David Feller, Senior Partner

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I.

DAVE FELLER, LAWYER-SCHOLAR

While in law school, in the late 1950’s, I decided that I wanted a career in labor law, representing unions. I asked my labor law professor what firms I should consider. He told me there was one firm nationwide that stood out from all the rest: Goldberg, Feller and Bredhoff. He warned, though, that the firm was very small, and the chances of getting a job there remote. I did some research and discovered that the firm had only four lawyers: three partners (Arthur Goldberg, Dave Feller, and Elliot Bredhoff), and one associate (Jerry Anker). The firm was General Counsel to one of America’s largest unions, United Steelworkers of America (which at that time had 1.3 million members). It was also General Counsel to the Industrial Union Department of the AFL-CIO (the continued embodiment of the CIO after its merger with the AFL). When I applied to the firm, I received a polite letter advising that the firm was not hiring, and I shuffled off to my second-choice, the Department of Justice.

Two years later, John Kennedy was elected President, and chose Arthur Goldberg to be Secretary of Labor. The firm, bereft of its senior partner, but still General Counsel of the Steelworkers and IUD, announced that it was looking for a new associate. I pounced.

My job interview began inauspiciously: I was ten minutes late. I explained that I had been unable to find the entrance to the building. Dave Feller asked caustically whether I anticipated similar difficulties finding my way into courthouses. I did not think this a good sign, and nothing else about the interview suggested that I was garnering any favor in that quarter. Indeed, as I later learned, another applicant had a more impressive academic record, and I strongly suspect that, given Dave’s intellectual bent,

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1. The firm’s address was 1000 Connecticut Avenue, but I was unable to find an entrance on Connecticut Avenue despite diligent search. It was ten minutes before it occurred to me to look around the corner, where I found the entrance on K Street. The building owners had reached for a tony Connecticut Avenue address, but hadn’t thought it necessary to match the doorway to the address.
I was not his first choice. But I did get the offer, even on a split decision, and that other candidate went off to a career as a renowned environmental law scholar at a top-ten law school.

The firm that I entered had two “senior” partners: Dave Feller, then 44, and Elliot Bredhoff, then 39. Both were intimately involved at the policy-making level in the affairs of the Steelworkers and IUD, and both participated in the Steelworkers’ negotiations with the steel, aluminum, and can manufacturing industries, but beyond that there was a clear division of responsibility: Dave was the barrister, Elliot the solicitor. Elliot strove to solve problems and avoid lawsuits. Dave relished lawsuits, and saw them as an instrument for achieving social change.

Newly minted lawyers are of little value in negotiating and problem-solving, so the bulk of my work at the firm was brief-writing under Dave’s tutelage. Dave did not suffer fools gladly, and my early efforts, I fear, confirmed his initial instincts that I was just such. Dave’s was not (then at least) a gentle pedagogy. If a draft of a brief fell short, Dave was quick to point out its deficiencies. My earliest drafts were returned with Dave’s “suggested” changes. A typical draft had literally everything I had written crossed out, with Dave’s substitute text handwritten onto every available white space on the page. For timid neophytes, this could be terrifying. As I was the only neophyte around, it was especially so.

But it was also remarkably educational. I was “enjoying” a unique experience: apprenticing in a four-person law firm with a consummate master. Dave was the best appellate advocate I’ve seen, bar none, in the now forty-plus years of my legal career. I learned by osmosis from my humbling experiences under Dave’s tutelage. In time, whole sentences of my draft briefs, and occasionally even paragraphs, survived Dave’s demanding pen. It’s good that they did, for in just a few short years Dave was gone to pursue his second career as academic/arbitrator, and I, not yet 30, was (by default) in charge of the firm’s litigation.2

I’ve written hundreds of briefs since Dave departed, but in my mind’s eye, even today, Dave is looking over my shoulder as I draft each of them. Each has been written to satisfy Dave’s restless pen; if it meets that standard, satisfying the judges will be a piece of cake.

I learned more than just brief-writing under Dave’s tutelage. I learned a unique method of practicing law. Lawyers who opt to represent unions do not have wealth acquisition as their primary goal, but Dave Feller and Elliot Bredhoff carried this disinterest to unparalleled heights. They did not solicit business for the firm. Rather, they were content to focus on the firm’s two principal clients, accepting occasional invitations to represent other unions

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2. “Default” is quite literally my claim to the position. With Dave’s departure, Jerry Anker chose to take his quite considerable talents to a larger firm in DC, and I was the only litigator left.
in the Supreme Court (Dave) or in perilous practical circumstances (Elliot). This meant that there was ample time to "dig deep" on the matters the firm did undertake, and those matters were usually path-breaking. The Steelworkers had a very talented staff of in-house lawyers, as well as top-flight law firms in all the major steel centers, who handled the union's bread-and-butter legal work. Our firm litigated only the cases that were of exceptional importance to the union—either because they involved breaking new legal ground, or because the stakes in practical terms were enormous. There was no "routine" litigation.

Ample time to work on precedent-making litigation yielded a remarkable intellectual enterprise. It was not until I came to academia in 1989 that I found a good analogue to my law firm experience: the faculty scholarship workshop. Our litigation team—Dave, Jerry Anker and me—would meet on virtually a daily basis to review whatever draft brief was in the works. A wide ranging discussion would ensue, much of it at high levels of legal theory. And the agenda for these explorations was labor law writ large, including civil rights, constitutional law, and more. The focus was not merely on winning that case, but on shaping the law so that it would benefit the labor movement (and hence America!) over the long run. We had a mandate from our clients to do this, and thus did not have to compromise the long view for immediate tactical victories. Ideas percolated that could not be deployed in the case under discussion, but they would be "filed away," to be invoked in future cases that came down the pipeline—cases that we would then be on the lookout to find. 3

When, in 1967, Dave decided to embark on a second career in academia, this seemed a natural transition: his legal practice, after all, had been an academic career, too. But, though he was now 3,000 miles away, his blueprint for what I now call "faculty workshop lawyering" lived on. We maintained, with the new lawyers who came to the firm, the intellectual approach to litigation Dave had fostered. Over the years the firm grew a bit, but hardly as other DC firms did: we were 22 lawyers when I left, twenty years after Dave. We deliberately controlled the volume of work, and the size of the firm, so that its unique attributes as a boutique think-tank could be preserved. 4

Perhaps the clearest testament to this academic lawyering is the

3. In 1994, Dave gave his Fireside Chat to the National Academy of Arbitrators, in which he described "the unique shop" that "Arthur Goldberg ... ran, of which I was fortunate enough to be a part." David E. Feller, How the Trilogy was Made, in Arbitration 1994: Controversy and Continuity: Proceedings of the Forty-Seventh Annual Meeting National Academy of Arbitrators 329 (1995). It is possible, as Dave described, that Goldberg gets credit for inventing this way of lawyering. But I came after Goldberg had left, and the "unique shop" that I found was a product of Dave's academic talents and inclinations.

4. That tradition has continued to this day. While the other Washington "boutiques" all grew (or merged) into much larger firms, Bredhoff & Kaiser has crept just to 30.
number of lawyers who, after spending time at this tiny firm, followed Dave’s example and moved on to academia: Cindy Estlund (to Texas, thence Columbia), Deborah Malamud (to Michigan, thence NYU and Yale), Jim Brudney (to Ohio State), David Sklansky (to UCLA), Barbara Bergman (to New Mexico), Jim Wooten (to Buffalo), Susan Carle (to American), Jim Holzhauer (to Chicago), Walter Kamiat (to Georgetown), and me (to Georgetown).5

II. DAVE FELLER, LEGAL ARCHITECT

Dave’s principal achievements while at the firm are well-known, so I’ll describe them only briefly. He played a major role in the CIO’s expulsion of communist-dominated unions, in the merger of the AFL and CIO, in the Steelworkers’ collective bargaining achievements from 1949 through the mid-1960’s, and, of course, in the development of the law governing the collective bargaining agreement.

Dave’s successes litigating Supreme Court cases involving the enforcement of collective bargaining agreements are legendary. I can’t think of another lawyer who has put his or her stamp on a field of law as Dave did on the law governing enforcement of the collective bargaining agreement. Dave didn’t just win every major foundational Section 301 case,6 he won with opinions that embraced precisely the analytical lines he had put before the Court. And those lines were breathtakingly innovative.

In Lincoln Mills,7 the Court held (1) that Congress, by conferring jurisdiction on federal courts to hear suits for violations of collective bargaining agreements, expected the federal courts to develop a “federal common law” of the collective bargaining agreement;8 (2) that the touchstone for formulating the federal common law would be the policies underlying the federal labor laws (and not state common law of contracts);9 and (3) that notwithstanding the Norris-LaGuardia Act’s prohibition against federal court injunctions in labor disputes—a provision whose “literal reading” would preclude orders enforcing agreements to arbitrate—federal courts could enter such orders because “[t]he failure to arbitrate was not a

5. Holzhauer and Kamiat later returned to practice. The rest of us appear to be in academia for keeps.
6. Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, provides, in pertinent part: “(a) Suits for violations of contracts between an employer and a labor organization...may be brought in any district court of the United States having jurisdiction of the parties...”
8. Id., at 451-57.
9. Id. at 456 (“federal law, which the courts must fashion from the policy of our national labor laws”).
part and parcel of the abuses against which the Act was aimed.”

The first of these holdings was unprecedented in the annals of American law, and remains so. There is not another federal statute, anywhere in the law, that the Court has construed as a mandate to develop an entire body of federal common law.

In the Steelworkers Trilogy—three cases that Dave argued consecutively over the course of two days—the Court laid out the foundation-stones of the federal common law Lincoln Mills had authorized. Labor agreements invariably prescribe arbitration as the forum for resolving disputes over the interpretation and application of the agreement. The Court’s opinions in these three cases established the following principles regarding labor arbitration. Courts are not to deny arbitration of a grievance arising under a labor agreement because they think the grievant’s claim frivolous. They are to read agreements to arbitrate broadly, and purported exceptions narrowly: “An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” And once the arbitrator rules, courts have no role in second-guessing the correctness of the arbitrator’s contract interpretation; they may set aside an award only if the arbitrator’s decision is avowedly based on his or her “own brand of industrial justice” rather than on the agreement of the parties. As Enterprise Wheel put it: “A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.”

These decisions do not seem revolutionary today. Forty years of consistent application has made them seem commonplace. But at the time, they were astonishing, for the judicial attitude then prevailing—manifested in Supreme Court decisions involving commercial arbitration—was to resolve all doubts against arbitration. To secure this sweeping about-face for labor arbitration, Dave persuaded the Court that labor arbitration is different in kind from commercial arbitration. The Court embraced Dave’s thesis in these words:

10. Id. at 458.
12. In those days, the Court allowed one hour per side for oral argument in each case, and sat for four hours per day. The Trilogy thus was argued over the course of two days.
15. Enterprise Wheel, 363 U.S. at 597.
16. Id. at 598.
The run of [commercial] arbitration cases [is] irrelevant... There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration on the other. In the commercial case, arbitration is the substitute for litigation. Here, arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes is part and parcel of the collective bargaining process itself.17

Ironically, Dave's success in moving the Court to receptivity for labor arbitration had a powerful reverberating impact on commercial arbitration. For, in succeeding years, the Court transported the 301 jurisprudence that Dave had built to the commercial arena as well. Although there was no intervening change in the Federal Arbitration Act—18—the federal statute that regulates commercial arbitration—the Court, citing its labor precedents, abandoned its prior hostility to arbitration and erected similar pro-arbitration presumptions under the FAA, citing the Steelworkers Trilogy.19

Dave was also the architect of the union's brief in John Wiley & Sons v. Livingston,20 in which, once again, he convinced the Court to abandon traditional legal rules in its evocation of federal common law. Under traditional principles, a company that purchases merely the assets (and not the stock) of another company is not bound by the latter's agreements. But in Wiley the Court held, as Dave urged, that the rule should be different with respect to collective bargaining agreements. The purchaser of assets who carries on the same work as the seller is bound to arbitrate disputes arising under the seller's collective bargaining agreement, with the arbitrator to determine (by construction of the agreement) whether it was intended to protect employees' jobs in the event of an asset sale.21

While at the law firm, Dave did encounter one frustrating experience in his Section 301 odyssey. The case was Independent Petroleum Workers v. American Oil Co.22 The union had lost a Section 301 case in the court of appeals, and retained Dave to get the decision overturned in the Supreme Court. Dave wrote a petition for writ of certiorari that convinced the Supreme Court to take the case, and briefed and argued the case on the merits with the aplomb that was his trademark. But Justice Goldberg had

17. Warrior & Gulf, 363 U.S. at 578.
18. 9 U.S.C. § 1 et seq.
21. Id. at 547-51.
disqualified himself (presumably because his former partner was arguing the case), and the remaining eight Justices divided 4-4. In the Supreme Court, a tie vote means that the lower court opinion is affirmed. This was Dave's only "loss" in the string of Section 301 cases he handled beginning with Lincoln Mills, although one of no lasting precedential significance (4-4 decisions don't count, except for the unfortunate petitioner in that case). And the irony is that there's little doubt how Justice Goldberg would have voted had he participated; Dave's position was in line with other decisions Justice Goldberg had rendered since joining the Court.

I recall the threat this decision seemed to pose at the time for Dave's career as the labor movement's most prominent and successful Supreme Court litigant. His involvement in a case apparently meant the loss of one vote on the Court, and the vote of a Justice whose voting record was relatively pro-union. From a client's perspective, was it worth losing one sympathetic vote on the Supreme Court to have Dave as one's lawyer, rather than America's second-best union advocate? The answer might rationally be "yes," but Dave was not optimistic potential clients would figure that out.

There are few good things that flowed from Justice Goldberg's decision, soon thereafter, to accept President Johnson's invitation to leave the Court to become U.N. Ambassador. But the one undeniably good thing was that it freed Dave from this bizarre dilemma. And, shortly after Justice Fortas was appointed to replace the departed Justice Goldberg, Dave was retained by the union officials who had lost below in Vaca v. Sipes. Thus was the last brick installed in the Section 301 house that Dave built.

In Vaca, the Court, again adopting arguments advanced by Dave, issued rulings as innovative as those in Lincoln Mills, the Steelworkers Trilogy, and Wiley v. Livingston. The Missouri courts had allowed a jury to find a union liable in negligence for failing to take a meritorious grievance to arbitration. Dave persuaded the Court to hold that (1) federal law is the exclusive measure of the duty owed by a union to the employees it represents (thus preempting all state law, including states' traditional negligence law); (2) the duty imposed by federal law—the duty of fair representation—is not breached by a union's negligence, but only "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith;" and (3) an employee whose grievance is not taken to arbitration by the union cannot sue the employer for breach of contract without first establishing that the union's failure

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24. Id. at 177, 188-89.
25. Id. at 190.
constituted a breach of the duty of fair representation. The second of these holdings is especially remarkable. So far as I know, unions are the only private institution in America not held to a duty of reasonable care to those they represent.

It's been four decades since these landmark decisions, and the Court has not deviated one iota from the principles established in these cases. Indeed, the Court has repeatedly reaffirmed them. Of course, Dave didn't leave that to chance: although now in academia, Dave kept a finger on the scales, authoring amicus briefs for the National Academy of Arbitrators in many of the important succeeding Section 301 cases. He had made the law, and he saw that it stayed made.

Dave was busily at work on this agenda until the very end, authoring four powerful Supreme Court briefs for the Academy after he turned 80. He was especially pleased with his success as octogenarian advocate in *Wright v. Universal Maritime Service Corp.*, for he added yet another wrinkle to the body of Section 301 law. In that case, the Fourth Circuit had held that an employee could not bring a lawsuit against his employer for violating the Americans with Disabilities Act, because his union had agreed in the collective bargaining agreement that all “matters under dispute,” if not resolved by discussion, would be submitted to arbitration. The parties’ principal focus in the Supreme Court was on the question whether a union’s power as exclusive bargaining agent extended so far as to oust employees of their right to bring lawsuits under external law. Dave, however, saw the case as an opportunity to achieve a goal for which he had long advocated—confining labor arbitration to the resolution of disputes over the interpretation and application of collective bargaining agreements, and excluding from labor arbitration disputes arising under external law.

In his scholarship, Dave had been a consistent advocate that the pro-arbitration principles adopted, at his urging, in the *Trilogy* were meant to apply only to contractual issues, not legal issues; indeed, he believed it was undesirable for labor arbitrators to mess with external law. But in

26. *Id.* at 186.
29. The briefs were in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), described *infra* note 30 and accompanying text; *E. Associated Coal*, 531 U.S. 57; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); and *Garvey*, 532 U.S. 504.
31. Among the articles in which he expressed this view were David E. Feller, *The Impact of
intervening years the Court, in commercial arbitration cases arising under the FAA, had extended the presumption of arbitrability to external law issues.\textsuperscript{32} While the parties' briefs in \textit{Wright} vigorously debated whether unions had power to deprive employees of their lawsuits under external law, Dave's \textit{amicus} brief suggested the Court need not decide that issue. For, Dave argued, the union should not have been understood to have attempted to do so in this case. The arbitration clause did not expressly mention external law—it provided only that "matters under dispute" would be arbitrated—and the Court should adopt a presumption \textit{against} the arbitrability of such claims under labor agreements unless the agreement expressly provided for arbitration of such claims.

The irony was marvelous. In 1960, Dave had successfully persuaded the Court to exempt labor agreements from the anti-arbitration doctrines that prevailed in the commercial sector. Thirty-eight years later, the pendulum having swung totally in the legal rules governing commercial arbitration, he was urging the Court to exempt labor agreements from one of the \textit{pro}-arbitration doctrines that now prevailed with respect to commercial agreements. Dave had not changed his views. His views were simply nuanced.

And, remarkably, the Court disdained the path to decision that the parties were focused upon, and adopted Dave's thesis once again. The Court held that there is a presumption \textit{against} arbitration of legal issues under a collective bargaining agreement,\textsuperscript{33} and left to another day the question whether a union could, via a more explicit arbitration clause, deprive employees of their right to a judicial forum for resolution of claims arising under external law.\textsuperscript{34}

\textbf{III.}

\textbf{Dave Feller, Academic and Arbitrator}

My contacts with Dave were limited after he moved to California in 1967, and others are far better situated to recount his successes in the thirty-six years of his second career. But watching from afar, there were three aspects of that second career that were logical extensions of the first. First, already recounted, were Dave's \textit{amicus} briefs respecting the continued interpretation of Section 301. Second was Dave's scholarship respecting the collective bargaining agreement. His first article as law school professor, \textit{A General Theory of the Collective Bargaining Agreement},\textsuperscript{35}

\begin{itemize}
\item \textit{External Law Upon Labor Arbitration}, in \textit{The Future of Labor Arbitration in America} 83 (1976);
\item \textit{Wright}, 525 U.S. at 77-81.
\item \textit{Id.} at 82.
\item 61 Cal. L. Rev. 663 (1973).
\end{itemize}
remains one of the seminal pieces in labor law scholarship, still cited as recommended reading, thirty years after its publication, in the current edition of the leading labor law casebook. Third, and in many ways the most remarkable, was Dave’s success as one of America’s leading labor arbitrators. Although he had been a ferocious advocate for union causes during his law firm career, he was sought out as arbitrator by unions and employers alike. There aren’t many lawyers who, after spending a career toiling exclusively on behalf of one side in so highly-charged an arena, would be entrusted by the other to decide what often was high-stakes litigation. That Dave was so entrusted was a tribute to both his integrity and his brilliance.

I’m proud, and immeasurably enriched, to have been one of Dave Feller’s very first “students.” I continued learning from him for 42 years.