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Stephen F. Ross
Penn State Law

Roy Eisenhardt
Berkeley Law

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Clear Statement Rules and the Integrity of Labor Arbitration

Stephen F. Ross and Roy Eisenhardt*

ABSTRACT

Under the common law, employment contracts are submitted to civil courts to resolve disputes over interpretation, breach, and remedies. As an alternative, parties in labor contexts can agree to resolution by an impartial arbitrator, whose decision is reviewed deferentially by judges. Where employees are subject to rules of a private association, they are often contractually obligated to submit their claims to an internal association officer or committee; the common law provides for judicial review more limited than a civil contract but more searching than is the case for an impartial labor arbitrator. Recently, the National Football League and its players have gone to federal court in well-known disputes concerning employee discipline. Although the collective bargaining agreement expressly removes these issues from impartial arbitration, the cases have curiously been litigated as if the league commissioner is an arbitrator. This Article suggests that this is the wrong standard. It creates an anomaly where a unionized player's grounds for review are narrower than a non-union employee. It also creates an inevitable incentive for federal judges to distort the deferential rules of review of labor arbitration designed for expert impartial arbitrators, when reviewing the decision of a management executive. We discuss the baseline law of private association and why it is a superior standard of judicial review in these cases.

I. INTRODUCTION

Within our judicial system, there is a broad spectrum of standards that apply to judicial review of an initial decision resolving a civil dispute. In a civil action, the parties may seek review by an appellate court, which will thoroughly examine the record for mistakes of law and fact.¹ As an alternative to the judicial process, parties often agree to non-judicial commercial or labor arbitration by an independent arbitrator. In this context, the losing party retains the right of judicial review. However, the process is a more-limited motion to vacate the arbitral award in federal court.² In the case of a private association, the member-parties are bound by

* Ross is Professor of Law and Executive Director, Center for the Study of Sports in Society, Pennsylvania State University. Eisenhardt is Lecturer in Sports Law, Berkeley Law, University of California (Berkeley) and former President of the Oakland A's baseball club. We thank Professors Doug Allen and Paul Whitehead of the School of Labor and Employment Relations at Penn State for their critical insights, and Krista Dean for research assistance.

¹ Fed. R. Civ. P. 59.

² See Federal Arbitration Act, 9 U.S.C. § 1 et seq. (hereafter "FAA."); Labor Management Relations Act, § 301 (29 U.S. Code § 185). Both statutes are discussed *passim*.

agreement to the association's rules. Generally this involves submission of their claims to an internal officer or committee. Therefore, in private association cases, the common law provides the scope for judicial review of actions by the association's designated officer or tribunal.³

Each of these categories incorporates a prescribed and different standard of judicial review, which range from very broad in civil actions, to very narrow in the case of an appeal from a labor or commercial arbitration decision.⁴ Falling between these two extremes is the judicial standard of review for internal decisions of private associations.

Two recent discipline cases arising under the collective bargaining agreement (CBA) between the National Football League (NFL) and its players union (NFLPA) make the point. The NFLPA sought judicial review of disciplinary action taken by the NFL Commissioner against these players under the Commissioner's best interest power.⁵ The NFL CBA clearly expresses the parties' explicit intent to remove Commissioner's discipline for most types of on-field conduct and for "conduct detrimental to the integrity of, or public confidence in, the game of football" from the detailed system of labor arbitration the parties use to resolve other disputes under the CBA.⁶

³ See, e.g., Zachariah Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930). Chafee suggests the standard for judicial review of a private association as (i) the rules and proceedings must not be contrary to natural justice; (2) the expulsion must have been in accordance with the rules; (3) the proceedings must have been free from malice (bad faith).

⁴ This specific aspect of the judicial role in labor arbitrations was established in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *Enterprise Wheel & Car* was announced the same day as two other important decisions stressing the Court's deference to impartial and independent labor arbitrators, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Amer. Mfg. Co., er. Mfg. Co.*, 363 U.S. 564 (1960). These three cases are referred to as the "*Steelworkers Trilogy*." See, e.g., *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 648 (1986).

⁵ *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d. Cir., 2016) [hereinafter *Brady*]; *Nat'l Football League Players Ass'n on behalf of Peterson v. Nat'l Football League*, 831 F.3d 985 (8th Cir. 2016) [hereinafter *Peterson*]. This "best interest" power is established in Section 8.13A of the NFL Constitution, and applies to all members of the NFL: Owners, employees, officials, and players. For the exercise of this power against a player, the Commissioner is constrained by the provisions of Article 46 of the 2011 NFL-CBA.

⁶ Articles 43 and 44 of the NFL CBA set forth a typical labor arbitration regime utilizing an independent arbitrator. In contrast, Art. 46, §1(a) does not. Article 46 provides that "Notwithstanding anything stated in Article 43... all disputes involving a fine or suspension for conduct on the playing field [except for distinctive procures for unnecessary roughness or unsportsmanlike conduct on the field] or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of football, will be processed exclusively as follows . . ." To summarize the special process that ensues under Art. 46, the initial disciplinary hearing is customarily held before the Commissioner; if the player elects to "appeal," the player's "appeal" is not to an independent arbitrator, but to a "Hearing Officer" designated by the Commissioner. Often, as in *Brady*, the Commissioner serves as the hearing officer in review of his own decision. In other cases, as in *Peterson*, the Commissioner designated the former NFL Vice President for Labor Relations, Harold Henderson, as the hearing officer. In a recent disciplinary hearing, *In re the Matter of Ray Rice* (Nov. 28, 2014), available at ESPN.com/pdf/141128_rice-summary, the Commissioner appointed a retired trial judge to hear the

Nonetheless, as the *Peterson* and *Brady* cases demonstrate, the NFLPA routinely frames the motion to vacate in federal court under the very narrow standard appropriate to judicial review of an independent labor arbitrator.⁷ In our view, application of this narrow standard of judicial review is the wrong standard of review for Commissioner discipline against a player taken pursuant to Article 46.

This is not just a technical distinction. The choice of the wrong standard of review for Article 46 discipline has several ramifications. First, to treat the Commissioner's judgment as equivalent to the award by a labor arbitrator results in an unjustified anomaly: Courts review discipline of team owners and other non-union league employees under the state law of private associations.⁸ However, when the NFLPA files a motion for vacatur under independent labor arbitration standards, the player is limited to a more narrow scope of judicial review than team owners or non-union employees for what could be the same or similar offense.⁹ Second, perhaps more importantly, the utilization of the wrong process distorts the law of labor arbitral review, presenting ongoing risks to that important body of law which extends beyond the NFL. If parties collectively bargain to exclude a management decision from review by an independent arbitrator, then judicial review should respect that clear statement of intent, and apply the law of private associations otherwise applicable to non-union individuals subject to the private association's rules.

The recent decisions involving famous NFL stars Adrian Peterson of the Minnesota Vikings and Tom Brady of the New England Patriots illustrate the problem. Both were disciplined by Commissioner Roger Goodell for misconduct under Article 46. The discipline was unsuccessfully appealed pursuant to internal appeal provisions specified in that Article. In both of these cases, the NFLPA, on behalf of the player, sought judicial review under both section 301 of the Labor Management Relations Act (LMRA)¹⁰ and the Federal Arbitration Act (FAA),¹¹ to vacate the "arbitration" decision by the Commissioner. Consistent with the pleadings, the court opinions at

player appeal, as the Commissioner's testimony was essential to the merits on appeal. For similar reasons, in the famous "Bountygate" discipline, *In the Matter of New Orleans Saints Pay-for-Performance/ "Bounty"* (Dec. 11, 2012), available at <http://www.nfl.com>, the Commissioner appointed the previous Commissioner, Paul Tagliabue, as the hearing officer to hear the players' appeals.

⁷ See *NFLPA v. NFLMC (Peterson)*, 88 F.Supp.3d 1084, 1089 (2015) ("the NFLPA filed a petition to vacate the arbitration award under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA) and Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10 (FAA). The trial court, consistent with this petition, considered its standard of review under these two acts. See also *NFLMC v. NFLPA (Brady)*, 125 F.Supp.3d 449, 449 (S.D.N.Y.2015) (trial court states that the NFLPA and NFL, on cross motions, argued their respective positions "pursuant to Section 301 of the [LMRA] and Section 10 of the [FAA].")

⁸ The governing law for the NFL-CBA is New York. See Article 70 of the 2011 CBA. For general discussion of owner discipline under private association law, see discussion accompanying notes __ infra.

⁹ See discussion accompanying notes __, infra.

¹⁰ 29 U.S.C. § 141, Pub. L. No. 120, 61 Stat. 136 (1947).

¹¹ 9 U.S.C. §§ 1-14, Pub. L. No. 392, 61 Stat. 669 (1947).

both the district court and appeals court levels treated the case as seeking judicial review of the disciplinary decision by a labor arbitrator. Both district courts vacated the Commissioner's discipline.¹² The district judges, in rendering judgment, were clearly cognizant of the fact that the discipline under review was not that upheld by an independent expert arbitrator, but of a management executive.¹³ Both appellate courts reversed the district court decisions, based on the narrow guardrails imposed on judicial review by *Steelworkers Trilogy*.¹⁴ For example, the Second Circuit, in describing the Article 46 appeal process, characterized it as an arbitration, even though the CBA, by its language, clearly withdraws the review under Article 46 from the independent arbitrator paradigm: "Brady requested arbitration and League Commissioner Roger Goodell, serving as arbitrator, entered an award confirming the discipline."¹⁵

In our view, the standards specified in the LMRA and the FAA are not the correct standards for judges to review a decision expressly withdrawn from arbitration. The district courts engaged in a strained application of these standards, in order to vacate the Commissioner's "arbitral award," and were reversed by the courts of appeal. The application of these arbitration standards to review a matter of management discretion threatens the integrity of the arbitral process. The collective bargaining agreement should be interpreted in the straightforward way typical of non-sports agreements where a matter is clearly removed from review by independent arbitration. That is, where the decision is removed from arbitration and left to management, then affected parties are left with the same rights as they would have in the absence of collective bargaining, under the common law. To be sure, NFL owners and players are free to effectuate federal labor policy by altering this presumption, but they should be required to do so explicitly.¹⁶

The Article suggests that courts should presume that, when a matter is clearly removed from arbitration, the *Steelworkers Trilogy* and FAA standards for judicial review do not apply. These standards are designed for independent expert arbitrators, not unilateral decisions by one of the parties. Absent text that explicitly incorporates these standards into the collective bargain, where the NFLPA and players seek review in federal court of a disciplinary decision by the Commissioner that has been removed from impartial arbitration by the parties, they should plead for relief under the principles of judicial review that would apply under the law governing private associations. Judicial review of the Commissioner's decision should apply those standards, as they would in the case of discipline directed at an

¹² See note 8, *supra*.

¹³ *Id.*

¹⁴ *Brady*, 820 F.3d at 537; *Peterson*, 831 F.3d at 993-94. The cases comprising the *Trilogy* are cited *supra* note ____.

¹⁵ 820 F.3d at 537.

¹⁶ The review by the Commissioner of his own discipline under Article 46 has existed since the first NFL-CBA in 1968. The full document may be found at the Sports Lawyers Association website, <https://www.sportslaw.org/members/secureDocument.cfm?docID=985> (last visited March 1, 2017).

owner or non-union employee. Applying the appropriate standard will not be outcome determinative in all cases, but will focus the reviewing court on different issues and, in some cases, will give the courts broader leeway to overturn a decision that is arbitrary or contrary to established league practices.

The Article proceeds as follows. Part II lays out the common law baseline for judicial review of decisions by a sports league commissioner, in the absence of labor law and collective bargaining. Precedents regarding sports leagues and similar associations hold that association officials enjoy wide discretion, but that courts will reverse actions that exceed delegated authority, are wholly lacking in evidence, are arbitrary or capricious, or are contrary to established association rules. Part III sets forth the statutory overlay of labor law and its preference for arbitration, while emphasizing that the overarching policy of freedom of contract between unions and management is not unlimited. In Part IV, we apply these principles in the context of sports arbitration, with emphasis on the role of clear statement rules in interpreting both relevant statutes as well as collective bargains. Part V articulates our thesis that specific principles of review of impartial labor arbitrators should not be applied to other forms of dispute resolution, particularly when the language in the collective bargaining agreement expressly excludes impartial arbitration of a management decision. Rather, courts faced with disciplinary decisions that are withdrawn from impartial arbitration should review them, under their common law powers, either applying specific standards set forth in the collective bargaining agreement or applying the general standards for review that would be applicable to non-union employees or management officials. We discuss this approach to two recent sports disciplinary cases of owners.

II. THE COMMON LAW AND THE SPORTS LEAGUE COMMISSIONER

At common law, absent specific language in a contract, employment is “at will.” Workers can quit at any time. Employers can fire workers for any reason at any time.¹⁷

Employers and workers are, however, allowed to enter into enforceable contracts governing the terms of employment. The contract can specify terms of discipline and grounds for dismissal, and provide each party with remedies in case of breach. Disputes are resolved in civil litigation before judges.¹⁸ Significantly, on grounds of public policy at common law, courts refused to not enforce provisions that purport to waive access to courts to resolve disputes.¹⁹

Judicial review is circumscribed, however, when the decision is one designated by a private association based on private agreement. Where the rules of a private association provide for internal resolution of disputes, judicial review is limited for

¹⁷ 2 Emp. L. Deskbook Hum. Resources Prof. § 34:2

¹⁸ *Id.*

¹⁹ *See, e.g., Gulf South Conference v. Boyd*, 369 So. 2d 553, 557 (Ala. 1979).

social organizations (such as fraternal organizations), ecclesiastical organizations (such as churches, synagogues, or mosques) or business associations (such as medical groups or homeowners associations). Under the common law of private association, however, courts retain the authority to reverse association officers' decisions if the decision either (a) exceeds their delegated authority; (b) lacks any evidence in support; or (c) is contrary to the association's by-laws or rules.²⁰ Judicial review of private association decisions varies based on the nature of the particular organization and the degree of harm arising from discipline or expulsion.²¹ Where an association exercises a degree of control in an industry to preclude those subjected to discipline from engaging in their chosen profession, review is significantly closer than where the discipline is from a fraternal or social organization,²² where the plaintiff can choose to affiliate with other private associations, and where the defendant's interest in choosing with whom to associate is greater.

Major American professional sports are organized as private associations comprised of the clubs that participate in the competition.²³ Each of these associations have a governing document, called a league constitution, and all major professional sports follow the model created by baseball in the 1920s of creating the office of the Commissioner, selected by the owners with significant job security, and granted broad powers to take actions to discipline those within the game for conduct detrimental to the "best interests" of the game.²⁴ Distinctively from this "best interests" power, league constitutions also provide that the Commissioner "shall have full, complete, and final jurisdiction and authority to arbitrate" disputes between stakeholders within the league.²⁵ This reflects the unique role of the commissioner of sports league. Discipline regarding the integrity or the "best interests" of the entire sport must be industry-wide, not just for a single employer. History has shown the need for a single commissioner with regard to special integrity needs of sporting competitions.²⁶ The arbitration power reflects related but distinct concerns about providing a quick, efficient non-judicial system for resolving internal disputes.²⁷

²⁰ Chafee, *supra* note __, at __.

²¹ *Falcone v. Middlesex County Medical Soc.*, 62 N.J. Super. 184, 196 (1960).

²² *Id.* at 198.

²³ Technically, the NHL is a 501(c)(6) tax-exempt organization. The NFL was also a 501(c)(6) until 2014, when it abandoned that classification and became an unincorporated association. Major League Baseball opted to forego its 501(c)(6) status in 2007. The principal exception is NASCAR, a private company that organizes the premier stock car racing competition, where racing teams have separate "vertical" contracts. *See generally* Stephen F. Ross and Stefan Szymanski, *Fans of the World, Unite! A (Capitalist) Manifesto for Sports Consumers* (2008), chapter 4.

²⁴ On the origin of the system, see Eliot Asinof, *Eight Men Out: The Black Sox and the 1919 World Series* (2000). The NFL Constitutional delegation is typical. NFL Const. Art. 8.13(a).

²⁵ *See, e.g.*, NFL Const. Art. 8.3.

²⁶ Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach From a Corporate Perspective*, 6 Marq. Sports L.J. 65, 70 (1995)..

²⁷ *Id.*

Two sports cases illustrate and apply these principles. *Finley v. Kuhn*²⁸ was a challenge to a decision by the Commissioner of Baseball disapproving three agreements whereby the Oakland Athletics sold the contracts of three star players to the New York Yankees and the Boston Red Sox. The court upheld the decision as within the Commissioner's broad authority to take action to prevent conduct "inconsistent with the best interests of baseball." As to this judgment, the court was extremely deferential. The court explained that baseball "cannot be analogized to any other business" and standards like "the best interests of baseball" were not "familiar to courts and obviously require some expertise in their application."²⁹

The Seventh Circuit expressly considered a provision in the Major League Agreement that provides that all clubs agreed to be bound by the Commissioner's decision and to waive recourse to courts. However, it refused to read the provision literally. Instead, the court applied Illinois law.³⁰ That law conforms to well-recognized principles of deference under the law of private associations. The court ruled that:

[T]he waiver of recourse clause contested here seems to add little if anything to the common law non-reviewability of private association actions. This clause can be upheld as coinciding with the common law standard disallowing court interference. We view its inclusion in the Major League Agreement merely as a manifestation of the intent of the contracting parties to insulate from review decisions made by the Commissioner concerning the subject matter of actions *taken in accordance with his grant of powers*.³¹

Thus, the court further reasoned, the clause does not foreclose access to courts under all circumstances. Exceptions to judicial deference exist:

- 1) where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association, or
- 2) where the association has failed to follow the basic rudiments of due process of law.³²

²⁸ 569 F.2d 527 (7th Cir. 1978).

²⁹ *Id.* at 537.

³⁰ As the court's jurisdiction was based on diversity, it faced a decision as to choice of applicable state law. The original Major League Agreement was signed in Chicago in 1921, so Illinois seemed the appropriate choice. The court then commented as follows on the applicable law: "Oakland has urged us to apply the substantive law dealing with the "policies and rules of a private association" to the Major League Agreement and actions taken thereunder. Illinois has developed a considerable body of law dealing with the activities of private voluntary organizations and we agree that the validity and effect of the waiver of recourse clause should initially be tested under these decisions." *Id.* at 543. The current Major League Constitution, adopted in 2005, lacks a governing law provision, so presumably faced with this question again, a court would apply Illinois law.

³¹ *Id.* at 543 (emphasis added).

³² *Id.* at 544.

Indeed, the court specifically considered and rejected, as lacking sufficient evidence, Finley's claim that the decision was arbitrary and capricious, or motivated by "malice, ill will, or anything other than the Commissioner's good faith judgment that these attempted [contract] assignments were not in the best interests of baseball."³³

The distinction between impartial arbitration and judicial review under the law of private association is also illustrated by *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn* ("*Turner*").³⁴ One of the responsibilities of sports league commissioners is to enforce standards against "tampering" with players still under contract to other clubs. Baseball Commissioner Bowie Kuhn found that Atlanta Braves owner Ted Turner had violated this standard and imposed sanctions. Subsequently, at a cocktail party with media present, Turner told San Francisco Giants' owner Bob Lurie that the Braves would outbid the Giants for the services of star centerfielder Gary Matthews. Eventually, Matthews signed with the Braves. After a hearing, Commissioner Kuhn found that Turner's repeated violation of tampering rules was "not in the best interests of baseball." After another hearing, Kuhn imposed sanctions against the Atlanta club, including suspending Turner for one year and denying the Braves its first pick in the following summer's amateur draft.

As in *Finley*, the judge in *Turner* refused to read the waiver-of-recourse clause in the Major League Agreement as precluding any judicial review. Of particular relevance to this Article, the court expressly rejected the claim that the standard for judicial review of an arbitrator's decision under the Federal Arbitration Act was applicable to Kuhn's decision.³⁵

The court observed that the Commissioner's disciplinary powers were grounded in one provision of the Major League Agreement, whilst the Commissioner's authority to resolve all "disputes and controversies related in any way to professional baseball between clubs" is contained in a separate provision.³⁶ Prior precedent supported the claim that the Commissioner's arbitral authority did not apply where the dispute was a disciplinary one generated by the Commissioner himself under his "best interest" powers. This distinction is well-illustrated by the Commissioner's decision. Had the Commissioner ordered the Braves to pay the Giants a sum of money, or assigned a player's contract to the Giants, or given a Braves' draft pick to the Giants, then the decision would seem akin to an arbitral award between two disputants. Instead, by suspending Turner and simply taking away a draft pick, the decision was clearly of a punitive nature by the Commissioner in the exercise of his "best interests" authority.³⁷

³³ *Id.* at 539 n.44.

³⁴ 432 F. Supp. 1213 (N.D.Ga. 1977).

³⁵ *Id.* at 1218.

³⁶ *Id.* at 1219.

³⁷ Kuhn was precluded from barring the Braves from signing Mathews, as that would most certainly have provoked a successful grievance from the players association.

Turning to the merits of the case, the court upheld the Commissioner's determination that Turner's conduct was contrary to the "best interests of baseball" and that the sanction of suspension was within the Commissioner's discretion. However, the court found the Agreement's provisions concerning penalties did not include removal of a draft pick, and given the penal nature of the clause, it was to be strictly construed.³⁸

In sum, under the common law of private associations, sports league commissioners enjoy wide discretion to define what constitutes the "best interests" of the sport. However, courts retain the power of judicial review over commissioner's decisions that exceed their delegated authority, are wholly lacking in evidence, are contrary to established league rules, or those that are arbitrary and capricious.

Based on these precedents, consider what might have occurred if New England Patriots' executive Jonathan Kraft (son of owner Robert Kraft), rather than NFLPA member Tom Brady, had been the one personally subjected to the Commissioner's discipline for the alleged deflation of game balls. Judicial review of Commissioner Goodell's decision in such a case would have been under private association standards, whereas the courts reviewed Brady's discipline under the traditional standards governing labor arbitrations.³⁹ Absent clear language in a CBA, why should a player be more limited in his rights to judicial review than a non-union employee?

III. THE STATUTORY AND JUDICIAL PREFERENCE FOR INDEPENDENT ARBITRATION OF INDUSTRIAL DISPUTES

Professional sports athletes followed non-sports employees in taking advantage of the National Labor Relations Act to organize collectively.⁴⁰ As players in the NHL, NBA, and MLB organized to strengthen their bargaining position regarding wages and working conditions, one of their top priorities was to secure a collective bargaining agreement that permitted an independent labor arbitrator to resolve disputes between players and their employers, or with the commissioner.⁴¹ Under the labor model, the substantive "law" was the CBA, not the league constitution, and the dispute resolution mechanism was impartial arbitration, not the law of private association that designates the Commissioner as the tribune. Under these CBAs, federal law governing arbitration, rather than the law of private association, now governs most sports labor disputes.

³⁸ 432 F. Supp. at 1225.

³⁹ See discussion accompanying note __, *infra*.

⁴⁰ The first players' union to be certified by the NLRB was the NFLPA in 1970, following the assertion of jurisdiction by the NLRB over professional sports in American League of Professional Baseball Clubs, 180 NLRB No. 30 (1969).

⁴¹ For example, the use of an independent arbitrator was included in the MLB CBA in 1972. The provision went relatively unnoticed by the owners. Ironically, the ability of the players' to take the Messersmith/McNally free-agency grievance before that arbitrator has changed baseball forever.

The NFL bargaining history is different. Since its first CBA in 1968, the independent arbitration model has been utilized in all aspects of dispute resolution, with the express exception of the Commissioner's exercise of the "best interest" power. In that case, as stated earlier, the Commissioner initially imposes the discipline; if the player elects to "appeal" that discipline, his recourse is to a hearing officer designated by the Commissioner. The hearing officer is frequently the Commissioner himself.⁴²

A. The Federal Arbitration Act

Under the common law, agreements to waive recourse to courts were generally unenforceable as contrary to public policy.⁴³ To facilitate the concept of neutral arbitration as an alternative means of dispute resolution, in 1926 Congress enacted the FAA.⁴⁴ For contracts subject to regulation under Congress' power to regulate interstate commerce, the FAA makes valid agreements to submit disputes to binding arbitration, superseding state laws to the contrary.

The FAA's theoretical foundation is that parties otherwise competent to make binding promises are free to make a bargain to abide by the decision of an arbitrator.⁴⁵ Thus, when a judge reviews an arbitral award, the award itself is presumptively the decision of the parties. Consider a sports illustration: The provision in the Major League Baseball (MLB) collective bargaining agreement to arbitrate certain players' salaries.⁴⁶ Although an arbitration-eligible player and his club did not agree on the salary, the salary awarded by the arbitrator is correctly understood to reflect the decision of the parties.

The FAA provides important but narrow exceptions. Section 10 provides a federal court may vacate an award under any of the following provisions:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators . . .
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the

⁴² Compare NFL-CBA 2011 Articles 43 & 46; see text accompanying note 6, *supra*.

⁴³ See note ___ *supra*.

⁴⁴ Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

⁴⁵ Legislative history reinforces this conclusion. See S. REP. No. 68-536 (1924) stating:
The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means- cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.

⁴⁶ See MLB CBA, Article VI, Section E., *available at* http://mlb.mlb.com/pa/pdf/cba_english.pdf

controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁴⁷

The presumptive validity of arbitral agreements set the stage for their primacy in resolution of industrial labor disputes. Indeed, courts have acknowledged that the FAA's principles are generally incorporated into labor arbitration, although the process has been not entirely smooth.⁴⁸

B. The Labor Management Relations Act and the *Steelworkers Trilogy*

Having federalized labor policy towards collective bargaining with the passage of the National Labor Relations Act in 1935, Congress sought to improve the process for dispute resolution in the 1947 LMRA.⁴⁹ A critical provision in this regard, section 301, conferred subject matter jurisdiction in federal courts, replacing state common law contract rules with a federal common law to enforce and interpret collective bargaining agreements.⁵⁰ CBAs generally displace the doctrine of employment of will at common law, affording workers greater job security than non-unionized workers whose employment is not secured by an individually negotiated contract. Most important for our purposes, section 203(d) of the LMRA is a statutory declaration that the "desirable method for settlement of grievances" under a CBA is a "final adjustment by a method agreed upon by the parties."⁵¹

⁴⁷ Title 9 U.S.C. §10. See also dictum in *Wilko v. Swan*, 346 U.S. 427 (1953) (overruled on other grounds in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989) suggesting that "manifest disregard for the law" is a ground for overturning an arbitration decision. See also *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), holding that parties may not expand by agreement on the standards of review specified in the FAA.

⁴⁸ See Lisa M. Eaton, *Arbitration Agreements in Labor and Employment Contracts: Well Within the Reach of the FAA*, 2002 J. Disp. Resol. 193, 212 (2002); See also Michael LeRoy, *Irreconcilable Differences: The Troubled Marriage of Judicial Review Standards under the Steelworkers Trilogy and the Federal Arbitration Act*, 2010 J. Disp. Resol. 89 (2010).

There is some debate whether the FAA was intended to apply to labor arbitration, turning particularly on the exclusionary language in section 1 stating "... nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This was rejected in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

⁴⁹ 29 U.S.C. § 141, Pub. L. No. 120, 61 Stat. 136 (1947).

⁵⁰ 29 U.S.C. § 185(a) ("Suits for violation of contracts between an employer and a labor organization representing employees in an industry. . . , or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.")

⁵¹ See 29 U.S.C. §203(d): "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

The Supreme Court's landmark decisions in three cases commonly referred to as the *Steelworkers Trilogy* provides the authoritative interpretation of these provisions. The Court interpreted the LMRA to create two clear doctrines. First, in *United Steelworkers v. Enterprise Wheel & Car Corp.*, the Court held that federal judges must defer to the parties' choice of alternative dispute resolution procedures.⁵² Second, in *United Steelworkers v. American Manufacturing Co.*,⁵³ the Court held that, where the parties have chosen impartial arbitration, federal judges must enforce awards that "draw their essence from the contract." This second holding reflected the reality that of all the many promises parties make in a CBA, the most important one is that all disputes are determined by an arbitrator of their choice, and not by federal judges.

In explaining these holdings, the Court went far further than was required to carry out dutifully the congressional declaration to effectuate grievance settlement "by a method agreed upon by the parties."⁵⁴ It discussed at length the many benefits to labor, management, and the general public of the impartial arbitrator.⁵⁵ An arbitral tribunal has greater expertise than federal judges in interpreting a CBA to reflect the parties' agreement and to facilitate the parties' ongoing relationship. In addition, labor arbitration promotes labor peace. It is quicker and cheaper than federal court litigation, and the parties are more likely to move forward constructively after a decision by an arbitrator of their choice. As Justice Douglas observed, whereas arbitration in effect substitutes for litigation in commercial disputes, in labor disputes it often substitutes for strikes and lockouts.⁵⁶

These standards are premised on a fundamental policy assumption concerning the independence, neutrality and expertise of the arbitrator.⁵⁷ For example, Justice Douglas states in the *Enterprise Wheel* opinion:

⁵² 363 U.S. 593 (1960) (reversing lower court's refusal to defer to arbitrator regarding a non-meritorious claim).

⁵³ 363 U.S. 564 (1960) (reversing lower court's set-aside of an arbitral award because of its disagreement with the merits of the arbitrator's decision).

⁵⁴ 29 U.S.C. § 173 (1947).

⁵⁵ *Warrior & Gulf*, 363 U.S. at 580-82.

⁵⁶ *Id.* at 578.

⁵⁷ None of the three *Steelworkers* opinions refers to the Federal Arbitration Act, nor addresses the question whether the standards under section 10 under that act are congruent with the subjective standards articulated in *Steelworkers*. The two cases that are the centerpiece for this article, *Peterson* and *Brady*, utilize both *Steelworkers* and the FAA interchangeably. The district court in *Peterson* recognized the issue, and stated:

For purposes of this case, the standard of review under the LMRA and the FAA is the same. Courts give decisions by labor arbitrators "substantial deference." "The federal labor laws 'reflect a decided preference for private settlement of labor disputes.'" Therefore, "as long as the arbitrator is even arguably construing or applying the [CBA] and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.⁵⁸

To implement this rationale, the Court adopted a clear statement rule to enforce the first of their clear doctrines established in *Warrior & Gulf*: arbitration is enforced, unless the parties “evinced a most forceful evidence of a purpose to exclude” the dispute from arbitration.⁵⁹ The Court’s adoption of this clear statement rule is important. This holding is not consistent with a strict and literal reading of section 203(d). Consider a CBA that contains ambiguous language suggesting that certain disputes may not be subject to arbitration. Literally, the statutory command for a federal judge to implement the method of dispute resolution “agreed to by the parties” would require the judge, in cases of ambiguous text, to explore other evidence of the parties’ intent, and enforce the method which the judge determines is most probably the parties’ choice. However, *Steelworkers Trilogy* instead instructs judges to forego this inquiry and find a matter to be arbitrable unless the parties have clearly stated that it is not.

To further the second clear doctrine, established in *Enterprise Wheel & Car Co.*, the Court held that judicial challenges to arbitral awards would be narrowly circumscribed. To secure judicial relief, parties would need to demonstrate clear bias, fundamental procedural unfairness, or that the award disregarded the “essence” of the parties’ collective bargain in favor of the arbitrator’s “own brand of

National Football League Player’s Ass’n v. National Football League, 88 F.Supp. 3d 1084, 1089 (D. Minn. 2015). This position is consistent with *Oxford Health Systems v. Sutter*, 133 S.Ct. 2064 (2013) which suggests the standards under both are essentially the same, even in a non-labor arbitration: “Here, Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award “where the arbitrator[] exceeded [his] powers.” A party seeking relief under that provision bears a heavy burden. “It is not enough ... to show that the [arbitrator] committed an error—or even a serious error.” *Id.* at 2068, quoting *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 671(2010). Because the parties “bargained for the arbitrator’s construction of their agreement,” an arbitral decision “even arguably construing or applying the contract” must stand, regardless of a court’s view of its (de)merits.” *Oxford Health*, 133 S.Ct. at 2068. Only if the arbitrator acts outside the scope of his contractually delegated authority —issuing an award that “simply reflect[s][his] own notions of [economic] justice” rather than “draw[ing] its essence from the contract”—may a court overturn his determination. *Id.* at 2068, quoting from *United Paperworkers Intern. Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 38 (1987) (“But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”) The Court emphasized that “the sole question for us is whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.” *Oxford Health*, 133 S.Ct. at 2068

⁵⁸ 363 U.S. at 597.

⁵⁹ *Id.* at 585.

industrial justice.”⁶⁰ Alas, lower courts continue to ignore the Court’s instructions to restrain their impulse to second-guess impartial arbitrators,⁶¹ even though, as a court of appeals correctly interpreted *Steelworkers Trilogy*, awards cannot be set aside because the arbitrator “erred in interpreting the contract” or “clearly erred” or “grossly erred,” as long as they actually interpreted the CBA.⁶²

C. Limits to freedom of contract

A fundamental principle of labor relations law is that an employer and the workers’ chosen union should be able to fashion an agreement on wages, hours, and working conditions based on free choice. The congressional policy promoting regulation of labor through collective bargaining is facilitated, logic and experience suggest, when parties can reach their own bargains. External limits on free contract require the parties to forego the most efficient bargain, as they work around the external limitation. Because this increases the difficulty of agreement, it increases the likelihood of impasse, strikes and lockouts.⁶³

However, there are many exceptions to this important foundational principle. Union and management cannot agree to waive rights that workers have under related federal employment laws, such as minimum wages, maximum hours, or occupational health and safety regulations.⁶⁴ There are likely many examples of industrial bargains that would be facilitated if unions could waive specific safety standards, that might not necessarily be essential to their particular industry, in return for other favorable management concessions, but this exception precludes this possibility. Labor law also precludes unions from reaching agreements that breach its duty of fair representation to all workers in the bargaining unit.

In addition, the National Labor Relations Board (NLRB) has created other exceptions, in the exercise of its delegated discretion to effectuate the statutory requirement that parties bargain “in good faith.” One example that directly limits freedom of contract is the doctrine regarding creation and termination of multi-employer bargaining. The Supreme Court has upheld Board decisions that, when parties have voluntarily agreed to commence bargaining on a multi-employer basis, neither the union nor individual employers can withdraw until the end of a “bargaining cycle.”⁶⁵ For example, in the leading Board precedent, the parties were at an impasse with possible industrial action and the union sought to shift approaches by reaching a satisfactory agreement with one of the four employers

⁶⁰ 363 U.S. at 597.

⁶¹ Robert A. Gorman and Matthew W. Finkin, *Labor Law: Unionization and Collective Bargaining*, §25.1, 817 (2d ed. 2004).

⁶² *Hill v. Norfolk & West. Ry.*, 814 F.2d 1192, 1194 (7th Cir. 1987).

⁶³ *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987).

⁶⁴ *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985) (“Clearly, §301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law”).

⁶⁵ *Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404 (1982), *citing with approval* *Retail Associates, Inc.*, 120 N. L. R. B. 388 (1958).

with whom they were negotiating. The Board held that this could not take place until an appropriate time in the negotiation, with a finding that the union withdrawal was “a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis.”⁶⁶

In sum, although labor law generally seeks to fulfill the mutually-agreed desires of labor and management, there are multiple exceptions that may preclude or impair this goal. In some cases, freedom of contract is explicitly limited, sometimes it is implicitly limited, and in other cases, such as the *Steelworkers Trilogy*, freedom of contract is supplemented by the requirement of clear statement. If the parties fail to state their intent clearly with respect to arbitration, the presumption is in favor of arbitration.

D. Implication of *Steelworkers*: The independent integrity of the arbitral process.

The body of precedent beginning with the pathmaking decisions in the *Steelworkers Trilogy* make clear that judicial interpretation favoring labor arbitration is driven by policies that the Supreme Court favors and perceives are shared by Congress and the NLRB. As Professor Roger I. Abrams has argued, “freedom to operate without legal intrusion but with considerable legal support devolves upon the participants - - union, management, and arbitrators -- a responsibility to ensure that labor arbitration effectuates national policy.”⁶⁷ Because federal courts will enforce no-strike promises in collective bargains, and will not substantively review the correctness of an arbitral award, Abrams observes that, with “the courts and the streets now foreclosed, the contract rights of the working person must find protection in the forum of arbitration or be lost.”⁶⁸

In *Hines v. Anchor Motor Freight, Inc.*, the Supreme Court noted that a final and binding arbitration award was vulnerable if tainted by the union’s breach of its duty of fair representation to its workers. If “contractual processes have been seriously flawed,” the “integrity of the arbitral process” has been undermined. The Court reasoned that although Congress “has put its blessing on private dispute settlement arrangements provided in collective agreements,” it presumed “that contractual machinery would operate within some minimum levels of integrity.”⁶⁹ As Abrams notes, this holding means that the “preferred status of labor arbitration is thus not immutable.”⁷⁰ He notes that courts can easily impose core principles of arbitral integrity under the federal common law of labor arbitration established by section 301 of the LMRA.⁷¹

⁶⁶ *Retail Associates*, 120 N.L.R.B. at 394.

⁶⁷ Roger I. Abrams, *The Integrity of the Arbitral Process*, 76 Mich. L. Rev. 231, 235 (1977).

⁶⁸ *Id.* at 236.

⁶⁹ 424 U.S. 554, 571 (1976).

⁷⁰ Abrams, *supra* note __, at 235.

⁷¹ *Id.* at 263.

The Court clearly favors arbitration for reasons other than a commitment to *laissez faire* freedom of contract. A libertarian approach would overturn the common law entirely and permit parties to simply waive access to courts in lieu of impartial arbitration. Such an approach would direct courts to enforce the apparent intent of the parties, rather than presuming that the parties intended to resolve disputes before an impartial arbitrator absent clear evidence to the contrary. Rather, *Steelworkers Trilogy* articulates the substantive values of independent arbitration that warrant legislative, administrative, and judicial support. These values include the fact that the arbitrator, as the chosen instrument of the parties, is assumed to be controlled by their agreement and no other forces. The Court recognized that goals of collective bargaining and labor peace are served when union and management can rely on an arbitrator's "informed practical solution of a dispute they could not resolve themselves."⁷² Another significant value of independent arbitration is that parties tend to view the totality of arbitral decisions and acceptably based on the terms to which they agreed.

Of course, parties often take advantage of the primacy of voluntary bargaining to withdraw a matter from impartial arbitration, using clear language to do so. A common practice is to make it clear that a matter otherwise subject to arbitration would instead be reserved as a matter of management discretion (or, in certain context, union discretion). Occasionally, in an extreme form of Justice Brandeis' insight that it is more important for a matter to be settled than settled correctly,⁷³ unsuccessful mediation efforts conclude with a coin flip. In some contexts, recognizing the primacy of the overall labor relationship results in a specialized tribunal equally divided between management and labor, who are expected to resolve multiple industrial disputes through bargaining and accommodation.⁷⁴

Policies supporting freedom of contract permit parties to a collective bargain, if they so choose, to reject these general principles and to resolve disputes by means other than impartial arbitration. But because impartial arbitration serves these worthy values, the parties must do so clearly and unequivocally.

IV. THE ROLE OF CLEAR STATEMENT IN SPORTS ARBITRATION

A sports arbitral award transformed both baseball, and eventually modern labor relations in sports, by ending a decades-long agreement among baseball owners not to compete for the services of players at the expiration of their contract. Both the decision by a veteran arbitrator and the limited judicial review of that decision by federal courts demonstrate the role that clear statement rules serve in labor relations. The conclusion is inescapable that these rules largely preserve the ability

⁷² *Id.* at 236.

⁷³ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

⁷⁴ My thanks to Professor Paul Whitehead for these examples from his experience as General Counsel to the United Steelworkers of America.

of collective bargaining participants to craft results they want. However, judicially-created rules of clear statement allow judges to favor certain results and disfavor others.

In *Messersmith/McNally*,⁷⁵ the arbitrator interpreted the collectively bargained uniform player contract -- which explicitly stated the Club “may renew this contract for the period of one year on the same terms” – to preclude the repeated exercise of this renewal right. As a result, after one year, the player was completely free to receive competing bids from other baseball clubs.

This radical departure from past practice would not have been achieved had the arbitrator relied on techniques of contract interpretation primarily designed to achieve the most likely intent of the parties. The literal language supported the owners’ interpretation that the right could be perpetually exercised by the club. Prior practice suggested that the parties understood the contract to permit perpetual renewals, as evidenced by antitrust litigation funded by the players’ association that had challenged what was alleged as an owners’ agreement to refrain from competing for player services perpetually.⁷⁶ Assuming (likely correctly) that the negotiating parties were familiar with the interpretive precepts established by the Restatement of Contracts,⁷⁷ the arbitrator could have found, alternatively, that even if the parties attached different meanings to a term, the term should be construed in accordance with the meaning attached by the owners, because at the time the agreement was made, the owners did not know the players believed that the term permitted free agency after one renewal year, whilst the players knew that the owners interpreted the term as granting a perpetual right of renewal.

Instead, the arbitral decision was based on a principal of clear statement. The arbitrator relied on an interpretive canon requiring perpetual options to be express.⁷⁸ The result could also have been justified based on a related clear statement canon, *contra preferendum*, that requires ambiguities to be interpreted against the party who drafted them.⁷⁹

Because of the major implications of this pathbreaking decision, the owners sought a federal court judgment vacating the arbitral award in *Kansas City Royals v. MLB Players Ass’n*.⁸⁰ Aware that *Steelworkers Trilogy* precludes careful judicial review of an arbitrator’s contract interpretation, management counsel surely realized that

⁷⁵ *Messersmith/McNally* Grievance Arbitration, 66 Labor Arbitration Reporter 101(1975).

⁷⁶ *Flood v. Kuhn*, 407 U.S. 258 (1972).

⁷⁷ Rest. of Contracts §201 (Am. Law. Inst. 1981) .

⁷⁸ *Messersmith*, 66 Lab. Arb. R. at 113-14.

⁷⁹ Rest. (2d) of Contracts, §206. For a critique of these techniques in the context of interpreting a collective bargaining agreement between two sophisticated parties, see Roger I. Abrams, *Liberation Arbitration: The Baseball Reserve Clause Case*, in Proceedings of the 55th Annual Meeting of the National Academy of Arbitrators 192 (2002).

⁸⁰ 532 F.2d 615 (1976).

they would be unlikely to persuade a federal judge to accept their challenge as a matter of contract law to the arbitrator's judgment that a rule of clear statement applied to perpetual contracts, and that instead he should have relied on the literal meaning of the text or their contested view of the parties' intent. Indeed, the court of appeals had little difficulty upholding this aspect of the award.

A more significant challenge was the owners' argument that the dispute was not arbitrable. The collective bargaining agreement explicitly stated that it did "not deal with the reserve system" featuring no competition for player services. The court rejected this argument as well, but reviewed the question of arbitrability *de novo*. However, in upholding the arbitrability of the grievance filed by players Andy Messersmith and Dave McNally, the court of appeals' review was not based on whether it was more probable than not that the parties intended to arbitrate. Rather, applying *Steelworkers Trilogy*, the applicable test is whether "the record evinces the most forceful evidence of a purpose to exclude the grievances from arbitration."⁸¹

In sum, the court refused to determine for itself whether, as the LMRA literally requires, arbitration was the final method of dispute resolution of the parties. Rather, "what a reasonable party might be expected to do cannot take precedence of what the parties actually provided for in their collective bargaining agreement."⁸² Because the agreement did not explicitly demonstrate a clear intent to remove the matter from arbitration, and because federal courts believe that independent arbitration serves many benefits, the courts would enforce the arbitral award.

V. JUDICIAL REVIEW OF SPORTS COMMISSIONER DISCIPLINE IN THE ABSENCE OF INDEPENDENT ARBITRATION

The foregoing analysis yields the following conclusions about the proper scope of judicial review of disputes between unionized players and the league commissioner over disciplinary issues. Each sports league's collective bargaining agreement has provisions for impartial grievance arbitration. Absent clear intent to exclude a matter from impartial arbitration, the individual(s) chosen by the parties for this purpose has jurisdiction, and the resulting arbitral award is subject to deferential judicial review under the FAA and *Steelworkers Trilogy* standards, subject to vacatur only if judges are persuaded that the award did not draw its essence from the agreement but was instead the arbitrator's personal imposition of industrial justice. Moreover, absent clear and express language, sports agreements should not be read to give players significantly fewer rights than non-unionized league employees and owners.⁸³

⁸¹ *Id.* at 621.

⁸² *Id.* at 630.

⁸³ A decision that superficially bears on this analysis is *State ex rel. Hewitt v. Kerr*, 120 Fair Empl. Prac. Cas. (BNA) 1086 (Mo. Ct. App. 2013). The court held that a provision in the contract between the St. Louis Rams and its non-union equipment manager, which provided that all disputes would be resolved by the Commissioner, was unconscionable because of the Commissioner's bias as an

Each sports leagues' CBA, to varying degrees, does explicitly demonstrate a clear intent that certain matters are not subject to impartial arbitration, but reserved for the commissioner or his designee. The NFL CBA, similar to the other professional sports, provides that disputes between the parties "will be resolved exclusively" by a procedure of impartial arbitration, "except wherever another method of dispute resolution is set forth elsewhere in this Agreement."⁸⁴ However, pursuant to that last proviso, the 2011 CBA provides in Article 46 that any dispute involving a fine or suspension imposed upon a player for on-field conduct, or, more broadly, "for conduct detrimental to the integrity of, or public confidence in, the game of professional football," is expressly withdrawn from impartial arbitration.⁸⁵

In lieu of recourse to an independent arbitrator to review the discipline, the NFLPA agreed that Commissioner discipline imposed under Article 46 is instead reviewed by an appeal to the Commissioner, who would designate a hearing officer. There is no bar to the Commissioner serving as the hearing officer, and in fact that procedure is most often the practice. Consequently, in many cases the Commissioner appoints himself as the hearing officer to review his own decision, with the power to "render a written decision which will constitute full, final and complete disposition of the dispute and will be binding" upon all parties. No legal standard for the "hearing officer's" review of the initial discipline is stated in Article 46.⁸⁶

Article 46 as written demonstrates an intent to exclude "best interest" player discipline from independent arbitration. This election is not unusual; many labor agreements choose to designate certain matters as within management's prerogative, or to delegate certain types of grievances to management/labor committees, or other internally structured non-independent hearing committees. While these procedures are appropriate and common, they should not be mistakenly lumped with decisions made by independent arbitrators.⁸⁷

employee of the Rams and other clubs. However, more careful analysis reveals that *Kerr* does not really address the same issues we discuss in this Article. First, the issue goes to the Commissioner's power to arbitrate disputes between clubs and employees, not the Commissioner's unique power to discipline misconduct detrimental to the "best interests" of football. Second, the court emphasized, in concluding the provision was unconscionable, that the contract term was presented in take-it-or-leave-it fashion to an unsophisticated single employee. The court's reasoning makes it clear that the court's conclusion would not necessarily apply to a reasoned decision by a highly sophisticated union, with a veteran executive director and skilled legal counsel, to accept the Commissioner's authority to impose discipline without resort to an independent arbitrator.

⁸⁴ NFL CBA, Art. 43, sec. 1.

⁸⁵ NFL CBA, Art. 46, sec. 1(a).

⁸⁶ In the Ray Rice arbitration, *supra* note __, an independent arbitrator was appointed as the hearing officer. She noted the lack of a review standard in Article 46. Reasoning from the other sections of the CBA that did utilize an arbitrator, she determined that her standard of review, sitting in the place of the Commissioner, should be "arbitrary and capricious," as opposed to "just cause". See also text accompanying notes __-, *infra*.

⁸⁷ Consistent with the parties' intent, the NFL-CBA does not refer to the Article 46 process as an "arbitration," but instead describes the process of review by a hearing officer as an "appeal." Further, the Article's language does not apply the label of "arbitrator" to the hearing officer.

Under our system of labor law encouraging voluntary agreement by the parties, this negotiated departure from the reliance on an independent arbitrator utilized throughout the rest of the CBA is totally appropriate. The negotiation clearly reflects the union's judgment that other CBA provisions are more meaningful to their constituency.⁸⁸ The parties are also free to agree on an express standard of review of the Commissioner's decision through careful and appropriate drafting of the CBA's text. However, in lieu of such drafting, our concern is that the NFLPA, the NFL and the courts consistently utilize the traditional review standard designed for an independent arbitrator articulated under the FAA and the LMRA. These workable and effective standards are premised on the independence and expertise of a neutral arbitrator. They are ill-suited for reviewing the unique "best interest" decisions of a sports league commissioner.

The NFL's Article 46 procedure introduces no independent center of review that is fundamental to the *Steelworkers'* policy. The Article 46 discipline is imposed by the Commissioner, and appealed to the Commissioner. This form of governance effectively restores the power the Commissioner originally enjoyed over all stakeholders under private association law, and that has remained vested in the Commissioner with regard to owners and employees not covered by the union CBA. Because, with regard to actions taken pursuant to Article 46, the NFL more resembles a private association, the appropriate standard of judicial review likewise should be that of a private association.

Consider the "*Deflategate*" scandal where the NFL Commissioner found two club employees had conspired with star quarterback Tom Brady to illegally deflate footballs;⁸⁹ suppose instead that Brady was not implicated, but instead the Commissioner found that the employees had conspired with Patriots club President Jonathan Kraft (son of owner Robert Kraft)? As noted above, without the overlay of labor law, the Commissioner's authority to impose discipline on anyone is subject to judicial review under the law of private association. Under cases like *Turner v. Kuhn*, Kraft could have challenged any punishment on grounds that the decision was arbitrary and capricious, that it was contrary to existing NFL rules, or exceeded the Commissioner's authority. The only difference, in our view, between Kraft and Brady is that Brady's claim as a union worker would be filed in federal court and determined under the federal common law, while Kraft's claim would be determined by the applicable state common law of private associations.

To be sure, sports leagues and their players could agree that unionized workers waive rights they would otherwise have at common law to challenge the Commissioner disciplinary decisions (presumably in return for other concessions

⁸⁸ The relevant language of Article 46 is consistent with the language of previous NFL CBAs going back to the first 1968 CBA dealing with Commissioner discipline under the "best interest" clause. See note __, *supra*.

⁸⁹ The facts are recounted in *Brady, supra*, 820 F.3d at 532-533.

and protections in the CBA). Indeed, if they so chose, they could add the following hypothetical provision:

The parties agree that the Commissioner's decision shall be final with regard to any determination arising under this section of the agreement, and expressly state their intent that the matter shall not be subject to grievance by the impartial arbitrator. Any judicial review of the Commissioner's decision shall be limited to determining whether the discipline drew its essence from the authority delegated herein to the Commissioner, and the decision shall only be overturned if a court determines that the Commissioner breached his obligation under this agreement and instead imposed his own industrial brand of justice.⁹⁰

Although such a provision is permitted, it should not be encouraged. Judges are too tempted to distort the *Steelworkers Trilogy* standard, designed properly for impartial arbitration, when faced with a review by a management official. Nor are there sound reasons of policy why, absent express language, the well-developed common law of private association that applies to owners and non-union employees should not also apply to decisions by Commissioners applicable to players.

For these reasons, the same technique of clear statement that led the Supreme Court to presume that parties intend disputes to be arbitrated should be used to presume that unionized employees (i.e., NFL players) do not have fewer rights for judicial review of discipline than their non-union colleagues in the workplace.

We acknowledge that, in many cases, judicial review under the law of private associations and judicial review under the *Steelworkers Trilogy* will yield similar results. Well-reasoned judgments by a sports league commissioner that are faithful to the league's rules and precedents will be upheld under either standard. Decisions that impose his personal brand of industrial justice rather than drawing their essence from the CBA (subject to vacatur under labor arbitration rules) are likely to be found arbitrary or contrary to league rules (subject to invalidation under private association doctrine). Moreover, judges who themselves are tempted to impose their own brand of justice can easily fulfill their formal responsibilities to follow doctrine by pronouncing the correct labels. Thus, even though precedents applying *Steelworkers Trilogy* make it clear that an arbitrator's decision cannot be overturned because in the reviewing court's opinion the arbitrator misinterpreted the CBA,⁹¹ a recent court of appeals vacated an award because the arbitrator's misinterpretation of "plain meaning" showed that the award did not draw its essence from the contract.⁹² Alternatively, in the *Finley* case discussed above, if the court of appeals

⁹¹ *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987).

⁹² *United States Soccer Fed'n, Inc. v. United States Nat'l Soccer Team Players Ass'n*, 838 F.3d 826 (7th Cir. 2016).

felt that the Commissioner's act was unjust, they could have decided it was based on malicious animosity, and reversed on that ground.

We therefore do not claim that any particular decision necessarily would have been decided differently had the correct standard been used. However, the split panel decision *Brady* suggests that the issues would have been considered and debated in a different way, and the NFLPA might well have prevailed under the law of private associations.⁹³

Chief Judge Katzmann dissented in *Brady*, largely over the Commissioner's failure to reconcile the well-established and relatively minor penalty for wide receivers using improper "stickum" to give them an advantage in catching a football with what he perceived was a similar offense in deflating a football to give a quarterback an advantage in passing the ball. He wrote:

Precisely because of the severity of the penalty, one would have expected the Commissioner to at least fully consider other alternative and collectively bargained-for penalties, even if he ultimately rejected them. Indeed, the CBA encourages—though, as the majority observes, does not strictly require—the Commissioner to fully explain his reasoning by mandating that he issue a written decision when resolving an Article 46 appeal. That process is all the more important when the disciplinary action is novel and the Commissioner's reasoning is, as here, far from obvious.

Yet, the Commissioner failed to even mention, let alone explain, a highly analogous penalty, an omission that underscores the peculiar nature of Brady's punishment. The League prohibits the use of stickum, a substance that enhances a player's grip. Under a collectively bargained-for Schedule of Fines, a violation of this prohibition warrants an \$8,268 fine in the absence of aggravating circumstances. Given that both the use of stickum and the deflation of footballs involve attempts at improving one's grip and evading the referees' enforcement of the rules, this would seem a natural starting point for assessing Brady's penalty. Indeed, the League's justification for prohibiting stickum—that it "affects the integrity of the competition and can give a team an unfair advantage," —is nearly identical to the Commissioner's explanation

⁹³ In *Peterson*, the other major recent decision, the principal ground of appeal was that the Commissioner imposed a policy retroactively by issuing more severe discipline than he had in prior cases. However, the designated NFL executive charged with hearing the appeal, and the court of appeals, both recognized that the Commissioner has broad discretion to increase penalties if prior penalties were seen as ineffective. . *Peterson*, 831 F.3d at 992. Given the breadth of the Commissioner's best interests authority, see *Milwaukee American Ass'n v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931) (parties intended Commissioner to be "proverbial *pater familias*"), it would appear that the NFLPA would not have been successful had they sought to challenge Peterson's discipline under the law of private associations.

for what he found problematic about the deflation—that it "reflects an improper effort to secure a competitive advantage in, and threatens the integrity of, the game."⁹⁴

An impartial expert labor arbitrator is not bound by precedent and does not have to explain any deviation from similar cases. That is because it is the arbitrator's judgment that has been bargained for by the parties. In contrast, under the law of private association, those charged by the association's governing documents with internal decision making are obliged to both follow rules and do so in a way that is not arbitrary. The law of private associations recognizes that non-parties may be subject to association rules, and judicial review to ensure consistent rule compliance is therefore appropriate.⁹⁵ For example, in *Finley* the court of appeals took note that the Commissioner persuaded them that previously approved cash sales of players were of a different quality and magnitude than the ones disapproved in the case *sub judice*. Applying the labor arbitration model, in contrast, the majority in *Brady* expressly noted that the CBA did not require the "arbitrator" to explain his reasoning.⁹⁶ The failure to explain why Brady's misconduct was so much more severe may well have persuaded one of the judges in the majority that Commissioner Goodell's decision was not consistent with league rules, even if his overall judgment "drew its essence" from the CBA.

Another ground for appeal in *Brady* was the NFLPA's claim that the published rules specified that first offenses for equipment violations "will result in fines."⁹⁷ It appears likely that Judge Parker's majority decision rejected that claim on the merits, because it emphasized that the rules document later states that suspensions may also be imposed based on the circumstances.⁹⁸ However, the opinion is not clear on this point: it goes on to state that "even if other readings were plausible, the Commissioner's interpretation of this provision as allowing for a suspension would easily withstand judicial scrutiny because his interpretation would be at least "barely colorable," which, again, is all that the law requires."⁹⁹ This seems to be a correct way of re-wording the "draws its essence from the contract" standard for labor arbitrators. However, the law of private associations would not likely uphold an official's unpersuasive and unjustified interpretation simply because it was "barely colorable."

A final significant difference between judicial review under the *Steelworkers Trilogy* and the law of private association concerns the appropriate standard of review, as a matter of internal NFL "law," that the Commissioner applies in reviewing his initial decision. In three recent internal decisions under Article 46, the designated hearing

⁹⁴ *Brady*, 820 F.3d at 552

⁹⁵ *Gulf South Conference*, *supra*.

⁹⁶ *Brady*, 820 F.3d at 540.

⁹⁷ *Id.* at 539.

⁹⁸ *Id.*

⁹⁹ *Id.*

officers used three different standards.¹⁰⁰ In *Bountygate*,¹⁰¹ former Commissioner Paul Tagliabue, acting as Hearing Officer, articulated a standard of “consistency of treatment, uniformity of standards for parties similar situated and patent unfairness or selectivity.” In *Ray Rice*,¹⁰² retired federal judge Barbara Jones, acting as Hearing Officer, determined that the union had the burden of showing that the initial discipline was “arbitrary and capricious.” In *Peterson*, NFL Labor Relations Vice President Harold Henderson, acting as Hearing Officer, rejected the appeal on the ground that “the player has not demonstrated that the process and procedures surrounding his discipline were not fair and consistent.”¹⁰³ The law of private association would give a player seeking judicial review two alternative theories to attack the Hearing Officer’s decision: (1) That it improperly affirmed an initial disciplinary decision that was itself arbitrary and capricious, and (2) that the Hearing Officer breached league rules by applying a standard that was markedly different from pre-existing association practice. It is not clear that there is a marked difference between the three standards recently employed (although Tagliabue’s articulation is arguably clearer and perhaps worthy of emulation). Consider the possibility, however, that a subsequent hearing officer read the *Peterson* standard articulated by Henderson narrowly, to provide review only for procedures, and not the substance of the initial disciplinary decision. Under the law of private association, we believe that a court would be justified in overturning a decision where the Hearing Officer did not actually determine that the discipline was consistent, with uniform standards for parties similarly situated, or did not consider on the merits a player’s claim that he was the victim of patent unfairness or selectivity. In both *Brady* and *Peterson* (*Rice* was not appealed), the appellate courts disregarded the question whether the “arbitrator” applied the proper standard of review for the hearing officer under Article 46. Absent a specific clear standard, an impartial and expert labor arbitrator selected by the parties to resolve disputes is free to select any standard, as long as it drew its essence from the contract. Under the law of private associations, that question would be prominent for the reviewing court.

CONCLUSION

For nearly six decades, federal courts have worked hard to develop a system that facilitates peaceful resolution of industrial disputes through the designation of an impartial expert to arbitrate disputes. To achieve this goal requires judges to engage in uncommon self-restraint, refusing to step in even when they perceive a

¹⁰⁰ Inferentially, the standard is less rigorous than the “just cause” standard typically used by independent arbitrators to review disciplinary matters. NFL CBA Art. 42 provides for such a review of club discipline, but Art. 43(3)(b) specifically provides that any club discipline is preempted by Commissioner discipline imposed pursuant to Art. 46.

¹⁰¹ *Supra* note __.

¹⁰² *Supra* note __.

¹⁰³ See letter decision from Harold Henderson to Jeffrey L. Kessler and Daniel L. Nash, December 12, 2014, at page 8, copy on file with the authors.

legally-trained tribunal has erred in factual findings or legal conclusions. At the same time, federal labor law promotes industrial harmony by allowing unions and employers to make their own bargains, including the removal of disputes from impartial arbitration. However, given the judicial and legislative preference for arbitration, such an agreement must be express.

When the parties do expressly agree to resolve disputes by means other than impartial labor arbitration, the question arises as to the appropriate standard of review of that decision. We believe that the appropriate standard is the common law baseline that would have existed were the employees not protected by a collective bargaining agreement. Because employees involved in sports leagues have no choice but to subject themselves to league rules, reviewing courts have examined sports league decisions under the law of private associations, and have insisted that league officials taking adverse action must act in conformance with the authorized powers, consistently with league rules, and the decision must not be arbitrary or capricious.

Applying the standards of review appropriate for an expert impartial arbitrator to a management decision expressly withdrawn from arbitration is not appropriate. It creates the anomalous situation where a non-union employee's common law rights might exceed those of a unionized worker. More significantly, it risks distorting the law of labor arbitral review, because of judges' inevitable tendency to view a management decision differently. To be sure, union representatives and management executives are free to impose whatever standard they want, regardless of what others may think, but if they are going to adopt a standard designed for other purposes, they should have to do so expressly. Absent such an express incorporation of *Steelworkers Trilogy* language into a standard of review of a matter withdrawn from arbitration, challenges to Commissioner's decisions should proceed to federal court under section 301 of the LMRA under the common law standard of the law of private associations.