

## INDEPENDENCE HALL II

A TOUR GUIDE AT Independence Hall explains why the workings of our Constitution are a mystery to so many Americans: “Whenever you get to the stuff about all the checks and balances, people’s eyes glaze over.” Taking the glaze off was one of the goals of Congress and President Reagan when they enacted the Constitution Heritage Act of 1988, “To provide for continuing interpretation of the Constitution in appropriate units of the National Park System . . . , and to establish a National center for the United States Constitution within the Independence National Historical Park in Philadelphia, Pennsylvania.” A dozen years later, President Clinton broke ground for the “National cen-

pendence to the drafting and ratification of the Constitution to their own assessment of how well we have stayed in tune with those documents through some challenging times.”

Kmiec, like the tour guide, recognizes that, “even with law students a straight description of the story of the Constitution can elicit yawns, and that is why this interpretative museum has been designed to be accessible at multiple levels. It will use a fair amount of computers and other interactive systems, as well as role-playing actors and more conventional exhibits, to provoke people to think, and to give them the chance to move quickly through parts of the museum and sink into other subjects as deeply as they want to.”

According to Kmiec, work on the NCC presents an opportunity for public service. “If pro-



The National Constitution Center in Philadelphia is scheduled to open in 2003.

ter,” now known as the “National Constitution Center.” When the NCC opens its doors to the public in 2003, we will see a \$185 million combination museum, research center, and national education and outreach program based at one end of Independence Mall in downtown Philadelphia, directly across from Independence Hall.

“The NCC’s location in Philadelphia completes a sentence as it were,” says Douglas Kmiec of Pepperdine University, one of the NCC’s first visiting scholars. “A number of years ago, one of the Chief Justices said that the Declaration of Independence is the promise and the Constitution is the fulfillment. In a few years, visitors will be able to experience the bridges we have crossed from the philosophical premises of the Declaration of Inde-

bono work includes legal work that can enhance the understanding by American citizens of their rights and their role in the governance of our country, then work for the NCC counts, because everybody has a stake in this – a place where all of our stories are being told. One great thing about this endeavor is that there is such widespread support for it, from Supreme Court Justices O’Connor, Scalia, Stephen Breyer, to private practitioners, to individuals with no formal legal training but a commitment to building an institution that will make the Constitution accessible and understandable to all citizens.”

Alan Reed, a former chairman of Morgan, Lewis & Bockius, and a vice chairman of the NCC board of directors, says the Center expects more than one million visitors to the

museum in its first year. Make your vacation plans now.

David Boldt, *A place to honor history*, Philadelphia Inquirer, Sept. 28, 1999, at A19; Constitution Heritage Act of 1988, 102 Stat. 1640; 134 Cong. Rec. H7307, H7308 (1988) (Rep. Vento); [www.constitutioncenter.org](http://www.constitutioncenter.org).

## FAUX FEDERALISM?

**E**MPLOYERS AND unhappy current and former employees have fought for decades over the enforceability under the Federal Arbitration Act of agreements to arbitrate employment disputes. Section 2 of the FAA makes most commercial arbitration contracts “valid, irrevocable, and enforceable,” while § 1 of the Act excludes enforcement of arbitration clauses in “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

The consensus in the federal courts is that: (a) the FAA’s narrow reference to “seamen” and “railroad employees” precludes a broad exclusion of federally-sanctioned arbitration in employment; and (b) the pre-New Deal Congress that enacted the FAA intended the phrase, “any other class of workers engaged in foreign or interstate commerce” to apply to people working in interstate transportation in the same way that people who work on boats and railroads do. In *Craft v. Campbell Soup Co.*, however, the Ninth Circuit reached the opposite conclusion – that § 1 of the FAA excludes all employment arbitration agreements from enforcement under the Act. The court followed *Craft* in *Circuit City Stores, Inc. v. Adams*; *Circuit City* sought review in the Supreme Court and received it on November 6, 2000.

The *Circuit City* case brought more to the Court than the thoroughly masticated statutory interpretation question, however. The respondent, Saint Clair Adams, also argued that his case is really about federalism – a

debate about whether state or federal law governs the enforceability of employment arbitration agreements. On this theory, a vote to affirm the Ninth Circuit is a vote to empower each state to retain its traditional authority over contracts between individual employees and their employers.

According to Samuel Estreicher of New York University and Jay Waks of Kaye, Scholer, Fierman, Hays & Handler, both of whom represent parties opposing Adams, his federalism theory is a stealthy half-truth concealing an attempt to eliminate employment arbitration. They point to two key factors: (1) a footnote near the end of Adams’s brief in which he notes that if he prevails even those states that favor arbitration would be unable to enforce arbitration agreements with respect to federal claims, because a “federal anti-waiver rule would govern by reason of the Supremacy Clause”; and (2) employers are reluctant to enter arbitration agreements that cannot resolve all claims – state and federal.

The first, anti-waiver factor recognizes that with the FAA’s presumption of arbitrability out of the picture, there would be nothing to balance the fact that lawsuits are the only means of enforcement mentioned in Title VII, the ADA and other federal anti-discrimination laws, and that waivers of rights under these statutes are disfavored. Courts would not permit a state law favoring arbitration to trump a federal anti-discrimination enforcement scheme. The second factor, employers’ reluctance to enter arbitration agreements that cannot encompass all elements of a dispute, recognizes that employers balance the benefits of economical resolution of otherwise costly litigation of major claims against the cost of handling and sometimes paying out on small claims that might not even be raised in the absence of arbitration.

According to Estreicher and Waks, a victory in the Supreme Court for Adams would benefit employees with large and promising