DAVID E. FELLER
MEMORIAL LABOR LAW LECTURE

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“A General Theory of the Collective Bargaining Agreement” at 35

Judge Marsha Berzon†

I am pleased to be here giving a lecture about David Feller, who was my Labor Law professor at Boalt Hall, my mentor and role model while I was in practice, and, quite coincidentally, my next-door neighbor.

So what to speak about? Despite my varied contacts with Professor Feller over the years, what his name brought to my mind immediately was his magnum opus as a legal scholar, his book masquerading as a law review article (it weighed in at just under 200 pages): A General Theory of the Collective Bargaining Agreement.¹

I was an Articles Editor of the California Law Review the year the General Theory was published but—thank goodness for the well-being of my then-infant son—not the Articles Editor assigned to Professor Feller's article. Still, one could hardly escape the sheer bulk of the piece in the tiny office that the four of us in the Articles Department shared in the fall of 1972 and spring of 1973. I have a recollection that, although dated May 1973, the volume containing Professor Feller's General Theory actually came out sometime thereafter, as the editing process dragged on past the official date of the volume in which it appears.

¹ United States Court of Appeals for the Ninth Circuit. This piece was prepared as an informal lecture. It has been only lightly edited for publication, as I thought it better to retain the original flavor than to provide the full exposition and analysis typical in scholarly articles. I thank Rachel Deutsch, Michael Freedman, and Jennifer Goldman for their editorial assistance.

Gilda Feller, Professor Feller's wife, told me recently that the *General Theory* would never have come out at all—indeed, it would never have been written—had it not been for two things: first, a thief, and second, the fact that Professor Feller came to Boalt Hall in the late 1960s, after a long and illustrious career as a Supreme Court advocate and union labor lawyer, and so wrote his tenure article before there were any computers, e-mails, or PDF files. The thief took the only copy of a much more modest article that Professor Feller was in the midst of writing—an article limited, I believe, to describing and analyzing unions' duty of fair representation. Professor Feller could not bear the idea of trying to replicate from memory a piece that he was not particularly fond of, so he set out on a much more grandiose project, a "general theory," no less, obviously patterned on the "general theory" of another gifted scholar in quite a different field, John Maynard Keynes.\(^2\) Not too many legal writers would undertake to emulate Keynes, but Professor Feller was up to it.

Thank goodness. The *General Theory* was my Bible when I was in practice; it summarized vast areas of labor law and made sense of them in a way nothing else I've seen did. I haven't been able to find the dog-eared copy of the *General Theory* that sat in a drawer behind my desk all the years I practiced law, so I had to make a new copy to prepare this talk. If I still had my behind-the-desk copy, it would be interesting now to read the marginal notations I wrote in over the years.

At any rate, it seemed a good idea to see how the *General Theory*, brilliant at the time it was written, has stood up in the ensuing thirty-five plus years. So I had a topic, a container, for my talk, but one lacking any filler. As it turned out, the Supreme Court solved that problem, granting certiorari, hearing argument in, and deciding this spring a case that involved, or at least should have involved, many of the concepts Professor Feller addressed in his article.

It would be well for me to begin by summarizing that case, *14 Penn Plaza v. Pyett*,\(^3\) before I try to give you a sense of the content of Professor Feller's nearly 200-page article. A contemporary focus at the outset will make it easier to see how the law of the workplace has changed in basic ways since 1973 and how it has not. I should confess that by proceeding this way I am emulating Professor Feller's *General Theory*, by beginning with a real, current case and working backwards. Professor Feller began his article in exactly the same way when he set out the facts and holdings of a

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case decided by the First Circuit in 1970: Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO.4

I can see why Professor Feller started that way. It is much easier to understand a complicated set of intertwined legal doctrines if you begin with a real-world case situated squarely at the intersection of those doctrines. In addition, the differences between the doctrines that bumped into each other in Figueroa—Professor Feller’s paradigm case—and mine—Penn Plaza—go a long way toward explaining the relevant legal developments in the intervening thirty-five years, as well as the changes in the workplaces from which those legal rules have evolved.

So, to Penn Plaza. That case concerned a very large New York local of the Service Employees International Union that represents building services personnel in New York City and bargains on a multiemployer basis with an association of building owners and service contractors. Several older employees working as night security guards for a service contractor at 14 Penn Plaza brought suit under the Age Discrimination in Employment Act, the ADEA. The union and the employer—for they, of course, and not the covered employees, were the parties to the collective bargaining agreement, a point central to Professor Feller’s General Theory—had agreed that the employees could be reassigned to non-security-related work and replaced by licensed security guards provided by a subcontractor.

As it turned out, the replacements were younger than the original employees. In a move that would have been fully familiar to Professor Feller, the displaced employees asked their union to file grievances on their behalf, complaining that the new subcontracts violated the collective bargaining agreement’s rules for the workplace—what Professor Feller would have called its rules of industrial self-government—by violating seniority principles and failing equitably to rotate overtime. But the employees wanted to add—and this would have been much less familiar in a union-represented workplace in 1973—that the employer had also violated their right not to be discriminated against on the basis of age, a right protected by federal law as well as the collective bargaining agreement. The union initially agreed to add this claim.

The grievance and arbitration system in this collective bargaining agreement also would have been familiar to Professor Feller in 1973. Indeed, its basic attributes were quite similar to those most common at the time he wrote the General Theory. So, as was true of the typical collective bargaining agreement in 1973, the SEIU local’s agreement in 2003 provided for a multi-step dispute resolution procedure, culminating in

arbitration at the behest of the union. The agreement also contained another provision that would be familiar to readers of the *General Theory*: it stated that "[a]ll Union claims are brought by the Union alone, and no individual shall have the right to compromise or settle any claim without the written permission of the Union."\(^5\)

The *Penn Plaza* collective bargaining agreement went on to set up: (1) a process for the union and the multi-employer group to choose arbitrators to hear disputes arising under the agreement; (2) a method (which did not include any input from the grievant) for designating arbitrators on a case-by-case basis; and (3) a scheme that split arbitration costs evenly between the union and the employer group. These provisions are more elaborate than those in many collective bargaining agreements, because the local union is so large, but are typical in their basic features.

But the collective bargaining agreement in *Penn Plaza* also contained a provision that would have puzzled Professor Feller at the time he wrote the *General Theory*, although perhaps not later. The agreement prohibited discrimination "by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law";\(^6\) such a prohibition is a common feature of collective bargaining agreements in recent years. The agreement went on, though, to specify that the discrimination provision applies to "claims made pursuant to" a long list of statutes, state and federal, banning various forms of workplace discrimination, including the ADEA. Finally, and most significantly, the agreement provided that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations."\(^7\)

The bargaining history of this anti-discrimination provision indicates that it came about because of the confluence of two legal developments, one entirely, and the other largely, occurring after 1973. It is worth digressing a bit from the *Penn Plaza* tale to review those developments, as they are essential to understanding how the contemporary workplace world of *Penn Plaza* differs from the one Professor Feller surveyed in 1973.

First, established legal doctrine in 1973 very much discouraged the enforcement of pre-dispute agreements to arbitrate statutory claims as an alternative to litigation. The Federal Arbitration Act (FAA) was, and is, the federal statute governing arbitration.\(^8\) The notion was that public policy favored contractual provisions creating private dispute resolution systems to

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7. Id.
cover issues arising from contracts, while claims arising from violations of statutes belonged in the public fora provided for and spelled out in the enacting legislation. State law was even narrower with respect to private dispute resolution, tending to be skeptical about enforcing agreements to arbitrate at all. As a result of the narrow reach of the FAA and the universal understanding that it applied only to cases brought in federal court, agreements to arbitrate workplace disputes were enforceable only in narrow circumstances outside of workplaces with collective bargaining agreements.

In a series of cases beginning in the mid-1980s, the Supreme Court, as Professor Feller later noted, “drastically rewrite[ed] the FAA.” In addition to overruling the cases holding that arbitration agreements generally were not applicable to statutory causes of action, the Court also held that the FAA applies in state as well as federal court. Moreover, the Court eventually held that the FAA’s preference for arbitration was applicable to almost all arbitration provisions that cover disputes between employers and employees. The Court also began to enforce private agreements to arbitrate without regard to whether the contract containing the arbitration agreement was one of adhesion or one resulting from arm’s length negotiations between parties of equivalent economic power. Due to these developments, non-union employers are now largely free to require that their employees, as a condition of employment, abide by arbitration systems unilaterally imposed—as a practical matter—by the employer.

It is almost certain that judges’ frustration with judicial dispute resolution precipitated these developments. Public litigation is complicated, expensive, and time-consuming. It also involves, as I am very much aware, long and hard work for judges. The public is often not willing to provide the judicial system with the resources it needs to do its job well, and Congress and state legislatures have a tendency to pass substantively complex statutes without providing commensurately for the judicial person-power, buildings, and technical equipment needed to deal with the


10. Courts sometimes invalidate arbitration provisions in employment contracts on unconscionability grounds, pursuant to the FAA’s provision that arbitration agreements may be invalidated for any reason that exists under state law. 9 U.S.C. § 2. See, e.g., Davis v. O’Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007); Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005); Alexander v. Anthony Int’l, L.P., 341 F.3d 256 (3d Cir. 2003); Armendariz v. Foundation Health Psychcare Serv. Inc., 6 P.3d 669 (Cal. 2000).


litigants who come flocking to the courts for interpretation and application of that legislation. One might think that the judiciary’s reaction would be to streamline litigation rather than push it out of the public court system, but even the streamlining of litigation is largely out of the hands of judges, bound as we are by externally imposed procedural rules and statutes.

Among the reasons for the vast expansion of arbitration enforcement by the Supreme Court could have been, of course, some disdain for run-of-the-mill cases brought by individuals against large corporations. But it is noteworthy that the Court has been quite consistent in applying its new overriding preference for arbitration in all manner of cases, from complex commercial arbitration to low dollar-value employment discrimination cases.13

The second development that likely influenced the bargaining of the anti-discrimination provision in the *Penn Plaza* agreement began in the years preceding 1973 but had its primary impact afterwards. This development was the widespread enactment by Congress and by state legislatures of statutes protecting individual employees from discrimination and other unfair workplace practices, including plant closures without notice and the indiscriminate use of polygraph tests. The Equal Pay Act was enacted in 1963.14 Then came Title VII,15 the Age Discrimination in Employment Act,16 the Americans with Disabilities Act,17 and the Family and Medical Leave Act18 among others. Of particular importance was the Civil Rights Act of 1991,19 which provided for compensatory and punitive damages and jury trials in employment discrimination cases, not just bench trials for back pay and prospective remedies as before. The key Supreme Court case extending the preference for arbitration to employment discrimination cases, *Gilmer v. Interstate/Johnson Lane Corp.*,20 was also decided in 1991.

In any event, the new judicial enthusiasm for arbitration as a substitute for litigation even outside of the collective bargaining context has resulted in a proliferation of employer-imposed limitations on employee resort to courts to enforce rights conferred on them by this bevy of relatively new

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employee-protective laws. The case law characterizes the arbitration provisions as resulting from agreements between the individual employee and the employer. In fact, employers that utilize these arbitration systems typically insist as a condition of employment that applicants agree to arbitrate any future claims.

There is, to be sure, a raging academic debate concerning whether these essentially employer-imposed systems are good or bad for employees. Some academics, and most lawyers and legal organizations that represent plaintiffs insist, to paraphrase one academic, that employer-imposed arbitration systems are the yellow-dog contracts of contemporary employment law, hampering the development of employee-protective statutes and denying adequate practical remedies for violations of statutory rights. Others contend—and are working on developing empirical proof for their position—that the unilaterally created systems provide feasible, efficient redress for ordinary workers who otherwise could not attract lawyers to litigate their small claims. According to these proponents, mandatory arbitration of employment discrimination and other statutory employment issues does not, as a practical matter, limit the relief available to the vast majority of employee plaintiffs, as access to trial-by-jury is only useful for highly paid employees likely to obtain very large damages awards.

One thing is clear: the dispute about the impact on employees aside, many employers see mandatory arbitration of discrimination and other statutory claims as advantageous to them. That some courts, including those in California, have required employers to develop dispute-resolution systems that abide by certain fairness standards has not altered this perception. The multi-employer group that negotiated the collective bargaining agreement underlying Penn Plaza was certainly of this view. And so it sought to extract from the union an agreement that the employees it represents will give up their right to go to court in favor of using the union-negotiated grievance and arbitration system to decide statutory discrimination claims.


Penn Plaza came to the Supreme Court on the assumption that that is precisely what the parties to the collective bargaining agreement had agreed to do: The court of appeals had assumed that the agreement did compel every individual employee to arbitrate ADEA and other employment discrimination claims. That court held the agreement to be invalid because it understood that Alexander v. Gardner-Denver, decided in 1974, just a year after the General Theory article, precluded enforcement of any such promise if contained in a collective bargaining agreement. The basis for this conclusion, derived from Gardner-Denver, was the understanding that the union could not “waive” the represented employees’ right of access to courts to adjudicate statutory claims. So the employer in Penn Plaza came to the Supreme Court, asking it to decide whether “an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members’ right to a judicial forum for their statutory discrimination claims, [is] enforceable?”

The union did not get involved until the case reached the Supreme Court. Before that, the case had been maintained between the plaintiff employees and the defendant employer, as is customary in such cases. So the union’s version of the story, which was quite different from the employer’s, unfortunately does not appear anywhere in the record of the case.

The union did, however, file a brief amicus curiae in the Supreme Court. According to that brief, the collective bargaining agreement did not bind individual employees to litigate employment discrimination claims in the collective bargaining agreement’s internal dispute resolution system, nor did it obligate the union to bring any such claim to arbitration. Instead, the union represented that the grievance and arbitration system merely regulated the conduct of the union and the employer, with the union deciding which grievances to advance to arbitration and which to settle or drop. The union’s version of the discrimination clause’s history was that the employers had tried to obtain the union’s agreement to a requirement that individual employees agree as a condition of employment to litigate their statutory discrimination claims in the collective agreement’s internal system, but the union did not accede.

To those, like Professor Feller, steeped in the world of collective bargaining and collectively bargained grievance and arbitration systems, the

union’s version would not have required any extra-record factual support. As we will see, Professor Feller believed that these systems mediate the relationship between the union and the employer, and that the represented employees have no direct rights—or obligations—under them. In their amicus briefs, the local union that was party to the agreement, the two national labor federations (the AFL-CIO and Change to Win),\(^{26}\) and Professor Feller's own favorite organization in his academic years, the National Academy of Arbitrators,\(^{27}\) all tried to explain to the court that collective bargaining agreements’ grievance and arbitration systems are not designed to vindicate individual, externally conferred rights. Instead, as the National Academy argued, these systems are part of “a system of collective self-government.” These words largely encapsulate Professor Feller’s General Theory, which the National Academy cited to the Court. The National Academy went on to put the point in graphic terms: “It is true that both employment arbitration and labor arbitration are called ‘arbitration.’ But just as hounds and greyhounds, mongrels and spaniels are all called dogs”—citing Macbeth—“they’re not the same animal.”\(^{28}\)

But the Court, it appears, was not interested in theories of the collective bargaining agreement, general or otherwise. Instead, it assumed that collective bargaining agreements are contracts like any other. Against this backdrop, the Court looked at what had actually happened in the case and what it had been asked to decide. The union, it turns out, had indeed declined to arbitrate the age discrimination claim, as it itself had signed onto the contractual provision that was being challenged by that claim. But it had agreed to allow the employees, if they chose, to use the arbitrator selection system established by the collective agreement to arbitrate their ADEA claims as long as the union did not have to pay anything toward the arbitration. (Interestingly enough, the employees not only rejected this offer but also filed suit—which they later withdrew—alleging that the union had violated its duty of fair representation by declining to pursue the ADEA arbitration on their behalf.)

So the Court just decided the narrow question exactly as presented to it, holding that a provision in a collective bargaining agreement that “clearly and unmistakably requires union members to arbitrate ADEA claims” is enforceable.\(^{29}\) The Court declined to take up the question of what the agreement actually contemplated, regarding that issue as not adequately

\(^{26}.\) Brief of the AFL-CIO and Change to Win as Amici Curiae Supporting Respondents, Penn Plaza, 129 S. Ct. 1456 (No. 07-581).

\(^{27}.\) Brief for National Academy of Arbitrators as Amicus Curiae Supporting Respondents, Penn Plaza, 129 S. Ct. 1456 (No. 07-581).

\(^{28}.\) Id. at 16.

\(^{29}.\) Penn Plaza, 129 S. Ct. at 1474.
raised by the parties. As the plaintiffs did not share the union’s view of the collective bargaining agreement, they proceeded during the course of the litigation on the premise that the contract did require them to use the agreement’s dispute resolution system and none other. That concession is not surprising, as plaintiffs’ lawyers are usually steeped in the world of employee protective statutes and may have little experience with or understanding of the world of collective bargaining agreements.

At the Supreme Court, the employees argued that if the agreement were read in a way that requires them to bring all claims within the agreement’s dispute resolution system, it could work a substantive as well as a procedural waiver of their ADEA rights, because the union could, and in fact did, refuse to advance individual ADEA claims through arbitration. To this argument, the Court replied, cryptically, that “a substantive waiver of federally protected civil rights will not be upheld,” but that the question whether the collective bargaining agreement “allows the [u]nion to prevent [respondents] from effectively vindicating their federal statutory rights in the arbitral forum” was not within the question the court had agreed to decide.30

The four dissenters did not take on this characterization of the case before the Court. They therefore did not address the question that would have been, to Professor Feller, the most difficult and interesting one raised by the inclusion of statutory rights in collectively bargained grievance and arbitration systems: how that coverage can be squared with the union/employer nature of both collective bargaining agreements in general and this particular agreement’s dispute resolution system. Instead, the dissenters on Penn Plaza maintained, variously, that the trend toward substituting arbitration for litigation had gone much too far in general, and that Gardner-Denver had, contrary to the majority’s view, decided that unions can never waive the rights of individuals to pursue their employment discrimination claims in court and should remain the law.31 So the majority, with no objection on this point from the dissenters, decided an issue that probably did not reflect the on-the-ground reality in the case before it, and certainly does not represent the way that collectively bargained grievance arbitration systems generally operate. In short, what could have been a very important case may turn out to have little staying power.

It was the on-the-ground reality, as it existed in 1973, that consumed Professor Feller as he wrote the General Theory, and that, in his view, cried out for a coherent set of principles from which to derive the rules applicable in particular situations. Many of the attributes of that system as it existed in

30. Id. at 1460.
31. Id. at 1475-76 (Stevens, J., dissenting); id. at 1477 (Souter, J., dissenting).
1973 have fundamentally changed, not least the new predominance in the workplace of externally created employee protections. Professor Feller was well aware of, and wrote a great deal about, that development after 1973, and also wrote and spoke about the great expansion of non-collective bargaining arbitration. My basic point tonight is that what has not changed is the need to focus on and think deeply about the special nature of collective bargaining agreements in deciding cases that involve them.

Making a comprehensive effort to undertake that task is, to me, the real legacy of Professor Feller’s 1973 magnum opus. In discussing the article, let me first briefly outline the primary points made in *A General Theory*, and then turn to surveying which of the underlying assumptions made in the article have held up over time.

I will follow in Professor Feller’s footsteps by beginning with his paradigm case, *Figueroa*. Professor Feller, in a phrase that could equally be applied to *Penn Plaza*, characterized *Figueroa* as “containing a veritable school of red herrings.”

The basic facts of the case are as follows. Figueroa’s employer laid off a large number of employees. The union pursued the grievances resulting from the lay-offs, but refused to move forward with separate grievances filed by Figueroa and others on the ground that they were duplicative and could be held in abeyance. Figueroa and her colleagues sued the union and the company, alleging (1) that the union had breached its duty of fair representation by failing to file grievances on their behalf, and (2) that their employer had violated the collective bargaining agreement in making the lay-offs.

The case was tried to two juries. The first was charged with deciding whether the grievances had merit—that is, whether the plaintiffs’ contractual rights were violated by the employer—and decided that they did. The second jury was thus instructed that the grievances had merit and was asked to decide whether the union had breached its duty toward the grievants by failing to process the grievances.

Unsurprisingly, the second jury found for Figueroa and her colleagues. The court of appeals affirmed that the union had indeed breached its duty of fair representation—even though it had acted in good faith—by declining to process the grievance until other issues it regarded as related were resolved. Nonetheless, the court of appeals denied the employees relief against the union, holding that they had filed their duty of fair representation claim too late. So it upheld the damages judgment against the employer, holding the

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32. Feller, *supra* note 1, at 666.
company responsible for backpay for the entire seven years in which the dispute remained unresolved.

After laying out these basic facts and noting the unsatisfying nature of the outcome, Professor Feller went on to survey, brilliantly, the history of enforcement of collective bargaining agreements. He discussed the early Railway Labor Act cases, the post World War II Taft-Hartley cases—including those in which he was intimately involved, Lincoln Mills\(^{34}\) and the Steelworkers Trilogy\(^{35}\)—through Vaca v. Sipes,\(^{36}\) the pivotal duty of fair representation case. By Professor Feller’s account, the opinions from all of these cases, taken together, confirm that the collectively bargained grievance and arbitration system originated not as an alternative to litigation but as an alternative to strikes. The grievance and arbitration system was a central feature of “industrial self-government,” through which union and employer together create and then themselves enforce the rules of the workplace. So the grievance and arbitration process, the cases surveyed in the article stressed, was a continuation of the bargaining process rather than a strictly adjudicatory system. After surveying this canon, Professor Feller added a fascinating discursion into the role of rules in workplaces generally, stressing that hierarchical systems require rules and that the real innovation of collective bargaining was not the rules themselves but, instead, the combination of bilateral rule-creation and bilateral rule-enforcement.

Finally, Professor Feller posited his “general theory,” which can be subdivided into three main propositions. First, the collective bargaining agreement is not a contract between the employer and any employee, and neither may bring suit against the other. Second, the collective bargaining agreement is a judicially enforceable contract between the union and the employer: the employer’s primary obligation is to comply with the grievance and arbitration system, and the union’s primary obligation is to refrain from striking while the agreement is in force. Third, the union owes a duty of fair representation to the employees it represents. The duty of fair representation derives only from the union’s status as “exclusive representative” under the National Labor Relations Act, not from any trustee or third-party beneficiary relationship. This duty is, and must be, limited to the union’s obligation not to act arbitrarily or capriciously or to abuse its discretion in processing and settling employee grievances. If the duty is breached it should be remediable not in a suit for damages, but in a suit to compel the union to arbitrate. Finally, employers may not stand in

\(^{34}\) Textile Workers of Am. v. Lincoln Mills, 353 U.S. 448 (1957).


the way of that remedy, but should not be worse off because of the union's breach of its duty.\textsuperscript{37}

Having laid out and defended these propositions, Professor Feller then returned to Figueroa. He concluded that Puerto Rico's 15-year statute of limitations for contract-based claims should not have been applied because the employees' suit against the union and the employer was not grounded in contract. He maintained that the only triable issue in the case should have been whether the union had breached its duty of fair representation. Once it was determined that the union had breached its duty, the court should have ordered arbitration instead of providing an award of damages against either the union or the employer. Moreover, under Professor Feller's view, the union should have been responsible for any back-pay ordered by the arbitrator that exceeded the amount that would have been owed by the employer had the union timely filed a grievance.\textsuperscript{38}

Of course, Professor Feller's suggested outcome drastically differed from the outcome ordered by the court. Under the article's approach, the parties' chosen dispute-resolution process, rather than the courts, would have been used to decide the contractual question; moreover, the union, rather than the employer, would have been responsible for the bulk of the back pay.

Even before the legal and structural changes I will survey shortly, this prescription did not accord with the law as it stood in 1973. Most obviously, from \textit{Smith v. Evening News}\textsuperscript{39} through \textit{Vaca}, there was—Professor Feller's protestations to the contrary about \textit{Smith} notwithstanding—always a notion embedded in the case law that there is a contractual relationship of some kind between individual employees and the employer, a relationship that incorporates the terms of the collective bargaining agreement. Additionally, courts have consistently declined to remit the employees to an arbitration remedy where the strict terms of the grievance and arbitration procedure have not been complied with, although the National Labor Relations Board has not had trouble doing so.\textsuperscript{40}

I note in this connection a line of cases that forms another thread in the intertwined history of collective bargaining agreements and individual rights litigation. These cases, enunciating what has become known as the §301 preemption doctrine, hold that employees covered by a collective

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  \item \textsuperscript{37} Feller, \textit{supra} note 1, at 773-74.
  \item \textsuperscript{38} \textit{Id.} at 827-28.
  \item \textsuperscript{39} Smith v. Evening News Ass'n, 371 U.S. 195 (1962).
  \item \textsuperscript{40} See, e.g., Roadmaster Corp. v. Prod. & Maintenance Employees' Local 504, 851 F.2d 886 (7th Cir. 1988); NLRB v. Columbus Printing Pressmen & Assistants Union No. 252, 543 F.2d 1161, 1167 (5th Cir. 1976); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).
\end{itemize}
bargaining agreement cannot litigate in court cases that rest on external employee protective litigation but that also rest on interpretation of the collective agreement.  

The courts' primary rationale for this rule is that allowing the cases to go forward in court would undermine the primacy of the collectively bargained dispute-resolution system for the determination of contract-based questions. It has been suggested, both by the Supreme Court and by my court, the Ninth Circuit, that there may be circumstances in which it would make more sense to order the parties to arbitrate the contractual issue and then return to court for a decision on the statutory question, rather than limiting the statutory employment rights of union-represented employees. But, as far as I know, that procedure has never been followed. Instead, employees covered by collective bargaining agreements often lose their right to either an arbitration or a judicial forum when they present a claim that incorporates both statutory and contractual issues. Professor Feller's suggestion that the remedial scheme in duty of fair representation cases be changed so as to lead the parties back to the arbitrator has fared no better.

Moving now to an assessment of how later developments have affected the General Theory, I start by noting that I'm not as sure as Professor Feller was that his two most basic propositions—that there are no individual rights under a collective bargaining agreement, and that the proper remedy for malfunctions of the collective agreement's dispute resolution system is remitting the complaining individual and the employer to the agreement's dispute resolution processes—any longer need stand and fall together. In hindsight, Professor Feller's perception about the role of rules in large, hierarchical workplaces is well borne out, as demonstrated by the proliferation of employee handbooks in nonunion workplaces. But there has been a tendency in the case law to view those very sets of rules as more than the authoritarian pronouncements by employers that Professor Feller assumed them to be. Instead, these unilaterally promulgated employer rules have been regarded as giving rise to bilateral implied contracts between individual nonunion employees and their nonunion employers, the consideration for which on the part of the employees is their work for the employer. Once that development takes hold, no reason appears why truly bilaterally negotiated rules—that is, collective bargaining agreements—should not have equal status as a source of implied individual contracts as those unilaterally imposed, giving rise to individual, contract-based rights.

42. Livadas, 512 U.S. at 124 n.18 (citing Collyer, 192 N.L.R.B. 837).
privileges, and obligations for employees who accept jobs in places where such agreements are in place.

Professor Feller's other key points, however—that the internal dispute process is the central aspect of the union/employer contractual relationship, and that it is both the quid pro quo for a no strike promise and the vehicle for ongoing bargaining and industrial self-government—seem to me separable and still basically viable.

It is true that some of the arguments Professor Feller made in support of these propositions seem almost quaint today, but we should bear in mind that he was writing when the private, union-represented workforce was about 25% of the entire private workforce. Now, following a decline that began in the 1950s, that percentage hovers at a little over 7%. Also, the world about which Professor Feller was writing was populated primarily by large manufacturing plants: the very steel plants, auto plants, and traditional electrical manufacturers that are now, and for many years have been, rapidly shedding jobs. In that world as he saw it, "[m]ost modern American industries accept[ed] the notion of collective bargaining," because of the advantages it provided. These advantages included employee consent to managerial authority, protection from work stoppages, workforce stability, and a means by which higher management can exercise control over lower management through the collectively bargained grievance system, all encouraged by a well-functioning final dispute resolution system.

One suspects that the threat of strikes does not concern many employers these days, and that stability and hierarchical control are thought to be obtainable through employee handbooks, human resources departments, and, indeed, the very non-union dispute and arbitration systems fostered by the recent case law discussed above. The notion that employers accept the collective bargaining system willingly and see advantages in it—even if they should—has little resonance today.

A second basic assumption of the General Theory with considerably less persuasive value now than in 1973 is the proposition that the substantive rules contained in collective bargaining agreements, "the product of consensual arrangement," were the key protections afforded employees. Professor Feller accurately understood at the time that "American industrial society relies to an extraordinary degree on the voluntarily developed systems of law embodied in collective agreements to provide the protections for employees which are provided in other societies.

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45. Feller, supra note 1, at 762.
46. Id. at 853.
by public law.\textsuperscript{47} Consistent with that view, his summary of his General Theory reads as if employees have just one right protected by federal statute, the right to fair representation derived from the exclusivity rule of the National Labor Relations Act.

Of course, this proposition, as I already mentioned, has turned out to be mostly, although not entirely, wrong. While it remains true that public law does not directly govern matters such as job scheduling, overtime allocation, and personnel evaluation and classification, judges certainly get involved in those matters in various kinds of employment discrimination lawsuits. It is the prospect of such judicial scrutiny that encourages employers to regularize and systemize their employment policies so as to better protect themselves from allegations of sex, race, or disability discrimination.

Moreover, the very existence of these employee-protective statutes has had the effect, as we’ve seen, of providing strong reason for employers, including the employers in Penn Plaza, to seek to opt into private dispute resolution systems covering this relatively new panoply of statutory protections for individual employees. As his later writing shows, Professor Feller was well aware of the effects of these incentives as well as those of the §301 preemption cases I mentioned briefly a minute ago.\textsuperscript{48} Perversely, those cases precluded employees covered by collective bargaining agreements from taking advantage of some kinds of employee-protective legislation and instead funneled them into a “system of industrial self-government” not well suited to adjudicating their independent statutory rights.

Both these developments have profoundly altered the incentives for employers with regard to the breadth of collectively bargained dispute resolution schemes. They have driven employers to want broader rather than narrower coverage by such schemes. The attendant loss of managerial flexibility does not seem to discourage this trend, presumably because the trade-off is between courts and arbitrators, not between regulation and no regulation. As a result, the one-to-one relationship between the substance of the collective bargaining agreement and the reach of its dispute resolution system presumed in the General Theory has come under stress. Employers are now attempting to bring within the scope of the private system substantive obligations that the parties did not create and cannot alter.

Despite all this transition in American workplaces and the law covering them, it seems to me that the members of the Supreme Court, and

\begin{footnotesize}
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\item \textsuperscript{47} Id.
\item \textsuperscript{48} See, e.g., Feller, supra note 9, at 566-67.
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their law clerks, would have done well to consider certain of the insights in *A General Theory of the Collective Bargaining Agreement* before hearing and deciding *Penn Plaza*, for three reasons:

First is the *General Theory*’s foundational assertion that the only parties to a collective bargaining agreement are the employer and the union. The Supreme Court was reminded of this point by the employee plaintiffs, the local, the national labor federations, and the National Academy, but chose not to take note. Had it done so, it might have questioned the assumption that individual employees are bound equally with the union to all aspects of the collective bargaining agreement’s arbitration system, including its exclusivity.

As I have indicated, I do not think Professor Feller’s corollary to this proposition, that there is in no sense a contractual relationship between the employee and the employer, necessarily follows. But it does follow that the employee’s privately endowed rights and obligations are, as a practical matter, limited by the dispute-resolution system provided for in the agreement. In other words, the employee must resort to the dispute-resolution system created by his employer and the union representing his working unit because the obligation to do so is as much a part of the bilaterally negotiated set of rules governing his workplace as the substantive provisions of the agreement. In contrast, substantive and procedural rights conferred on individual employees by statute do run directly against employers, without regard to anything contained in or conferred by the bilateral agreement between the union and the employer. So if individual employees are bound, without more, by commitments made by their unions with regard to dispute resolution for statutory claims, we need some explanation for why that is the case.

The Supreme Court did make some effort to explain this point, by noting that the manner of resolving workplace disputes is and always has been a mandatory subject of bargaining under the National Labor Relations Act. While that statement is true, it ignores the fact that the disputes resolved under classic collective bargaining agreements almost always concerned contract-based rights and obligations. That is why Professor Feller was able to emphasize the attractions of industrial self-governance for employers and unions alike.

This objection is not meant to suggest that *Penn Plaza*’s mandatory subject-of-bargaining ruling may not survive a more complete analysis, or that it is not recommended by substantial practical considerations. Under settled doctrine, the mandatory subject-of-bargaining rules prohibit employers from negotiating with individuals in unionized workplaces or

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from single-handedly requiring employees to arbitrate their statutory claims. As a result of that prohibition, unions should be able to either resist bringing statutory claims into the internal system or to permit their inclusion only when suitable protections are in place not available to employees in non-unionized workplaces. Still, there should be some recognition that a collectively negotiated dispute resolution system for terms and conditions themselves established by the agreement—with the concomitant role of that system in developing further the workplace rules and continuing the collective bargaining process—is, as the National Academy said, a different animal entirely from the system supposed in Penn Plaza. The simple declaration, without more, that both systems are equally and exclusively negotiable collectively seems, to continue the metaphor, an exercise in indiscriminate cross-breeding.

Second, and for somewhat similar reasons, all the Penn Plaza opinions miss the traditionally central role of unions in administering the internal grievance/arbitration system. Instead, the question whether the employees in fact had any authority under the agreement to arbitrate their ADEA claims without the union’s instigation and participation was treated as a simple matter of contract interpretation, with no background understanding one way or the other. This is one development that I don’t think Professor Feller would have foreseen. It would have been unthinkable to him that an agreement that quite clearly adopted the union’s usual gate-keeping role over the grievance and arbitration system could be interpreted to have created a system of adjudication that individual employees could use on an elective basis.

Perhaps the Court knew this but nonetheless determined to barge ahead with the case the Court thought was there when it granted the writ of certiorari. But I doubt that. In recent years, with the decrease in the size of the union-represented workforce, the rise of individual employee rights litigation, and the development of concepts of individual employee contract rights, the presuppositions of the collectively bargained grievance arbitration system, so second nature to Professor Feller, have become hidden from view. Although labor law was a standard law school subject through the early 1970s, very few law students, including Supreme Court law clerks, now study labor law. Judges, even at the Supreme Court, see relatively few cases involving union-represented employees. To complicate matters further, the concepts underlying the National Labor Relations Act and the rules governing the enforcement of collective bargaining agreements and the duty of fair representation are far from intuitive. If these concepts do not receive renewed attention, they are likely to slip into oblivion.
I am reminded of a conversation I once had with the Reporter for the Restatement of the Law of Lawyers about the ethical duties of lawyers who represent unions in presenting and arbitrating employee grievances. The Reporter maintained that the relationship between the lawyer and the employee was similar to the one between an insurance-company-provided attorney and an insured. The Reporter, having had no experience with arbitration under collectively bargained agreements, simply did not understand when I informed him that among labor law practitioners, it was universally understood that the lawyer represented the union, not the employee.

So it is with analogies between the collective bargaining agreement dispute-resolution system and the employment dispute-resolution system with which the court is now—ironically—much more familiar: FAA arbitration in nonunion workplaces. These analogies do not work very well and often lead to confused or unrealistic results. The Court of decades past, which heard many cases about union workplaces every year, would have been sensitive enough to these distinctions at least to suspect that the question presented in the petition for certiorari in *Penn Plaza* might not be reflecting the whole story.

Third, and finally, Professor Feller’s teachings about the reach of the duty of fair representation and the reasons why it is quite limited might have made the Court in *Penn Plaza* a bit less sanguine about the employees’ authority to hold the union accountable. As the *General Theory* explains, building on *Vaca v. Sipes*, within mature collective bargaining relationships only a tiny percentage of the grievances filed are brought to arbitration. Were that not the case, the systems would collapse, as they would become too time-consuming and expensive. The majority opinion in *Penn Plaza* recognized that the union’s duty of fair representation is quite limited, but it nonetheless relied upon that duty to answer concerns about union conflicts of interest in representing minority employees. There was no explicit recognition that, as the *General Theory* explains at length, there are all manner of reasons why unions may permissibly decline to press grievances forward. Most of these reasons are not discriminatory and do not violate the duty of fair representation, but they do result in a decision not to advance an employee’s complaint through the system. Part of the problem is that courts and parties in cases similar to *Penn Plaza* now often see this union prerogative, fundamental to *Vaca v. Sipes* and other duty of fair representation cases, as being somehow illicit and grounded in hostility to minority interests.

50. See Feller, supra note 1, at 806.
It may turn out that the holding in *Penn Plaza* will be confined to the circumstances in which the case hypothetically arose—that is to say, where employers and unions agree to set up a grievance and arbitration system and allow individual employees to pursue their statutory claims within it by themselves, with no union filter. If so, the duty of fair representation problems should go away, as the union would have no obligation to pursue grievances and so would not violate the duty if it did not do so.

But one has the sense that this is an area of the law that does not stand still for long, and that the more likely result may be a shifting of the duty of fair representation standard to one less deferential to union decisionmakers. Such a shift is unlikely to be confined to the species of employee dispute arbitration at issue in *Penn Plaza*, involving public rights accorded employees. Instead, there is likely to be spillover to the other “animal,” labor arbitration of contract-based grievances. If so, the internal dispute resolution systems are unlikely to survive at all in their current form, as the union gatekeeper role would give way.

There is much more to say, but no time to say it. It has been a great pleasure for me to revisit the wisdom of my Labor Law professor, David Feller, and to reflect a bit on how changing times can bend established doctrines beyond recognition.