THE CHANGING FACE OF LIBERALISM IN WORKPLACE DEMOCRACY: THE SHIFT FROM COLLECTIVE TO INDIVIDUAL RIGHTS

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INTRODUCTION

The 1960s and 1970s saw a drastic change in the liberal conception of workplace equality. Post-war liberals defined equality in terms of collective rights, with labor law and unions epitomizing this conception. The Civil Rights generation, on the other hand, thought equality to be based in the rights of the individual. As new laws upholding individual civil rights proliferated, employers found themselves increasingly bound by incompatible legal duties under the two parallel systems governing labor rights: the labor arbitration regime and the courts.

Through their union agreements, employers were bound to treat all employees identically, administering vacations, bonuses, and promotions according to seniority as outlined in the collective bargaining agreement. However, the civil rights statutes demanded deviation from these agreements at times by requiring employers to consider individual employee circumstances. By injecting required recognition of individual rights in a time when most workplace decisions were governed by contracts upholding collective rights, a question arose: Where the rights of the collective and the rights of the individual are opposed, to which do we give primacy?

This issue quickly became the subject of dispute in both the courts and labor arbitrations. However, a survey of each system's approach to the problem reveals very different procedural methods of resolution leading to equally different substantive outcomes. In close cases, labor arbitrators tended to side with employers who followed the collective bargaining agreement, often in contravention of the new civil rights statutes. I propose that this pattern arose not from differing views as to what the substantive law should be, or even from racial animus, but rather, from the inherent structural limitations of the labor arbitration process as it stood in the early 1970s.

The role of labor arbitrators had traditionally been limited to interpreting the collective bargaining agreement within the four corners of

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the document, and I propose that the arbitration mechanisms were simply not equipped to take cognizance of laws outside this limited purview. I also suggest that employees' conflicting access to individual rights, depending upon whether they went through the union grievance process or directly to litigation, may have led to a changed view of labor law's role for the average worker. Labor law no longer represented the *avant garde* of the liberal workplace democracy. Rather, its structures now acted to inhibit the movement that the courts and society in general were making toward individual rights. This structural deficit may in turn have led to a social movement away from unionization.

This Article focuses on a narrow time frame in the early 1970s, after the Civil Rights movement was underway, but before labor law and its internal dispute resolution mechanisms had the chance to harmonize themselves with the new conception of equality. It is in this period that the clash of collective rights and individual rights become most apparent within the dispute resolution mechanisms.

I. THE CLASSIC LABOR PARADIGM

Liberals of the post-World War II labor movement sought to transform the "anarchy of the marketplace, which exploited workers, into the harmony of a modern cooperative capitalism, which protected workers."[1] These industrial pluralists of the 1940s and 1950s focused upon the creation of legal rules and administrative processes to resolve workplace conflicts, rather than leave these decisions to unchained employer discretion.[2] Under this system, workplace democracy was conceptualized "in process terms—outcomes or fairness were to be irrelevant."[3]

The legislation which most embodies this pluralistic conception of liberalism is the National Labor Relations Act (or Wagner Act, after Robert F. Wagner) enacted in 1935.[4] This statute limited the means by which employers could react to workers' organizing efforts by explicitly granting employees the right to collectively bargain and requiring the employer to bargain with the employees' appointed representatives.[5] Collective bargaining consisted of negotiation of the terms and conditions of

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1. James B. Atleson, *Wartime Labor Regulation, the Industrial Pluralists, and the Law of Collective Bargaining*, *in* INDUSTRIAL DEMOCRACY IN AMERICA 143, 143 (Howell John Harris & Nelson Lichtenstein eds., 1993).
2. *Id.*
3. David Brody, *Workplace Contractualism in Comparative Perspective*, *in* INDUSTRIAL DEMOCRACY IN AMERICA, *supra* note 1, at 178 (quoting Atleson, *supra* note 1, at 149).
4. *See* National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 451 (codified as amended at 29 U.S.C. §§ 151–180 (2006)).
5. 29 U.S.C. § 157.

employment between representatives of both the union and employer.[6] Under this system, the parties would attempt to predict common employment scenarios—such as hiring, firing, overtime, and vacation—and agree in advance as to how these matters should be handled when and if they arose. This bargaining would eventually culminate in a contract called the collective bargaining agreement (CBA). By delineating procedures to be implemented in given situations, the CBA protected employees from employer whims and in this way attempted to guarantee "equal" treatment.[7] Ideally, the CBA created workplace equality by guaranteeing identical procedural treatment across the bargaining unit thereby ensuring the same predictable level of benefits and opportunities to all employees. Equality for liberals of this era, then, meant the right to identical procedural treatment in the workplace and uniform methods of grievance resolution for those disputes that did arise under the CBA.

II. THE INDIVIDUAL RIGHTS MOVEMENT: TITLE VII AND AFFIRMATIVE ACTION

The 1960s saw several meaningful changes to the legal environment that drastically altered the social and legal landscape upon which collective bargaining agreements operated. Title VII of the 1964 Civil Rights Act[8] imposed a statutory obligation on employers and unions not to discriminate against any individual with respect to his hire or discharge or with respect to his "compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin."[9] Equally significant was an Executive Order[10] that required major government contractors to adopt affirmative action programs to ensure that "applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin . . . includ[ing] . . . upgrading . . . or transfer."[11] These broadly sweeping civil rights laws, aimed at protection of individual rights, quickly

6. Grant T. Anderson, *Collective Bargaining Agreements,* 15 OR. L. REV. 229, 229 (citing Rentschler v. Mo. Pac. R. Co., 253 N.W. 694, 696 (Neb. 1934)).

7. *See* Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 794 (1998) (finding that collective bargaining agreements provided employees with "equalized bargaining power" through "a system of rules governing the employment relation").

8. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e–e15 (1964)).

9. 42 U.S.C. § 2000e–2.

10. Exec. Order No. 11,246, 3 C.F.R. 167 (1965) (amended by Exec. Order No. 11,375, 3 C.F.R. § 684 (1966–1970)).

11. *Id.*

became a source of conflict in the labor dispute resolution structure, which had as its core purpose the protection of collective rights.[12]

These laws demonstrated a dramatic shift in liberalism to a focus on the sanctity of individual rights as opposed to collective rights. "[C]ertain democratic norms w[ere] subordinated" by the labor movement to allow for the collective bargaining process, but under the new civil rights laws, certain rights of the individual could not legally be subordinated for any reason.[13] Whereas post-war labor liberalism aimed to protect the worker by preventing individualized assessment and discretion on the part of the employer,[14] Title VII insisted upon it. These new laws had at their core a fundamentally different conception of workplace equality than was found in the classic labor paradigm, and they proscribed duties on the part of the employer which conflicted with the classic conception of collective rights.

III. A Structural Deficit Manifests Within Labor Dispute Mechanisms

Employers attempting to follow both the new civil rights law and the CBA began to find themselves unable to satisfy obligations to both. For example, an employer with few minority employees might need to perform a layoff but find that the next employee in line for layoff under the CBA is an African-American. Laying off that person could put the employer at risk of Title VII liability. On the other hand, skipping over the minority worker and laying off the next, non-minority employee, would put it in the position of violating the CBA. Employers in these situations faced potential violations no matter which action they chose. This conflict of employer duties carried the confusion created by this clash of rights from the shop floor into the labor dispute resolution mechanisms themselves.

The questions posed by these conflicts broke new ground for labor arbitrators, requiring them to look to laws external to the CBA. Traditionally, arbitrators were tasked with resolving disagreements over the meaning of provisions in the CBA through interpretations of the contract terms within the four corners of the document.[15] Their only duty then was to interpret the CBA as it was written, applying basic contract principles, and to determine whether the parties had complied with their mutually

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12. Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158, 159 (1974–1975).

13. Brody, *supra* note 3, at 178 (quoting Nelson Lichtenstein, *Great Expectations: The Promise of Industrial Jurisprudence and Its Demise, 1930–1960*, *in* INDUSTRIAL DEMOCRACY IN AMERICA, *supra* note 1, at 115).

14. William M. Wiecek, *America in the Post-War Years: Transition and Transformation,* 50 SYRACUSE L. REV. 1203, 1216 (2000).

15. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 333 (3d ed. 1973).

agreed-upon duties.[16] The disputes arising under the civil rights laws, on the other hand, required arbitrators to step from their usual role as contract interpreters into the role of full-fledged adjudicator. This new role raised questions of arbitrator competency, not only as to the substantive law involved, but even as to the arbitrator's authority to decide these disputes.

"Arbitration is a private forum in which the arbitrator receives his authority from the parties to the collective bargaining agreement . . . ."[17] His power to resolve the dispute is derived from party agreement within the contract.[18] Thus, it was unclear whether consideration of Title VII and other laws, not explicitly agreed to in the CBA, came within the scope of arbitrator authority.

Arbitrators became increasingly vexed as to the interface between their obligations to the CBA and new job discrimination laws. The question arose in arbitration after arbitration—to what extent are arbitrators competent to handle "legal" issues in employment discrimination cases?[19] That is, when could an arbitrator address issues arising outside the closed realm of the collective bargaining agreement?

The arbitrators' own answers to these questions were far from uniform. In numerous instances, arbitrators undertook to construe Title VII and apply it to the grievances.[20] However, in numerous other cases, arbitrators took the view that his responsibility and authority was to interpret and apply the CBA only; the Civil Rights Act was beyond his scope of authority.[21] Whichever side of the line an arbitrator fell on, the vast majority of arbitrators informed their decisions as to their own competency by consulting the arguments of one of two scholars: Bernard Meltzer and Robert Howlett.[22]

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16. *Id.*

17. Hollander & Co. v. Int'l Bhd. of Teamsters, 64 Lab. Arb. Rep. (BNA) 816, 818 (1975) (Edelman, Arb.).

18. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

19. *See* ELKOURI & ELKOURI, *supra* note 15, at 331–33.

20. *Id.* at 331 n.34.

21. *Id.* at 331 n.35.

22. *See* Gulf States Utils. Co., 62 Lab. Arb. Rep. (BNA) 1061, 1067 (1974) (Williams, Arb.) (considering both Meltzer's and Howlett's views on competency); *Hollander*, 64 Lab. Arb. Rep. (BNA) at 818 (explaining that Professor Meltzer "has become the most often cited and leading proponent of the view that where a direct conflict exists between the collective bargaining agreement and the law, the arbitrator must ignore the law and follow the agreement").

A. Howlett and Meltzer

According to Bernard Meltzer, the arbitrator could not look beyond the CBA.[23] His two main arguments for this position concerned the parties' consent and the arbitrator's competence. According to Meltzer, "[t]he parties ha[d] consented only to the arbitrator's construing their contract, not to his conforming it to applicable [federal] law. And arbitrators are not competent—in the sense of qualified—to rule on questions of federal law."[24] For these reasons, according to Meltzer, arbitrators were bound to respect "the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law. Otherwise, arbitrators would be deciding issues that go beyond not only the submission agreement but also arbitral competence."[25]

Howlett, on the other hand, argued that "[t]here [was] a responsibility of arbitrators . . . to decide, where relevant, a statutory issue, in order that the [National Labor Relations Board], consistent with its announced policy, may avoid a decision on the merits, and the statutory policy of determining issues through arbitration may be fulfilled."[26] According to Howlett, "each contract includes all applicable law."[27] He thus "infers that an arbitrator charged with construing a contract is also authorized to interpret the applicable law."[28]

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23. Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, *in* THE ARBITRATOR, THE NLRB, AND THE COURTS: PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 1, 16 (Dallas L. Jones ed.,1967).

24. Michael I. Sovern, *When Should Arbitrators Follow Federal Law?*, *in* ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS: PROCEEDINGS OF THE TWENTY-THIRD ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 29, 30 (Gerald G. Somers & Barbara D. Dennis eds., 1970).

25. Meltzer, *supra* note 23, at 17.

26. Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts, in* THE ARBITRATOR, THE NLRB, AND THE COURTS, *supra* note 23, at 78–79.

27. *Id*. at 83.

28. Sovern, *supra* note 24, at 31. At the same time, even Howlett recognized that there would be times when the arbitrator should not bring external law into play:

> When an arbitrator meets one of those cases which might better be determined by the NLRB or EEOC (or some other agency), he may determine that the General Counsel or the Commission, with its power of investigation, is in a better position to secure evidence than is an under- or non-represented employee whose dispute has been submitted to arbitration. He should so advise the parties and withdraw.

Howlett, *supra* note 26, at 92–93 (footnote omitted).

B. Problems with the Scholars' Theories As Applied: The Edwards Study

Several problems with these scholars' arguments become immediately apparent when applied in the real world. First, Howlett's position assumes an arbitrator has the ability to know the boundaries of his competence and when to withdraw. The self-reported statistics from arbitrators during this time, though, show that most were not.[29]

Harry T. Edwards conducted a survey of all United States' members of the National Academy of Arbitrators in 1975[30] in an attempt "to determine . . . the extent to which arbitrators [were] competent to handle 'legal' issues in employment discrimination cases."[31] According to this study, only 77% of the arbitrators had *ever* read a Title VII employment discrimination case.[32] Only 52% regularly read advance sheets to keep abreast of current labor developments.[33] Only 14% indicated they felt confident that they could accurately define and explain the relevant law regarding "bona fide occupational qualification," "reasonable accommodation/undue hardship," and "preferential treatment."[34] Despite this, "72 percent of the respondents indicated that they felt professionally competent to decide legal issues in cases involving claims of employment discrimination."[35]

To break these statistics down further, 50% of arbitrators who said they had never read employment decisions or advance sheets still thought they were professionally competent to decide legal issues involving claims of race, sex, national origin, or religious discrimination.[36] A full 70% of respondents who indicated they did not regularly read advance sheets or keep abreast of current developments under Title VII, nevertheless thought themselves professionally competent to pass judgment on these legal

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29. Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, *in* COLLECTIVE BARGAINING AND LABOR ARBITRATION 1049, 1059 (2d ed. 1979).

30. *Id.* at 1049.

> The survey questionnaire was sent to 409 persons; 200 arbitrators responded to the questionnaire. . . . The average years of arbitration experience among respondents was 21 years (with the range being from 4 to 40 years).
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> The percentage of survey questionnaires returned from each region in the United States was approximately the same. (The lowest percentage was in the southeast region where 40 percent of the arbitrators returned their survey questionnaire; the highest percentage of returns came from the State of Michigan where nearly 63 percent of the arbitrators answered the survey questionnaire.)

Id.

31. *Id.*

32. *Id.* at 1050.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1051.

issues.[37] In the end, "[o]nly 14 percent of the total group of respondents indicated that they felt that they were both (1) professionally competent to decide legal issues in cases involving claims of employment discrimination, and (2) able to define" terms relevant to determinations of employment discrimination.[38] From these statistics, "it is obvious that many arbitrators d[id] not believe that these factors [were] relevant measures of the professional competence of arbitrators to decide legal issues in cases involving claims of employment discrimination."[39] These statistics quite arguably call into question Howlett's assumptions about the ability of arbitrators to know when to withdraw.[40]

Meltzer's proposition has problems of its own. He argues staunchly that legal issues should be left to the courts and arbitrators should stick to what they know: contract interpretation. The first problem with this position is that it increases the likelihood that arbitrators will come to decisions that are illegal to enforce. An employer acting in conformance with the CBA, but contrary to Title VII, would "win" its labor dispute in a Meltzer arbitration because, looking only at the four corners of the document, the employer has acted in conformance with his duties. Of course enforcement of any proposed remedies would be illegal as it would be contrary to Title VII. Accordingly, Meltzer's proposition increases inefficiencies, which completely negate one of arbitration's main functions as a way to conserve scarce judicial resources. What is more, it increases the possibility of arbitral decisions against public policy.

Another problem with Meltzer's proposition that arbitrators should leave adjudication of civil rights issues to the courts was that most employees going through the arbitration process at this time never made it to the litigation phase. While arbitration did not foreclose employee-grievants from pursuing their legal remedies under Title VII, the Edwards study demonstrates that arbitration was frequently the only proceeding in which an employee engaged.

According to Edwards's 1975 study, employment discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC) or the courts in only 25%[41] of all employment discrimination cases heard in arbitration that year.[42] I propose that a possible reason for this

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37. *Id.*
38. *Id.*
39. *Id.*
40. Even those arbitrators who admitted they believed themselves incompetent to adjudicate these cases were in fact passing judgment. Fifty percent of those who felt they were not competent said they had nevertheless heard one of these cases in the past year. *Id.* at 1052.
41. Employment discrimination charges were filed with the EEOC or with the courts in only 84 out of 328 of all the employment discrimination cases heard in arbitration for that year. *Id.* at 1053.
42. *Id.*

dearth of EEOC filings was lack of legal counsel leading to employee ignorance of additional legal options. Legal representation in arbitration proceedings was a rarity for individual employees and hardly common for union-represented employees.[43] According to the Edwards study, employees were personally represented in only 9% of arbitrations during the year surveyed,[44] while their unions had legal representation in only 53% of the proceedings.[45]

Whatever the reason for the low number of appeals to outside entities, it appears that for the vast majority of grievants, arbitration was both the first and last stop. Thus, if employees did not have their Title VII remedies addressed in arbitration, they were not likely to have them addressed at all.

IV. Emergence of Decisional Patterns in Arbitration

Amidst the uncertainty of the arbitrator's competence to consider outside law, two general scenarios began to play themselves out repeatedly in arbitral decisions. In Scenario One, an employer violates the CBA by attempting to comply with laws external to the CBA. In these situations, the arbitrators almost uniformly find for the employee. In Scenario Two, the company takes some action in conformance with the CBA but in contravention of civil rights laws. In this situation, the outcome is almost always in favor of the employer.

Without the appropriate background knowledge, it would seem that this pattern is likely due to racist tendencies of arbitrators and the labor dispute resolution process. No doubt some were. But I propose that as often, it was the structure of the arbitration process, more than the substance of the arguments or the identities of the parties, which led to these divergent outcomes.

A. Case Studies: Scenario One

1. *Hollander & Co.*

The arbitration of *Hollander & Co.* is paradigmatic of an arbitrator's decision process under Scenario One.[46] This proceeding concerned the layoff of two senior white employees who claimed that their termination

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43. *Id.*

44. *Id.*

45. *Id.* It is interesting to note that employers were represented 76% of the time. *Id.*

46. Hollander & Co. v. Int'l Bhd. of Teamsters, 64 Lab. Arb. Rep. (BNA) 816, 817 (1975) (Edelman, Arb.).

constituted adverse employment action in violation of the CBA.[47] In 1968, when the bargaining unit involved was first recognized, the employer had eighteen employees, seven of whom were black.[48] Subsequently, the employer was forced to lay off part of its workforce, after which only four black employees remained.[49] In 1975, two additional layoffs became necessary.[50] The next two employees in line for layoff, by virtue of their seniority under the CBA, were two black employees.[51] Noting that laying off these employees would bring the employment ratio down to two black employees out of a total of eighteen,[52] the employer's attorney advised that further layoffs of black workers would probably result in violation of Title VII and the Civil Rights Act of 1866.[53] Acting on this advice, the employer retained the two black workers and laid-off the two white workers instead.[54] The two white workers then filed grievances against the employer for its failure to follow the CBA.[55]

During arbitration, the parties could not agree on the framing of the issue. The employer posed it as: "Are the seniority provisions of the collective bargaining agreement subordinate to the Civil Rights Acts of 1866 and 1964?"[56] The union framed the issue as: "Did the Employer violate Article VI of the contract by laying off" these employees?[57] The arbitrator, on the other hand, found it was first "necessary to consider what arbitrators ha[d] said about their own authority to deal with conflicts between the collective bargaining agreement and the law, and to determine whether Congress and the courts have provided sufficient guidance for arbitrators where such conflicts exist."[58]

Thus, this arbitrator explicitly acknowledged that a threshold question in any inquiry of this kind must be to what extent the arbitrator can even consider outside law. The arbitrator then framed the issue as: "[W]here a conflict exists between the law . . . and the collective bargaining agreement, from which should the arbitrator draw his authority?"[59]

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47. *Id*.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id.* at 822.
56. *Id*. at 817.
57. *Id*. Because the company admitted that the layoffs were not in accordance with the CBA, acceptance of the union's issue would have resulted in a *de facto* win for the union.
58. *Id.*
59. *Id*. at 818.

The union took a position similar to Meltzer's, arguing that the arbitrator is "without jurisdiction or authority to determine whether federal or state law controls this question. [He] can only interpret the collective bargaining agreement. Only the federal courts can apply and interpret federal statutes."[60] The employer did not contend that an arbitrator can always look to outside law but rather argued that certain language in their CBA allowed for the arbitrator to consider outside law in this particular instance.[61] The language to which the employer referred read: "Should differences arise between the Employer and the Union or any employee of the Company, such difference shall be settled in the following manner . . . ."[62] The company argued that this broad definition of grievance—simply stated as "differences"—implied that grievances under this CBA were not limited to matters arising under the CBA, and thus the outside law as well as the CBA must be considered.[63]

The arbitrator began his analysis of the scope of his own authority with a very Howlett-like statement: "Although [the arbitrator] may not be hired to apply and interpret federal and state law the arbitrator cannot escape the legal framework that surrounds the employment relationship and helps shape the collective bargaining agreement."[64] In summarizing the arguments of Howlett and Meltzer, the arbitrator laid out a brief survey of then-current published labor arbitration decisions, which he found "show[ed] wide differences on this question."[65] In the end, the arbitrator reached a less-than-satisfying conclusion in the typical fashion of arbitrators wrestling with these issues.

> In the final analysis[,] an arbitrator's position on this matter of law versus agreement must rest on his conception of the arbitration process, the clarity of the law, and the role ascribed to arbitration by the legislature and the courts. Neither arbitrators nor legal scholars speak with a single voice on this matter, in fact, the voices are particularly divided. This arbitrator regards the institutional role of arbitration to be that of a private forum endowed by employers and unions with the authority to interpret and apply the collective bargaining agreement. The first loyalty of the arbitrator is to the agreement. It is that document which he must follow.[66]

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60. *Id*. at 817.
61. *Id*. at 818.
62. *Id*. (quoting Article VIII ("Grievance Procedure") of the employment contract).
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*. at 819.

However, after coming to this Meltzer-like conclusion, the arbitrator added a Howlettian caveat, noting that despite his duty to the agreement, the arbitrator "works within a framework of national policy created by legislatures and the courts."[67] He went on to explain that as to national policy, the Supreme Court and Congress had made it clear that the use of arbitration to conserve scarce judicial resources was to be encouraged and thus an "arbitrator is following national policy when he performs his usual task."[68] Conflicts arise in civil rights cases, he explained, "because national policy is not yet clear enough to give the requisite guidance to the arbitrator."[69] The arbitrator noted that while "[s]ome courts have interpreted Title VII so as to allow the continuation of seniority systems even where the application of seniority principles in layoff would cause blacks and females to suffer disproportionally,"[70] others "have modified seniority systems where such systems have continued the effects of past discrimination."[71]

After recognizing the two competing national policies at issue, namely arbitration and antidiscrimination, and lamenting the paucity of guidance from the courts or Congress as to which should win out over the other, the arbitrator throws up his hands: "One of the branches of government will ultimately have to decide whether Title VII takes precedence over collective bargaining agreements and under what conditions."[72]

After all of his discussion regarding theories of arbitral competence and national policy, the arbitrator gives into his frustration and falls back on a classic labor interpretation of the contract, essentially ignoring the outside law. He finds that upholding the employer's interpretation and allowing the company to skip over some employees in line for layoff and choose others would constitute a modification of the CBA, and "[t]he terms of the present agreement [did] not give the arbitrator any such authority."[73] Thus, he held that the grievants were entitled to recall by the employer.[74]

It is clear that this arbitrator did not make his decision based on substantive civil rights law, nor did he perform any conflict-of-law analysis or attempt to discern whether the CBA had primacy over the civil rights laws. He merely concluded that he, in his capacity as an arbitrator drawing

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67. *Id*.
68. *Id*.
69. *Id*.
70. *Id*. (citing Jersey Cent. Power & Light Co. v. Local Union 327, 508 F.2d 687, 691 (3d Cir. 1975), *vacated by* EEOC v. Jersey Cent. Power & Light Co, 425 U.S. 987, 987 (1976)).
71. *Id.* at 819 (citing Watkins v. United Steelworkers of Am. Local 2369, 516 F.2d 41, 44–45 (5th Cir. 1975)).
72. *Id.* at 820.
73. *Id.* at 821.
74. *Id.*

sole authority from the parties to the contract, did not have the power to consider the civil rights laws, and therefore he treated them as nonexistent. Without reference to the civil rights laws, he came to the only conclusion possible: He could not allow the employer to skip over employees of its own choosing because (1) it was against the directives of the CBA, and (2) it would constitute a modification beyond the authority conferred to him by the CBA.

Accordingly, the outcome of this decision was wholly dependent upon the arbitrator's conception of his powers and authority as defined by labor law. This decision represents a paradigmatic example of an arbitrator's struggle with his authority and duty, culminating in a decision that completely abrogates employer duties and employee rights under the civil rights statutes.

2. *Mountain State Telephone & Telegraph Co.*

The arbitrator in *Hollander* spent a good portion of his decision discussing the lack of guidance from Congress and the courts as to the national policy of Title VII. Note that in *Hollander*, the employer's reason for its actions was an attempt to comply with the general mandate of Title VII; it was under no particular judicial order to desegregate, it had no approved affirmative action plan, and its CBA contained no antidiscrimination provisions from which an arbitrator might draw some authority.[75] A number of arbitrators during this period, including the one in *Hollander*, opined that if such directives were in place or such guidance was provided within the CBA, an arbitrator might then be vested with the authority to consider outside law.[76]

An example of such an instance is *Mountain States Telephone & Telegraph Co*.[77] This arbitration concerned four alleged violations of the parties' CBA, each involving the employer's implementation and application of its "Affirmative Action Program and Transfer, Promotion and Upgrade Plan."[78]

Originally, the matter included several individual grievances, but the parties later agreed to withdraw these and submit in their place four hypothetical fact scenarios.[79] The stipulated fact scenarios "were purposed to identify and delineate the most serious problems involving the

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75. *Id.* at 820.

76. *See id.* The arbitrator noted that some arbitrations, court decrees, or approved affirmative action programs have provided the necessary guidance, but in the instance before him, the company simply relied on its duties under Title VII at large.

77. Mountain States Tel. & Tel. Co., 64 Lab. Arb. Rep. (BNA) 316 (1974) (Platt, Arb.).

78. *Id.* at 320.

79. *Id.* at 317.

Affirmative Action Program"[80] and the parties agreed that each was to be treated as a separate grievance for the purposes of arbitration.[81] The grievance which relates to this Article is grievance number four:

> Grievant Senior filed a transfer request and was not awarded the requested position. Nonemployee was hired to fill the position requested by grievant Senior. Grievant Senior is a Caucasian female, and non-employee is a Black female. The Company hired non-employee, since there were no Black females in the job classification in the office where the opening occurred. In the city involved there are at least two Black females employees with greater seniority than grievant Senior, but such employees did not have on file transfer requests. Grievant Senior was qualified to assume the job which was filled by the Company hiring a non-employee. The sole reason for grievant Senior not being awarded the job described on the transfer request was the Company's application of its Affirmative Action override.[82]

Unlike the situation in *Hollander*, the employer in *Mountain States* acted pursuant to an approved affirmative action program and both parties agreed that the arbitrator could look to outside law as a basis for his decision.[83] What is more, the CBA actually included an antidiscrimination provision setting forth the parties' mutual promise not to "unlawfully discriminate against any employee because of such employee's race, color, religion, sex, age or national origin."[84] Thus, none of the procedural restrictions identified by the *Hollander* arbitrator existed here; the parties agreed that the arbitrator was competent to consider outside law, and the CBA included the parties' agreement to promote nondiscriminatory policies thereby seemingly bringing questions of discrimination within the arbitral scope. Further, the "outside law" reached beyond the generic Title VII decree, including an agreed-upon affirmative action program promulgated under a consent decree and approved by the court, which provided positive guidance as to which law the arbitrator should follow. Yet, even under these circumstances the arbitrator seemed unable to transcend his historical role.

His decision begins promisingly: "[I]t is obvious that whenever there is a direct conflict in judicial proceedings between a collective bargaining agreement and Federal law the latter will prevail, and any arbitration award

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 317–18.
84. *Id.* at 318.

ignoring or contravening it will be of no practical effect."[85] The arbitrator surmises that

> if the arbitration process is to continue to have practical value in cases involving alleged discrimination in employment, such cases must be entrusted to arbitrators of special competence, who should give full consideration to Title VII and, by inference, other relevant Federal statutory and administrative law in deciding the case.[86]

This arbitrator even goes on to say that in order for the employer to comply with Title VII's mandate of a "bona fide" seniority system, an employer "may unilaterally implement an Affirmative Action Program designed to correct the effects of past discrimination perpetuated by an existing although otherwise non-discriminatory seniority system."[87] But just as the arbitrator appears to be widening his scope, he quickly retracts it. He warns that despite the new civil rights laws, "[t]he collective bargaining agreement remains a binding contract between the parties, except in such specific instances as it may be shown to be unenforceable because of a direct conflict with the parties' legal obligations as defined by statute, administrative order, or court decree."[88] This interpretation puts the burden on the employer to prove that it would be impossible to comply with the CBA without putting itself in direct conflict with its statutory duties.

He explains that court acceptance of the affirmative action program deeming it in compliance with federal law "[did] not make performance of seniority provisions of the collective bargaining agreement impossible in every instance."[89] The decree in this proceeding authorized the company to set aside the seniority criteria "only if it is unable to meet its intermediate (affirmative action) targets within the stated time frames using these criteria"[90] and as such was not a grant of unfettered discretion. "Implicit in the Decree is a requirement that the Company make a careful, good faith determination that application of the affirmative action override is a matter of real necessity, and that it be able to document this finding."[91] The arbitrator determined that the employer's stated reason for diverging from the CBA—that "there were no Black females in the job classification in the office where the opening occurred"—did not indicate that "the Company

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85. *Id*. at 326.
86. *Id.*
87. *Id.* at 328.
88. *Id.* at 327.
89. *Id.* at 329.
90. *Id.* (internal quotation marks omitted).
91. *Id.*

was unable to meet that target 'within the stated time frame' under normal seniority criteria."[92] Hence, the arbitrator found that the employer had "failed to make a careful, good faith determination that it was unable to meet intermediate affirmative action targets within the applicable time frame without an affirmative action override," and found its actions thus violated the CBA.[93] In other words, according to this arbitrator, even where there is a court decree requiring an affirmative action program, the employer cannot diverge from the CBA to comply with that decree unless they can first prove it is the *only* way to comply with the CBA. This is a very narrow allowance from an arbitrator who purports to be construing and upholding federal antidiscrimination law.[94]

B. Case Studies: Scenario Two

1. *Gulf States Utilities Co.*

Scenario Two involves grievance arbitrations in which an employer takes some action in conformance with the CBA but in contravention of the civil rights statutes. In contrast to the outcomes in Scenario One, here, the arbitrators side almost uniformly with the employer.

Gulf States Utilities Co. involved the grievance of a black employee who alleged that his demotion was motivated by racial animus.[95] The grievant had been hired as a Laborer in September 1968 and was promoted to Helper Electrician in December 1970.[96] In November 1971, though, he was demoted and, in response, resigned.[97] He began preliminary grievance procedures with his union but filed a complaint with the EEOC before the process was completed.[98] After further discussion between the parties, the employer rehired him in March 1972.[99] The employer placed the grievant in

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92. *Id.*

93. *Id.*

94. *See also* Bliss & Loughlin Indus., Inc., 64 Lab. Arb. Rep. (BNA) 146, 147–50 (1974) (McKenna, Arb.) In *Bliss*, the company's contract included a seniority provision. The company promoted a black employee with less seniority than a white employee to conform with its approved affirmative action program. The arbitrator found that because there had been no judicial proclamation that the CBA created a discriminatory seniority system, no conflict existed between federal law and the CBA. The employer was, therefore, bound to comply with the CBA and diverging from the contract constituted a violation. *See also* USM Corp., 69 Lab. Arb. Rep. (BNA) 1051, 1056 (1977) (Gregory, Arb.) (finding that any deviation from the CBA is illegal and arbitrators should leave the interpretation of outside law to the courts).

95. Gulf States Utils. Co., 62 Lab. Arb. Rep. (BNA) 1061, 1067 (1974) (Williams, Arb.).

96. *Id.* at 1062–63.

97. *Id.* at 1063.

98. *Id.*

99. *Id.*

a position similar to the one he had held previously, Mechanics Helper, on a six-month trial period.[100] However, in September 1972, he was demoted a second time to Laborer.[101] This time the parties went through all stages of the grievance process.[102] This culminated in the employer's agreement to develop and administer a test for the grievant to examine the accuracy of the employer's original decision to demote him.[103]

During the arbitration proceedings, both parties agreed to frame the issue as: "Did the company violate the current labor agreement in reducing [the grievant's position] from Mechanic Helper . . . to Laborer?"[104]

The arbitrator acknowledged from the outset that the dispute involved "issues related solely to the contract and it also involves issues related to public law and its interpretation."[105] He thus recognized that the major question posed to him was whether he should look to the contract only, ignoring outside law, or whether both should be examined in his deliberations and final conclusion.[106] He noted that the discrimination claims created by Title VII inject a "new dimension" into run of the mill labor arbitration:[107]

> Given the bargaining experience of the company and the established experience in the representation of its members by the [union], the subject arbitration normally would be a routine case and one that ordinarily should not require more than one day for a hearing. However, the passage of the Civil Rights Act of 1964 is adding a new dimension to what had once been considered to be routine arbitration hearings.[108]

He then summarized the arguments of several scholars including Meltzer and Howlett.[109] The arbitrator ultimately settled on the Howlettian model, finding that the "case meets the test of competence and consent."[110] This led him to the "inevitable conclusion that he must consider the applicable

100. *Id.*
101. *Id.* at 1064.
102. *Id.*
103. *Id.* The grievance also included a separate charge that the test was not in compliance with applicable standards, but it is not necessary for the purposes of this Article to discuss that portion of the arbitration decision. *Id.*
104. *Id.*
105. *Id.* at 1067.
106. *Id.*
107. *Id.* at 1062.
108. *Id.*
109. *Id.* at 1067.
110. *Id.* at 1070.

federal law in arriving at a decision in the subject case."[111] He explained that use of outside law was proper because it was "helpful in interpreting the agreement to consider the law."[112] Further, "[t]he contract is compatible with the law, and in those cases where a dual interpretation is possible, the arbitrator will avoid a construction which would be invalid under a higher law. It is consistent with national labor policy to pursue such a course . . . ."[113] While recognizing that one of the main arguments against the consideration of outside law is that the arbitrator derives his authority from the parties to the contract, the arbitrator explains that he believes the only way to effectuate the wills of the parties is to consider outside law.[114] "[M]ost parties, and especially those in the subject case, expect [the arbitrator] to deal with their problem effectively, and to the extent possible, conclusively. This he cannot do if he ignores Title VII of the Civil Rights Act of 1964."[115]

The employer allegedly demoted the grievant because it found him to be unqualified for the Helper position.[116] According to the employer, this finding was based on the opinions of five supervisors who thought that the grievant lacked "mechanical aptitude, [had an] inability to recognize and select the right tools, and . . . [lacked] . . . inquisitiveness."[117] The union responded to these allegations with the argument that the standard of performance of a Mechanic Helper was not defined in any written material and so any evaluation of the grievant's performance would be entirely subjective.[118] The arbitrator was not swayed: "It is customary for management to place a heavy reliance on its supervisors in the determination of ability."[119] Possibly more telling of the arbitrator's reasoning was the next line of the decision: "Arbitrators consider the opinions of supervisors to be quite important in this regard."[120]

The arbitrator also noted that the existence of a trial period boded well for the employer.[121] "[It] is considered to be a very positive factor in evaluation, for arbitrators generally hold that the ability to perform the job, or the lack of ability, may be demonstrated by a trial or break-in period on the job."[122] Marching through the list of job qualifications, the arbitrator

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111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 1076–77.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

found the supervisor's assessment of the grievant conclusive in each instance, ultimately agreeing with the employer that the grievant was unqualified.[123] His determination relied almost solely on the evaluations of the supervisors, despite the fact that these evaluations were wholly subjective and mostly undocumented.

After determining that the grievant was not qualified for the Helper position, the arbitrator turned to the question of whether the demotion was arbitrary, capricious, or discriminatory.[124] Within this analysis, the arbitrator noted two on-the-job incidents that he felt demonstrated racial animus within the company. In one incident, a "mechanic told [the grievant] to watch where he was going and called him a 'black bastard.'"[125] In the other, a mechanic called him "boy" when he was at the welding bench.[126] When the grievant later approached the mechanic about the statement, the mechanic allegedly pulled a knife and said: "What do you want, Nigger?"[127] In response, the grievant picked up a pipe and a mop, and the two confronted each other.[128] In the end, no blows were struck and the incident ended.[129] The grievant felt that this incident set him apart from other employees in the shop and that he was treated differently afterwards.[130]

The arbitrator made no real inquiry as to how this incident truly affected the grievant's work environment. By the time of the arbitration, the mechanic involved was deceased and so with little discussion, the arbitrator concluded that there was no way to corroborate the incident.[131]

With these matters set easily aside, the arbitrator pointed to several factors which he believed trended away from a finding of discrimination. First, he felt that the six-month trial period, which allowed for an objective determination of skill, counseled against a finding of discrimination.[132]

> A major test of the fairness of a trial period relates to the instructions and assistance received by the employee. . . . "Where instructions and assistance [are] lacking, or . . . given in greater measure to one employee than to another, arbitrators have tended to rule that the trial period was unfair."[133]

123. *Id.* at 1081–85.
124. *Id.* at 1085.
125. *Id.* at 1092.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 1086.
133. *Id.*

The arbitrator held that the employer had passed this test of fairness, basing this finding in great part on statements of the company's vice president.[134] The vice president claimed he had told the grievant "that [the grievant] would be treated the same as any other employee" and that he had instructed the supervisors "to be sure [the grievant] got adequate attention."[135]

In the final section of his discussion regarding the charges of discrimination, the arbitrator looked to the company's past history "in regard to Blacks."[136] He explained that "[t]he failure to achieve a desired level of employment by a member of a protected class is not *ipso facto* racial discrimination. There must be evidence of a general pattern of discrimination or specific examples which contributed to the failure to achieve the desired level."[137] The arbitrator looked to the grievant and union to provide evidence to prove these propositions.[138] He also cited the grievant's own case as evidence that there was no discrimination on the part of the employer.[139] He felt that the grievant's initial promotion tended to show that the employer did not act discriminatorily toward black employees.[140] He also noted that "[o]ther blacks have performed well, and with no allegations of racial discrimination being suggested by anyone."[141] Based on this evidence, and because the union could not prove discrimination, the arbitrator found "no evidence of a general pattern of racial discrimination against blacks."[142]

In the end, the arbitrator denied the grievant relief because "[t]here was not '*clear and convincing*' proof by the union that the grievant was qualified or that the company's argument that he was not qualified was incorrect."[143] Nor was there "*clear and convincing*" proof that "[t]he demotion was not arbitrary, capricious, or generally discriminatory."[144] The arbitrator gave no explanation from where he derived the "clear and convincing" standard. He failed even to expressly acknowledge his choice of that standard in his discussion, mentioning it in passing as if an afterthought in the award determination.

134. *Id.*
135. *Id*.
136. *Id*. at 1095.
137. *Id*. at 1096.
138. *Id*. at 1085–96.
139. *Id*. at 1095.
140. *Id.*
141. *Id*.
142. *Id.*
143. *Id*. at 1097 (emphasis added).
144. *Id*. (emphasis added).

C. Arbitral Competence and Employee Access to Rights

Gulf States Utilities Co. exemplifies the difficulties employees faced in accessing Title VII remedies through the labor arbitration regime even when an arbitrator endeavored to consider outside law. The arbitrator in *Gulf States* held for the employer because the employee had not proven his case by clear and convincing evidence. Title VII puts no such proof burden on the employee, and the employee is never required to prove actual discrimination under any standard. Title VII requires only that an employee make out a *prima facie* case of discrimination.[145] A *prima facie* case is not the equivalent of a determination of actual discrimination; it merely requires the employee to produce evidence from which discriminatory animus may be inferred.[146] This is a very minor burden that comes nowhere near the requirement set forth by the *Gulf States* arbitrator.

When *Gulf States* was decided, the Supreme Court had already established the test for a *prima facie* case of discrimination in the hiring context, and the courts were quick to apply the new analysis to on-the-job practices as well.[147] In *McDonnell Douglas Corp. v. Green,* the Supreme Court held that:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he . . . was qualified for [the] job . . . ; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[148]

However, this standard was not meant to be an inflexible rule, and the Court noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."[149] Nowhere in the jurisprudence of the day was any employee ever required to prove actual instances of discrimination, let alone by clear and convincing

145. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

146. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576–77 (1978).

147. *McDonnell Douglas*, 411 U.S. at 802.

148. *Id.* Even though *McDonnell Douglas* involved a refusal-to-hire claim, lower federal courts quickly applied the *McDonnell Douglas* analysis broadly to cases involving other Title VII discrimination claims. *See, e.g.*, Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974) (remanding to the district court to apply the *McDonnell Douglas* test to a Title VII claim for discriminatory discharge).

149. *McDonnell Douglas*, 411 U.S. at 802 n.13.

evidence.[150] If an employee could establish his *prima facie* case, the burden shifted to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[151]

In *Gulf States*, the employer's articulated nondiscriminatory reason for the adverse action was predicated on the supervisors' subjective evaluations that the grievant was unqualified. Even prior to *McDonnell Douglas*, "employment decisions based on subjective, rather than objective, criteria" were found to "carry little weight in rebutting charges of discrimination."[152] Further, where the employer does articulate a reasonable, nondiscriminatory purpose for an employee's dismissal, *McDonnell Douglas* requires the employee be given the chance to prove that the articulated reason was pretextual.[153] "Other evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [the employee] during his prior term of employment . . . and [the employer's] general policy and practice with respect to minority employment."[154] In short, the employee "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[155] In *Gulf States*, it is not apparent that the grievant was given such a chance.

In *Gulf States*, we see the precise arbitral deficiencies postulated by the Edwards study playing out in the real-world context. The method of analysis followed by the *Gulf States* arbitrator shows a complete lack of understanding of employment discrimination law under Title VII. Despite the fact that he undertook to apply outside law he lacked the proper competence to see the employee's rights effectively redressed. While he purported to review the possibility of discrimination under Title VII, he performed no real Title VII analysis. Being unfamiliar with the civil rights statute, the arbitrator gives its violation much less weight than is due. He subordinated Title VII's provisions to the CBA by imposing a clear and

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150. *See, e.g.*, *Furnco*, 438 U.S. at 577 (finding that "[a] prima facie case under *McDonnell Douglas* raises an inference of discrimination"); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (stating that "the *McDonnell Douglas* formula does not require direct proof of discrimination").

151. *McDonnell Douglas*, 411 U.S. at 802–03.

152. Green v. McDonnell Douglas Corp., 463 F.2d 337, 343 (8th Cir. 1972); *see e.g.*, Moore v. Bd. of Educ. of Chidester Sch. Dist. No., 448 F.2d 709, 713 (8th Cir. 1971) ("[S]ubjective standards carry little weight in meeting the [employer's] burden to prove clearly and convincingly that it is not discriminating where there has been a history of racial segregation."); *see also* Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir. 1971) (holding that a fire department's decision to make prospective employees take an examination to determine employment eligibility was discriminatory to racial minorities).

153. *McDonnell Douglas*, 411 U.S. at 804.

154. *Id.* at 804–05.

155. *Id.* at 805.

convincing standard of proof upon the grievant and followed his trained tendency toward deference to the CBA.

SUMMARY OF FINDINGS AND CONCLUSION

These decisions demonstrate the challenges faced by arbitrators in deciding issues concerning conflicts between the CBAs and the outside law, Title VII in particular. Because of their classic role in subordination to the CBA, and their concomitant duty to refrain from looking to outside law when interpreting that contract, labor arbitrators had a particularly difficult time with the injection of these new rights into their decision processes. In situations where the CBA was violated, the arbitrator's natural tendency, borne of experience and training, was to find a violation on the part of the employer. On the other hand, when the employer followed the CBA, the arbitrator often lacked the close familiarity necessary to determine whether or not there had been a violation of the outside law. This lack of familiarity undoubtedly added to the arbitrator's natural tendency to give greater weight to CBA provisions than to the outside law. Of course, these problems arose only if and when the arbitrator found himself competent to consider the outside law in the first place. If the arbitrator found himself incompetent, Title VII would never even enter into the equation and any violation of the CBA was unacceptable, no matter what such law dictated. Thus employees attempting to address their Title VII rights through the labor arbitration process in the 1960s and 1970s found themselves fighting an uphill battle, even as their counterparts in the courts saw nationally publicized victories. While the structure of a court proceeding included proof burdens in the employees' favor, the structure of a labor arbitration gave more credence to the provisions of the CBA, which by its nature upheld collective rights at the expense of individual rights. The effect of these structural differences was that a unionized employee, whose first step in any workplace dispute was labor arbitration, found his Title VII remedies only sporadically enforced. Society at large had made a shift from a definition of equality centered in collective rights to one centered on the individual. Labor law's inability to make that shift because of its inherent legal structure left it a relic in a time of change and may even have helped lead to the downfall of union organization as the dominant example of progressive workplace democracy.