limiting representation to non-statutory cases or demanding that grievants pay for that representation would impair the union’s marketing.

Unions thus have no reason to agree to a *Pyett*-like term and many reasons not to do so. They might be swayed if employers were to offer major tradeoffs, but how much would a *Pyett*-like arbitration clause be worth to a typical employer? Not much, I suggest—surely not enough to gain union assent.

The current reluctance of most employers to impose mandatory employment arbitration even for their nonunion employees is revealing. It shows that they do not believe the benefits of mandatory arbitration are worth the costs. The downside of those plans for employers is that compulsory arbitration provides a forum to many employees who would otherwise not have one. Few employees who believe they have been discriminated against are able to obtain legal representation because the chances of prevailing are small and the potential damages are too low to interest most lawyers. Even when employees do sue, federal courts have been surprisingly willing to dismiss their claims on summary judgment. If statutory claims can be deterred or defeated so easily in court, why would an employer make major concessions to provide a more convenient (and perhaps more sympathetic) forum for employees?

The answer is that a *Pyett*-like clause would be valuable to employers only if they feared litigation more than arbitration. So long as they win most court cases at an early stage, arbitration offers few advantages, certainly none worth a major concession to buy the union's concurrence.

V. CONCLUSION

My conclusions should be clear from my preceding comments.

Complaints about procedural legalism in the 1950s and after exaggerated the quality of earlier labor arbitration practices and took no account of the changing needs and wishes of the parties. The more legalistic brand of arbitration we have today is different, but not necessarily worse—and in many respects better—than its predecessors.

Similarly, the complaints about substantive legalism in the 1960s and 1970s proved fruitless. Just as parties had gradually adopted a quasi-judicial form of arbitration, they gradually opted to present their arbitrators with statutory issues. Rather than recoiling from the notion that arbitrators might decide statutory questions, they embraced the practice, incorporating legal dictates in their agreements, and readily arguing those legal issues before their arbitrators. Pre-1964 labor arbitration was different from what we see today, but on these matters it was certainly not better.

Finally, the fears that *Pyett* would reshape the landscape and compel unionized employees to waive their rights to litigate statutory claims have proven so far to be overblown and perhaps even groundless.

Creeping legalism, in other words, is a declension myth, not an accurate criticism of labor arbitration. That charges of legalism are exaggerated and misaimed does not, however, mean that arbitration is perfect. Far from it. Different bargaining relationships and different cases should fall into different places on the formality/informality continuum. Parties should adopt procedures in each instance that provide the best balance of accuracy, fairness, speed, and expense. If they decide to reduce formality, they could implement small changes, like impos-

ing tighter deadlines for steps of the grievance procedure, or radical ones, like “delawyerizing” labor arbitration.¹⁰⁰

The over-arching point is that the parties themselves have complete control over the degree of legalism in their arbitrations. They can have exactly what they want. Neither arbitrators nor lawyers can force them to be more formal than they choose. But if they choose to be more legalistic than outside critics think wise, the outsiders should respect their choices. Their decisions about dispute resolution processes stem from their intimate knowledge of their own needs. Those decisions, therefore, deserve as much respect as their choices on any other matter of the bargaining relationship.

100. See Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L.J. 93 (1989).

