

above approach affects the analysis only when there are obvious, discrete, and functional reasons to disallow preemption, as there were in *Cuomo*. There is no need to resort to a general thumb on the scale in favor of states' rights, nor is there any need to construct a new enforceable representation of abstract federalism from whole cloth.⁷⁶ While judges will not all agree on which functional federalism considerations merit weight, these are precisely the questions that constitutional judges, such as the federal judiciary, are charged with answering. Such questions are already lurking in the background in the Court's *Chevron* decisions, including Justice Scalia's majority opinion in this case;⁷⁷ hopefully, *Cuomo* will prod future courts to provide a more natural accommodation between *Chevron* and federalism.

F. National Labor Relations Act

Waiver of Right to a Federal Forum. — In 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*¹ that employees could agree to arbitrate claims under federal antidiscrimination laws rather than bring them in court.² The majority of the circuits, however, continued to rely upon a 1974 Supreme Court case, *Alexander v. Gardner-Denver Co.*,³ to establish that collective bargaining agreements (CBAs) negotiated by employers and unions representing employees could not similarly waive the right to a federal forum.⁴ Last Term, in *14 Penn Plaza LLC v. Pyett*,⁵ the Supreme Court held that this understanding of the *Gardner-Denver* precedent was mistaken.⁶ Because collective bargaining agreements hold the same status as individual employment contracts,⁷ and because the right to a federal forum is a mandatory subject of bargaining under the National Labor Relations Act⁸ (NLRA), unions can waive the right to a federal forum through a collective bargaining agreement in the same way that individuals can waive this right through individual employment contracts. The Court presented this case as the obvious extension of *Gilmer* into

⁷⁶ See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009), for a textualist's critique of some of the Court's federalism constructs, such as its Eleventh Amendment jurisprudence, *id.* at 2032–34, and the anti-commandeering principle, *id.* at 2029–32.

⁷⁷ See *Cuomo*, 129 S. Ct. at 2718 (referencing joint federal-state enforcement regimes); *id.* at 2720–21 (referencing states' historic role in enforcing laws against national banks).

¹ 500 U.S. 20 (1991).

² *Id.* at 23.

³ 415 U.S. 36 (1974).

⁴ See, e.g., *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999).

⁵ 129 S. Ct. 1456 (2009).

⁶ *Id.* at 1466.

⁷ *Id.* at 1464–65.

⁸ 29 U.S.C. §§ 151–169 (2006); see *id.* § 159.

the realm of the unionized workplace.⁹ But the Court failed to address many complicated problems involving the place of labor in American society and the fundamental conflicts that arise between employment discrimination law and labor law. Its decision failed to find a theoretical or doctrinal middle ground between the two extreme poles of allowing unions to freely bargain away individual rights and not permitting unions to have any role in bargaining over these terms.

Local 32BJ, a Service Employees International Union local that represents property service employees,¹⁰ negotiated a collective bargaining agreement with the Realty Advisory Board (RAB), which maintains real estate properties in New York City.¹¹ This CBA “set[] the rates of pay, seniority, the amount and conditions of employment leave, the manner of filling vacancies, and myriad other basic terms and conditions of employment.”¹² Most importantly, the contract also included a provision that required the parties to arbitrate employee grievances, including those arising under federal workplace discrimination statutes like Title VII of the Civil Rights Act and the Age Discrimination in Employment Act¹³ (ADEA).¹⁴

In 2003, 14 Penn Plaza, a member of the RAB and a party to the collective bargaining agreement, contracted out its lobby security services to Spartan Security.¹⁵ In accordance with the terms of the CBA, the company sought and gained the approval of the union before taking this action.¹⁶ Nonetheless, when these services were contracted to Spartan, a few of the original lobby security officers were transferred to positions elsewhere in the building as porters and light-duty cleaners.¹⁷ With the help of their union, the employees filed a grievance against 14 Penn Plaza. Among the various claims made in the grievance, the union asserted that the employees had been discriminated against on the basis of their age in violation of the CBA and the ADEA.¹⁸ Pursuant to the CBA, the union brought these claims to arbitration, but upon further consideration, dropped the age discrimination grievances before an arbitrator even considered them.¹⁹ The em-

⁹ See *Pyett*, 129 S. Ct. at 1465.

¹⁰ Brief of the Service Employees International Union, Local 32BJ as Amicus Curiae in Support of Respondents at 1, *Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581) [hereinafter Brief of the Service Employees], available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-581_RespondentAmCuSvcEmplIntlUnion.pdf.

¹¹ *Id.* at 5.

¹² *Id.*

¹³ 29 U.S.C. §§ 621-634 (2006).

¹⁴ Brief of the Service Employees, *supra* note 10, at 10-11.

¹⁵ *Pyett*, 129 S. Ct. at 1461-62.

¹⁶ *Id.* at 1462.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

ployees decided to bring the age discrimination claims on their own and filed a complaint with the Equal Employment Opportunity Commission (EEOC) and ultimately a claim under the ADEA in the U.S. District Court for the Southern District of New York.²⁰ In response, the employer moved to compel arbitration through the Federal Arbitration Act²¹ (FAA).²² Citing Second Circuit precedent, the district court held that the right to a federal forum in which to make discrimination claims could not be waived through a collective bargaining agreement.²³ The employer appealed to the Second Circuit.²⁴

The Second Circuit affirmed the decision of the trial court.²⁵ Arguing that the Supreme Court's holding in *Gilmer* permits unions to waive the right to a federal forum, the employer asked the Second Circuit to reconsider its prior holding in *Rogers v. New York University*²⁶ that such waivers are unenforceable. The court rejected this invitation, reaffirming *Rogers* and holding that Supreme Court precedent identified a distinction between waivers in a collective bargaining situation and waivers in an individual employment contract.²⁷ It relied primarily on *Gardner-Denver*, which it interpreted to hold that unions could not waive the right to a federal forum for Title VII claims.²⁸ The Second Circuit noted that a later Supreme Court case, *Wright v. Universal Maritime Service Corp.*,²⁹ avoided the question by holding that the union at issue had not clearly and unmistakably waived federal forum rights in the CBA.³⁰ The court interpreted *Wright* as still recognizing the clear distinction between collective and individual waivers, thus leaving the *Gardner-Denver* holding undisturbed.³¹

The Supreme Court reversed. Writing for the Court, Justice Thomas³² first eschewed case law analysis and turned to the relevant statutes. The first issue the Court engaged was whether unions could waive federal forum rights under the NLRA. The Court cited the broad authority of unions to bargain collectively over all terms and conditions of employment and held that a federal forum waiver is a “condition[] of employment’ that is subject to mandatory bargaining

²⁰ *Id.*

²¹ 9 U.S.C. §§ 1–16 (2006); *see id.* §§ 3–4.

²² *Pyett*, 129 S. Ct. at 1462.

²³ *Id.* at 1462–63.

²⁴ *Id.*

²⁵ *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007).

²⁶ 220 F.3d 73 (2d Cir. 2000).

²⁷ *Pyett*, 498 F.3d at 92–93.

²⁸ *Id.* at 91 n.3.

²⁹ 525 U.S. 70 (1998).

³⁰ *Pyett*, 498 F.3d at 92.

³¹ *Id.*

³² Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito.

under § 159(a)” of the NLRA:³³ “The decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery.”³⁴ In a footnote, the Court noted the concern that a waiver of a federal forum right is unlike the other kinds of employment terms over which unions bargain, in that rights to be free from discrimination seem to protect individual, countermajoritarian interests, whereas unions are majoritarian institutions.³⁵ The Court insisted that this concern was misplaced because a waiver of a right to a federal *forum* did not constitute a waiver of the substantive right to be free from discrimination. This right, after all, could still be protected by an arbitrator.³⁶

The Court then considered whether the FAA or the ADEA prohibited the waiver of a right to a federal forum for ADEA claims. The Court noted that its decision in *Gilmer* had definitively answered this question, and that there was no aspect of either statute that would indicate a distinction between an individual and a collective waiver.³⁷

Only after performing this statutory analysis did the Court seek to distinguish its *Gardner-Denver* precedent, a case that had led all circuits but one to develop rules against collective waiver of federal forum rights.³⁸ The Court insisted that this case had been misinterpreted by lower courts, including the Second Circuit. According to the Court, the case did not concern the question of whether a union could waive a right to a federal forum for employees making discrimination claims. Rather, *Gardner-Denver* addressed whether an employee who had pursued a discrimination claim under a CBA arbitration provision that did not clearly incorporate statutory rights was then prohibited through the doctrines of election of remedies and *res judicata* from bringing a statutory discrimination claim in federal court.³⁹ The Court admitted that parts of the *Gardner-Denver* decision spoke more broadly about the harms of arbitration, but the Court observed that these aspects of the opinion were not only *dicta*, but also were based on a misplaced — and later corrected — mistrust of arbitration.⁴⁰

³³ *Pyett*, 129 S. Ct. at 1464 (alteration in original) (citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991)).

³⁴ *Id.*

³⁵ *See id.* at 1464 n.5.

³⁶ *Id.*

³⁷ *Id.* at 1465–66.

³⁸ *See, e.g., Air Line Pilots Ass’n, Int’l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999) (describing how the circuits had resolved this issue).

³⁹ *Pyett*, 129 S. Ct. at 1466–68.

⁴⁰ *Id.* at 1469.

Justice Stevens filed a dissenting opinion that focused on the Court's aberrant willingness to shed prior interpretations of a statute that Congress and lower courts had presumed to be the law.⁴¹

Justice Souter also dissented.⁴² Like Justice Stevens, Justice Souter criticized the Court for what he perceived to be the shedding of its *Gardner-Denver* precedent even though that case had interpreted a federal statutory provision that had not been disturbed by Congress.⁴³ Justice Souter also emphasized the difference between CBA provisions that cover wages and CBA provisions that waive individual rights, the latter being beyond the scope of the NLRA, which is meant to govern majoritarian processes.⁴⁴

The Court enters difficult terrain when it seeks to set the proper balance between the NLRA, which is concerned with collective rights and duties, and other expansive statutory schemes, such as the ADEA, that are concerned with individual rights and duties. *Pyett* is the most recent example of the Court's all-or-nothing approach to NLRA interpretation. Under this approach, either the "collective rights" embodied by the NLRA predominate over individual rights and duties or individual rights and duties predominate without regard for how they might undercut the collective interests protected by federal labor law. This approach is perhaps rooted in a notion that the collective interests protected by the NLRA are irreconcilable with other statutory regimes. But this idea is mistaken. In fact, it is possible to take a more nuanced, pragmatic, and balanced approach to statutory interpretation in the labor law context that preserves both the individual and collective interests at stake in collective bargaining.

Despite the fact that the Court presented the case as involving simple statutory analysis,⁴⁵ conflicts between labor and employment protections pervaded *Pyett*. Historically, minority groups — racial minority groups in particular — have had a strained relationship with the labor movement. On the one hand, unions have frequently recognized that minorities make up a large proportion of the working class and are critical to the growth of the unionized workforce.⁴⁶ On the other

⁴¹ See *id.* at 1475–76 (Stevens, J., dissenting).

⁴² Justices Stevens, Ginsburg, and Breyer joined Justice Souter's dissent.

⁴³ *Pyett*, 129 S. Ct. at 1478–79 (Souter, J., dissenting).

⁴⁴ *Id.*

⁴⁵ See *id.* at 1466 (majority opinion) ("Examination of the two federal statutes at issue in this case, therefore, yields a straightforward answer . . . : The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA.").

⁴⁶ See, e.g., NANCY MACLEAN, FREEDOM IS NOT ENOUGH 88–89 (2006) (explaining how, spurred by Title VII, African Americans began joining the Southern workforce in greater numbers and were at times welcomed by unions that saw this trend as an opportunity to swell their ranks).

hand, union leaders have also sought to preserve the advantage of a small — and very often homogenous — set of employees.⁴⁷ Indeed, many of the Court's most sweeping statements in *Gardner-Denver* may have been grounded not only in a distaste for arbitration, but also in a desire to protect minorities from unions that may have been eager to give away minority rights in exchange for higher wages and benefits for everyone.⁴⁸

However, changes in union behavior with regard to the protection of minority rights may provide a reason for moving beyond *Gardner-Denver*. One could argue that as the labor movement has moved beyond its racially discriminatory past, unions should have the opportunity to bargain over issues relating to minority rights, as unions may provide the most robust support for these rights.⁴⁹ But even if unions no longer discriminate against minority employees, there is a conceptual problem with allowing them to bargain over issues so closely related to minority rights. Labor law is grounded in a majoritarian system, whereas employment laws are explicitly countermajoritarian, protecting those employees who do not make up a majority of the workforce.

Some of *Pyett's* doctrinal consequences exacerbate these tensions. The first step in the Court's analysis was its determination that the right to a federal forum to litigate statutory antidiscrimination claims was a mandatory subject of bargaining.⁵⁰ This conclusion not only means that the NLRA gives unions the authority to bargain over the waiver of a right to a federal forum, but also that employers cannot unilaterally impose the waiver of this right on employees.⁵¹ Conversely, if unions did not have the authority to bargain over this term, there is a strong argument that employers could force employees to accept the term as a condition of employment,⁵² thus implementing the

⁴⁷ See NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 74 (2002) ("In many factories and mills white workers came to see their committeemen and union seniority system as protectors of a new sort of property right to the job. If security was a watchword of the New Deal and the new unionism, it now came into conflict with the new rights consciousness generated by African Americans seeking an entrée into the mainstream of blue-collar industrial life.").

⁴⁸ For a prominent example of a case in which the interests of employees and their union were at odds, see *Emporium Capwell Co. v. West Addition Community Organization*, 420 U.S. 50 (1975), which held that unionized minority employees could not bargain directly with their employer over issues relating to employment discrimination. *Id.* at 70.

⁴⁹ See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1834–36 (2001) ("When the law sends the message that racial and gender justice have nothing to do with economic justice, it fragments workers' identities and saps the moral power from the labor movement's call to arms." *Id.* at 1834.).

⁵⁰ See *Pyett*, 129 S. Ct. at 1464.

⁵¹ See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335–37 (1944).

⁵² Cf. *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484–86 (D.C. Cir. 1999) (holding first that the Supreme Court precedent set in *Gilmer* and *Gardner-Denver* established a

kind of modern-day “yellow dog contract[]” that employees’ rights advocates have condemned.⁵³ Therefore, given the Court’s holding in *Gilmer*, one could argue that a finding that a waiver of the right to a federal forum is a mandatory subject of bargaining is more protective of the rights of employees because it ensures that union representatives stand between them and potentially unfair terms.⁵⁴ At the same time, however, a finding that a waiver is a mandatory subject of bargaining presents other problems for employees, as it may mean that employers can insist upon the term to impasse, forcing employees to invoke economic action (or work without a collective bargaining agreement) if they want to avoid waiving their right to a federal forum to bring statutory discrimination claims.⁵⁵

Instead of addressing these theoretical and doctrinal conflicts, however, the Court invoked an all-or-nothing approach. The majority failed to recognize that labor law provided them with the tools to allow unions substantial collective bargaining power while still protecting individual interests. Similarly, the dissents should have acknowledged that the individual rights and interests they sought to protect could be preserved while still allowing unions to play a powerful, and arguably very important, role in advocating on behalf of individual employees.

Rather than more closely examining how the process of collective bargaining might accommodate both collective and individual interests, the Court merely described avenues for protecting individual interests that require post hoc examination of the manner in which unions and employers deal with discrimination claims. These avenues fail to take into account the union’s role in arbitrations and provide insufficient guidance to lower courts, threatening to swallow up the Court’s decision. Moreover, because these possibilities address the issue of how a union deals with a claim of discrimination rather than with the collective bargaining process, they fail to provide much guidance for unions and employers on whether and how they can include such arbitration clauses.

rule that unions could not waive employees’ rights to a federal forum for statutory discrimination claims, and second that it did not make sense to force employers to bargain with unions over a term to which unions could not commit employees).

⁵³ Crain & Matheny, *supra* note 49, at 1802 (internal quotation mark omitted).

⁵⁴ Counsel for 14 Penn Plaza made this point at oral argument. See Transcript of Oral Argument at 19, *Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-581.pdf (“What is the alternative here? The alternative is that employers can bypass the union. They can just go around the union and — and have individual *Gilmer* agreements signed up.”).

⁵⁵ See Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 515 (2001).

First, the Court explained that unions that choose not to bring statutory antidiscrimination claims could be liable for a breach of the duty of fair representation or directly liable under federal antidiscrimination law.⁵⁶ The former source of liability, though, is limited: Supreme Court precedent is clear that putting the interests of the collective above the interests of the individual in deciding not to bring any particular claim to arbitration is not a breach of the duty of fair representation.⁵⁷ This duty protects against only the most egregious and arbitrary conduct and recognizes that unions have a duty to the collective, not to any single individual. By its very definition, then, the claim does not protect against exactly the kind of union behavior that worried the petitioners in *Pyett*: a union's decision to forsake minority rights to protect majority interests.

Second, the Court noted that courts must consider in each particular case whether the prescribed arbitration procedure allows employees to “effectively vindicat[e]” their federal statutory claims.⁵⁸ Although an employee's claim that she could not fully vindicate her statutory rights may be compelling in many instances, the Court provided minimal guidance for how lower courts should address this question. The Court left the door open for courts to find that union-run arbitration schemes never properly allow employees to vindicate individual statutory rights, thereby completely undercutting the Court's holding in *Pyett*.⁵⁹ More important for the purposes of this comment, allowing this argument casts doubt over all union-negotiated waivers of federal forum rights without forcing unions to take individual rights into account at the collective bargaining stage. In other words, it allows lower courts to engage in the same kind of all-or-nothing approach to labor law on display in *Pyett*: either the collective bargaining agreement trumps the employee's individual concerns just as the Court implied they sometimes should in *Pyett*, or the individual interests predominate, negating any union-negotiated term after the fact.

⁵⁶ See *Pyett*, 129 S. Ct. at 1472–73.

⁵⁷ See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (“A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.”).

⁵⁸ *Pyett*, 129 S. Ct. at 1474 (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)) (internal quotation marks omitted).

⁵⁹ In the first case to answer the question left by *Pyett*, the Southern District of New York found that a union's complete control over the arbitration and grievance process prevented individuals from being able to vindicate fully their federal statutory rights. Thus, the collective bargaining agreement at issue impermissibly waived the employees' rights to a federal forum. See *Kravar v. Triangle Servs., Inc.*, No. 1:06-cv-07858-RJH, 2009 WL 1392595 (S.D.N.Y. May 19, 2009); cf. *Borrero v. Ruppert Hous. Co.*, No. 08 CV 5869 (HB), 2009 WL 1748060, at *2–3 (S.D.N.Y. June 19, 2009) (ordering arbitration of a suit brought under the same CBA at issue in *Pyett* but noting that *Pyett* recognized an exception to the general rule of arbitrability if the union thwarted the plaintiff's efforts to arbitrate his claims).

The Court should have adopted a framework that both recognizes that unions can play a role in protecting individual rights and acknowledges that individual interests are sometimes inherently opposed to collective interests. Indeed, the Court had multiple alternative options at its disposal.

First, even if the Court believed that unions have the *authority* to waive rights to a federal forum, this conclusion did not necessarily require the Justices to find that waiver is a mandatory term; instead, waiver could be a *permissive* term.⁶⁰ This distinction could be critical to individual employees. As indicated above, a mandatory subject of bargaining can be insisted upon until impasse. As a result, if federal forum rights are a mandatory subject of bargaining, employers will often be able to obtain a waiver of the right merely by insisting upon the term. Even if the arbitration provisions at issue here are “conditions of employment” under section 9(a) of the NLRA,⁶¹ there is an argument that terms are *not* mandatory subjects of bargaining if insistence upon them would burden the collective bargaining process.⁶² Even more easily, the Court could have provided some indication that even if waiver of forum rights was a mandatory subject of bargaining, employers could not implement this term to impasse.⁶³ The Court has already held that traditional grievance arbitration provisions cannot be implemented to impasse,⁶⁴ and this doctrine seems easily applicable in the context of arbitration of statutory rights. Although the Court was not confronted with this question, it missed an opportunity to allow unions to waive the right to a federal forum while preserving some of the unique individual interests at stake in these kinds of cases.

Second, the Court failed to address the issue of the relationship between its holding and the possibility that an employer could insist upon waiver as a condition of employment if the union did not have the authority to bargain over the term. On the majority’s part, an acknowledgment that its holding had the result of prohibiting these sorts of “yellow-dog contracts” would have exhibited an understanding of how its holding might protect *individual* rights. And the dissenting

⁶⁰ See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (holding that an employer could not insist upon a nonmandatory term to impasse).

⁶¹ See *Pyett*, 129 S. Ct. at 1463 (quoting 29 U.S.C. § 159(a) (2006)) (internal quotation mark omitted).

⁶² See *NLRB v. Katz*, 369 U.S. 736, 747 (1962) (“[T]he Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement.”); see also *Hodges*, *supra* note 55, at 532–33.

⁶³ Cf. *McClatchy Newspapers, Inc.*, 321 N.L.R.B. 1386 (1996).

⁶⁴ See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201 (1991) (“We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement.”).

Justices, who would have held that a federal forum waiver is not a mandatory subject of bargaining, should have discussed the attendant possibility of employers imposing “yellow-dog” arbitration clauses. The dissent could even have argued that a holding that waiver is *not* a mandatory subject of bargaining does not necessarily mean that employees are subject to unilateral imposition.⁶⁵ Even if this approach were ultimately unpersuasive, it would exhibit a greater awareness of the tensions at stake in this case. Although counsel for Pyett was willing to grant that waiver was not a mandatory subject of bargaining, putting off the question of the impact this holding would have on individual employees for another day,⁶⁶ the dissent could have taken a more balanced approach.

Finally, such a balanced approach would have required the Court to justify the assumption that any obligation legally entered into by the union automatically binds employees as well. Here, there was a serious factual question about whether the contract actually did bind the employees to arbitrate their claims. The union vigorously argued in its amicus brief that the employees were never bound to arbitrate, and in fact, that the arbitration mechanism specified in the contract could not be applied to the employees.⁶⁷ To be sure, if the Court had decided that the CBA at issue did not bind individual employees, unions and employers could then more carefully negotiate language about waiving the right to a federal forum and eventually force the Court to consider whether unions had the authority to bargain over this term. But even if the Court had ultimately arrived at the same holding, an analysis of whether the CBA bound individual employees would have served an important function. Indeed such an analysis would have highlighted the important role that unions have in bargaining over the mechanisms for dispute resolution while also acknowledging that when it comes to statutory discrimination claims, the interests of individ-

⁶⁵ See Hodges, *supra* note 55, at 540–56 (arguing, in part, that the close relationship between waivers and mandatory subjects of bargaining counsels against allowing employers to impose waivers on employees through private agreement, even though waivers may not be *mandatory* subjects of bargaining). This argument is more compelling when the term is a permissive as opposed to an illegal subject of bargaining. See *Air Line Pilots Ass’n, Int’l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484–85 (D.C. Cir. 1999).

⁶⁶ Transcript of Oral Argument, *supra* note 54, at 41 (“And the question of whether or not imposing arbitration on individual workers would be a condition of employment, that is a question that you can safely leave for another day.”).

⁶⁷ See Brief of the Service Employees, *supra* note 10, at 18. The union also noted that it was *impossible* for the employees to take part in the kind of arbitration that the contract contemplated without the participation of the union. See *id.* In this way, there was no contract under which the district court could have ordered arbitration pursuant to the FAA.

ual employees may not always be perfectly aligned with those of the union.⁶⁸

It is understandably difficult for courts to accommodate collective and individual interests simultaneously. But instead of giving up and allowing one set of rights and interests to trump the other, the Supreme Court should attempt to find a workable solution that will protect the policies embodied in both labor and employment statutes. In *Pyett*, this opportunity was available to the Court in the form of a more fine-grained analysis of the role of unions and employees in collective bargaining. Instead, the Court held that when it comes to bargaining, the union is a perfect stand-in for the employee. The Court failed to recognize the ways in which this holding would protect some individual interests while undermining others.

G. Review of Administrative Action

1. *Clean Water Act — Judicial Review of Cost-Benefit Analysis.* — The controversy regarding whether and how administrative agencies should use cost-benefit analysis has long divided scholars, bureaucrats, and politicians. The Supreme Court's position in the battle, however, has remained uncertain. In 1981, when cost-benefit analysis was a relatively new tool of the administrative state, the Court refused to find that a statute *required* cost-benefit analysis in the absence of clear statutory text to that effect.¹ The Court did not address the issue again until twenty years later, in *Whitman v. American Trucking Ass'ns*,² when it "refused to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs."³ Taken together, the Court's early decisions could be read to establish a presumption against cost-benefit analysis in the absence of clear congressional language to the contrary.⁴ But proponents of cost-benefit analysis argue that these cases are not so definitive and advocate that the Court clarify its stance by adopting a general presumption in favor of cost-

⁶⁸ Furthermore, engaging this issue would have, in conjunction with *Wright*, provided for a kind of clear statement rule: a CBA that sought to waive individual rights to a federal forum would not only have to mention explicitly the statutes at issue, but also would have to state that the term applied to individual employees. This rule would provide some extra protection for employees while still enabling unions to bargain over the waiver of federal forum rights.

¹ See *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510–12 (1981).

² 531 U.S. 457 (2001).

³ *Id.* at 467.

⁴ See, e.g., Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 428 (1981) (suggesting — although ultimately rejecting — that *Donovan* "may indicate a judicial presumption against requiring cost-benefit analysis"); Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 238 (2004) (arguing that the Court decided *American Trucking* in part on a presumption that "where the statutory language is ambiguous, the court should presume that Congress has *not* authorized the agency to consider costs").