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Cover Page Footnote

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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 collective bargaining agreements, can agree to dispute resolution by an independent arbitrator, whose decision is reviewed deferentially by judges. Where employees or members of an association are governed by its internal rules, in contrast, they often agree contractually to submit internal disputes to an association officer or committee. In this circumstance, the common law governing private associations affords judicial review that is more limited than a civil dispute, 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 player discipline. Although the collective bargaining agreement expressly removes these issues from impartial arbitration, recent cases have curiously been litigated as if the league commissioner is an independent arbitrator. This Article suggests that this is the wrong characterization of the league commissioner's legal role. Treating the commissioner as if he were an arbitrator creates an anomaly: a unionized player's grounds for judicial review are more narrowly defined than discipline of a non-union employee, even for the same behavior. The use of management personnel in lieu of an independent arbitrator also elevates the temptation for federal judges to stretch the deferential rules of review of labor arbitration developed for independent arbitrators. We discuss the baseline law of private association and why it is a superior standard of judicial review in player disciplinary cases, where there has been no review by an independent arbitrator.

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

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¹ FED. R. CIV. P. 59.

motion to vacate the arbitral award in federal court.² In the case of a private association, the member-parties are bound by agreement to the association's rules. Generally this involves submission of their claims to an internal officer or committee. Therefore, in private association cases, state 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.

Three recent discipline cases arising under the collective bargaining agreement (CBA) between the National Football League (NFL) and the NFL Players Association (NFLPA) make the point. The NFLPA sought judicial review of disciplinary action taken by the NFL Commissioner against these players under the Commissioner's broad power to take action to remedy conduct detrimental to the integrity of the game.⁵ The NFL CBA clearly expresses the parties' explicit intent to remove Commissioner's discipline for most

² See Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1947); Labor Management Relations Act, 29 U.S.C. § 185 (1947).

³ See, e.g., Zachariah Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1014 (1930) (suggesting 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)).

Beyond the scope of this article is the choice of law question concerning the common law of private associations. In some cases discussed in this article, the courts assume that a particular state's common law applies. See, e.g., *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978) (applying Illinois law). Because judicial review of private association law is based primarily on adherence to the association's constitution and by-laws, see text accompanying notes 26-33, *infra*, sports leagues can avoid lack-of-uniformity problems by inserting a choice of law provision into their Constitution. For an argument that federal courts could develop a federal common law regarding review of private associations for purposes of judicial review of managerial decisions to discipline workers outside the context of industrial arbitration, see note 112, *infra*.

⁴ This limited 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 of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960). These three cases are referred to as the "*Steelworkers Trilogy*." See, e.g., *AT&T Techs. v. Comm's. Workers of America*, 475 U.S. 643, 648 (1986).

⁵ *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527 (2d. Cir. 2016) [hereinafter *Brady*]; *NFL Players Ass'n v. NFL*, 831 F.3d 985 (8th Cir. 2016) [hereinafter *Peterson*]; *NFL Players Ass'n v. NFL*, 874 F.3d 222 (5th Cir. 2017) [hereinafter *Elliott CA5*]. In a procedural move, the NFL in the latter case filed a motion to enforce an arbitral award, under the Labor and Management Relations Act, *NFL Management Council v. NFL Players Ass'n*, No. 17 Civ. 6761 (KPF) (S.D.N.Y.), where the parties turned to preliminary relief as well. See slip op. (October 30, 2017) [hereinafter *Elliott NY*].

This "best interest" power applies to all members of the NFL: owners, employees, officials, and players. *NFL, CONSTITUTION AND BYLAWS OF THE NFL* § 8.13(A) (1970) (Rev. 2006). To exercise the "best interest" power against a player, the Commissioner is constrained by the provisions of the 2011 NFL-CBA. See *NFL PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT* art. 46 (2011).

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 Nonetheless, as the *Peterson*, *Brady*, and *Elliott* 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 Commissioner discipline of team owners and other non-union league employees under the state law of private associations.⁸ However, when the Commissioner disciplines a union player, and the player exhausts his appeal right, the NFLPA has, to date, filed a motion for vacatur under labor arbitration standards. As a result, 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

⁶ NFL COLLECTIVE BARGAINING AGREEMENT, art. 43-46 (2011). Articles 43 and 44 of the NFL-CBA set forth a typical labor arbitration regime utilizing an independent arbitrator. In contrast, Article 46, Section 1(a) does not. Article 46 provides that “[n]otwithstanding 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 Article 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. *Brady*, 820 F.3d 527. In other cases, like *Peterson*, the Commissioner designated the former NFL Vice President for Labor Relations, Harold Henderson, as the hearing officer. *Peterson*, 831 F.3d 985. In a recent disciplinary hearing, the Commissioner appointed a retired trial judge to hear the player appeal, as the Commissioner’s testimony was essential to the merits on appeal. Barbara S. Jones, *In the Matter of Ray Rice* (Nov. 28, 2014), https://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf. For similar reasons, in the famous “Bountygate” discipline the Commissioner appointed the previous Commissioner, Paul Tagliabue, as the hearing officer to hear the players’ appeals. Paul Tagliabue, *In the Matter of New Orleans Saints Pay-for Performance/ “Bounty”* (Dec. 11, 2012), <http://www.nfl.com/news/story/0ap1000000109668/article/paul-tagliabues-full-decision-on-saints-bounty-appeal>.

⁷ See *NFL Players Ass’n v. NFL*, 88 F. Supp. 3d 1084 (D. Minn. 2015), *rev’d by Peterson*, 831 F.3d 985 (“[T]he 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 *NFL Mgmt. Council v. NFL Players Ass’n* 125 F. Supp. 3d 449 (S.D.N.Y. 2015), *rev’d by Brady*, 820 F.3d 527 (the trial court stated 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].”), and *Elliott CA 5*, 874 F.3d 222 (slip op. at 2) (analyzing dispute under LMRA).

⁸ See, e.g., NFL COLLECTIVE BARGAINING AGREEMENT art. 70, § 1 (the governing law for the NFL-CBA is New York). See discussion *infra* note 17 and accompanying text.

⁹ See discussion *infra* note 17 and accompanying text.

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. A major issue in the most recent *Elliott* case concerned the NFLPA's claim that the Commissioner's discipline can be overturned if federal judges are persuaded that the procedures used fell short of the broad concept of "fundamental fairness."¹⁰ 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.¹¹

The recent decisions involving famous NFL stars Adrian Peterson of the Minnesota Vikings, Tom Brady of the New England Patriots, and Ezekiel Elliott of the Dallas Cowboys illustrate the problem. Each was 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 each of these cases, the NFLPA, on behalf of the player, sought judicial review under both section 301 of the Labor Management Relations Act (LMRA)¹² and the Federal Arbitration Act (FAA),¹³ to vacate the "arbitration" decision by the Commissioner. Consistent with the pleadings, the court opinions at both the district court and appeals court levels treated the cases as seeking judicial review of a disciplinary decision by a labor arbitrator. Three district courts vacated the Commissioner's discipline.¹⁴ 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 was discipline imposed and reviewed solely by a management executive. Three appellate courts and one follow-on decision by a district judge reversed the district court decisions, based on the narrow guardrails imposed on judicial review by *Steelworkers Trilogy*.¹⁵ For example, the Second Circuit, in describing the Article 46

¹⁰ NFL Players Ass'n v. NFL, No. 4:17-CV-615 (E.D. Tex., Sept. 8, 2017) (hereinafter *Elliott PI*). A similar critique of the Commissioner's decision in the *Brady* case comes from an academic commentator. See Anne M. Lofaso, *Deflategate: What's the Steelworkers Trilogy Got to Do with It?*, 6 BERKELEY J. ENT. AND SPORTS L. 47 (2017), available at: <http://scholarship.law.berkeley.edu/bjesl/vol6/iss1/11>, at 74 (opining Commissioner deprived Brady of "industrial due process").

¹¹ See, e.g., Adam Rhodes, *How Ezekiel Elliott's 2nd Circ. Case Could Upend Arbitration*, Law 360 (Nov. 13, 2017), available at https://www.law360.com/sports/articles/984382/how-ezekiel-elliott-s-2nd-circ-case-could-upend-arbitration?nl_pk=b8322f18-889c-4abe-b5b2-6e47f2229d11&utm_source=newsletter&utm_medium=email&utm_campaign=sports. In the article, Professor Michael Leroy suggests that the expanded judicial review used by the district courts in the cases discussed here would adversely affect commercial arbitration, particularly in the securities area.

¹² Labor Management Relations Act, 29 U.S.C. §§ 141, 185 (1947).

¹³ Federal Arbitration Act, 9 U.S.C. §§ 1-14, (1947).

¹⁴ *Elliott PI, rev'd*, NFL Players Ass'n v. NFL, 874 F.3d 222 (5th Cir. 2017); NFL Mgmt. Council v. NFL Players Ass'n, 125 F. Supp. 3d 449, 474 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d. Cir. 2016) (*Brady*); NFL Players Ass'n v. NFL, 88 F. Supp. 3d 1084, 1092 (D. Minn. 2015) (*Peterson*), *rev'd*, 831 F.3d 985 (8th Cir. 2016).

¹⁵ *Brady*, 820 F.3d at 537; *Peterson*, 831 F.3d at 993-94 (2016); *Elliott CA 5*; *Elliott NY*. See *supra* note 4 (*Steelworkers Trilogy*).

appeal process, characterized it as an arbitration, even though the CBA, by its language, never places Article 46 discipline within the independent arbitrator paradigm. In the court's words, "Brady requested arbitration and League Commissioner Roger Goodell, serving as arbitrator, entered an award confirming the discipline."¹⁶

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 under the CBA. The district courts in *Peterson, Brady and Elliott* engaged in a strained application of these standards, in order to vacate the Commissioner's "arbitral award," and were reversed by the courts of appeals. 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. Stated differently, 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.¹⁷

The Article suggests that, when a matter is clearly removed from arbitration, the *Steelworkers Trilogy* and FAA standards for judicial review do not apply and reviewing courts should not apply those standards. These standards are designed for independent expert arbitrators, not unilateral decisions by one of the parties to the agreement. Absent text that explicitly incorporates these standards into the collective bargain, when the NFLPA and players seek review in federal court of an Article 46 disciplinary decision, they should plead for relief under the principles of judicial review that would apply under the law governing private associations. This would conform the judicial review of the Commissioner's decision to the same standards as review of discipline directed at an owner or non-union employee. Applying the appropriate standard will not be outcome determinative in all cases. However, it will focus the reviewing court on different questions and, in some cases, will give the courts broader leeway to overturn a decision. Finally, this approach will not distort the standards of judicial review generally applicable to arbitral awards.

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, are tainted by fundamental procedural unfairness, 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

¹⁶ *Brady*, 820 F.3d at 531; *see supra* note 6.

¹⁷ NFL COLLECTIVE BARGAINING AGREEMENT, art. 46. The review by the Commissioner of his own discipline under Article 46 has existed since the first NFL-CBA in 1968. Even Professor Lofaso, *supra* note 10, at 29, who is critical of Goodell's decision, acknowledges that the parties did not bargain for Goodell to arbitrate the grievance (a key premise of *Steelworkers Trilogy*) but that they bargained "for discretion in cases that question the integrity of the game of football."

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 owners. We discuss this approach to three recent sports disciplinary cases of team owners and non-union employees.

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.¹⁸

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.¹⁹ Significantly, on grounds of public policy, courts refused to enforce contract provisions that purport to waive access to courts to resolve disputes.²⁰

Judicial review is circumscribed, however, when the dispute resolution is one designated by a private association²¹ based on agreement of its members. Under the common law of private association, where the organization’s rules provide for internal resolution of disputes, judicial review is limited. Courts do retain the authority to reverse an association officers’ decision if the decision: (a) exceeds delegated authority, (b) lacks any evidence in support, or (c) is contrary to the association’s by-laws or rules; (d) was motivated by malice or bad faith; (e) was arbitrary; or (f) is contrary to public policy.²² Judicial review of private association decisions varies based on the nature of the particular

¹⁸ William M. Howard, Annotation, *Common-Law Retaliatory Discharge of Employee for Refusing to Perform or Participate in Unlawful or Wrongful Acts*, 104 A.L.R.5th 1 (2002).

¹⁹ *See Id.*

²⁰ *See, e.g., Gulf South Conference v. Boyd*, 369 So. 2d 553, 557 (Ala. 1979).

²¹ Examples of private associations are social organizations (such as fraternal organizations), ecclesiastical organizations (such as churches, synagogues, or mosques) or business associations (such as medical groups or homeowners associations).

²² *See Chafee, supra* note 3 at 1001, for support for items (a)-(c). As discussed in items (d)-(f), other grounds for reversing these decisions can include an arbitrator’s manifest disregard of the law, as in *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997); an award that is arbitrary, capricious or an results from an abuse of discretion, *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775 (11th Cir. 1993); or an award that violates public policy, *E. Assoc. Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000) and *Gulf South Conference v. Boyd, supra*, note 20.

organization and the degree of harm arising from discipline or expulsion.²³ Significantly, 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,²⁴ 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.²⁵

The common law of private associations recognizes an exception from the doctrine of judicial deference regarding the decisions of a private voluntary association where the challenged action violates the association's own bylaws or constitution.²⁶ Courts avoid intervening in the merits of private association disputes, but will carefully review adherence to their own rules. For example, in *Smith v. Kern County Medical Association*,²⁷ the California Supreme Court upheld Dr. Smith's expulsion from the association for engaging in the "unethical" conduct of continuing to serve patients at the county hospital. This was objectionable because other members of the association were pressuring the hospital to limit their service to indigent patients so that private hospitals could serve those able to pay. Without considering whether Dr. Smith's actions were "unethical" in any objective sense of the term, the Court agreed that his actions were "unethical" as defined in association rules, and his expulsion was procedurally correct. In contrast, in the *Cal State (Hayward)* case, the court of appeals affirmed a preliminary injunction against the NCAA for declaring a Pioneer athlete ineligible, concluding that the equities favored the university and that the plaintiffs were entitled to a judicial determination as to whether the decision contravened NCAA rules and authoritative interpretations of the rules on which the university relied.²⁸

Procedurally, courts will also reverse private association decisions, "particularly one that affects the member's economic interests," where the association deprives a member of "notice of the basis for the proposed expulsion and a fair opportunity for the member to respond to the charges."²⁹ Clearly summarizing this law, a recent state trial judge observed that courts will protect individuals from arbitrary decisions by private associations when these decisions affect "tangible economic benefits," and this review

²³ *Falcone v. Middlesex County Med. Soc'y*, 62 N.J. Super. 184, 196 (1960).

²⁴ *Id.* at 199.

²⁵ Thus, even a breach of the association's own rules may not secure judicial relief for private clubs where the associational interest is great and the plaintiff's injury was largely to status rather than tangible economic benefits. *See, e.g., Rutledge v. Gulian*, 459 A.2d 680, 685 (N.J. 1983) (rejecting challenge to discipline by Masonic Order for technical violation of internal procedural rules).

²⁶ *California State Univ., Hayward v. Nat'l Collegiate Athletic Ass'n*, 121 Cal. Rptr. 85, 88-89 (Cal. Ct. App. 1975), *citing* *Sweetman v. Barrows*, 161 N.E. 272 (Mass. 1928); *Most Worshipful United Grand Lodge, etc., v. Lee*, 96 Atl. 872 (Md. 1916).

²⁷ *Smith v. Kern County Med. Ass'n*, 120 P.2d 874 (Cal. 1942).

²⁸ *Cal State (Hayward)*, 121 Cal. Rptr. at 89.

²⁹ *Cipriani Builders, Inc. v. Madden*, 912 A.2d 152, 161 (N.J. App. Div. 2006).

includes decisions that violate public policy “but also if the procedures the association followed in making that decision were fundamentally unfair.”³⁰ The California Supreme Court has developed an entire body of common law for disciplinary action taken by private associations where “certain private entities possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced.”³¹

An illustrative case is *James v. National Arts Club*,³² a heated dispute between a club’s board of governors and its former president. Pursuant to its bylaws, the board served James with a statement of charges. James secured an injunction to stay the hearing, and a subsequent judicial order disqualifying certain board members from presiding over the hearing. After James was expelled from the club, the trial court overturned the decision, disqualified board members the judge found to be biased from presiding over the hearing, and appointed a neutral arbiter. The appellate court reversed. First, it found that the lower court erred in failing to wait until the club’s internal proceedings were completed with a full record. Second, the allegations of bias were insufficient: the plaintiff must provide “a factual demonstration to support the allegation of bias and proof that the outcome flowed from it.”³³ This holding is significant because private association rules will often designate an arbiter who would not meet the standards of impartiality required of an independent arbitrator.

Major American professional sports are organized as private associations comprised of the member clubs that participate in the competition.³⁴ Each of these associations has a governing document, called a league constitution. All major professional sports follow the model created by baseball in the 1920s, which created the office of the Commissioner, elected by the owners with significant job security, and granted him (to date, always a man) broad powers to take actions with regard to any conduct detrimental to the “best interests” of the game.³⁵ 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

³⁰ *Levin v. Bd. of Trustees of Ocean Cty. Bus. Ass'n*, No. A-5596-11T2, 2013 WL 764685 (N.J. Super. Ct. App. Div. Mar. 1, 2013).

³¹ *Ezekial v. Winkley*, 572 P.2d 32, 35 (Cal. 1977).

³² *James v. Nat'l Arts Club*, 952 N.Y.S.2d 158 (N.Y.App. Div. 2012).

³³ *Id.* at 160 (citing *Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 423 N.E.2d 352 (N.Y. 1981)).

³⁴ 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 & STEFAN SZYMANSKI, *FANS OF THE WORLD, UNITE! A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS* 70-107 (2008). 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.

³⁵ *See* ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (2000) (explaining the origin of the league constitution). As such, the NFL Constitutional delegation is typical. NFL, *CONSTITUTION AND BYLAWS OF THE NFL*, art. VIII, § 8.13(A) (1970) (Rev. 2006).

league.³⁶ 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.³⁷ The arbitration power reflects related but distinct concerns about providing a quick, efficient non-judicial system for resolving internal disputes.³⁸

Two sports cases illustrate and apply these principles. *Finley v. Kuhn*³⁹ 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.”⁴⁰

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.⁴¹ 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

³⁶ See, e.g., CONSTITUTION AND BYLAWS OF THE NFL, art. VIII, § 8.13(A).

³⁷ 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).

³⁸ See *id.* at 77.

³⁹ *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).

⁴⁰ *Id.* at 537.

⁴¹ See note 3, *supra*, regarding choice of law issues. 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.” *Charles O. Finley & Co.*, 569 F.2d at 543.

concerning the subject matter of actions *taken in accordance with his grant of powers*.⁴²

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.⁴³

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."⁴⁴

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").⁴⁵ 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.⁴⁶

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

⁴² *Charles O. Finley & Co.*, 569 F.2d at 543 (emphasis added).

⁴³ *Id.* at 544.

⁴⁴ *Id.* at 539 n.44.

⁴⁵ *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977).

⁴⁶ *Id.* at 1218.

clubs” is contained in a separate provision.⁴⁷ 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.⁴⁸

Turning to the merits of the case, the court upheld the Commissioner’s determination that Turner’s conduct was “tampering” and contrary to the “best interests of baseball.” The sanction of suspension was within the Commissioner’s discretion under the Major League Agreement.⁴⁹ However, the court found the Major League Agreement’s provisions concerning penalties did not include loss of a draft pick, and given the penal nature of the clause, it was to be strictly construed.⁵⁰

Another well-known baseball case illustrates the now-accepted principle that sports league commissioner decisions are subject to judicial review for failure to follow internal rules. In *Rose v. Giamatti*,⁵¹ the specific question presented was whether federal courts had diversity jurisdiction over the Commissioner’s lifetime ban on the Cincinnati Reds’ legendary infielder for gambling on baseball games. In concluding that the dispute was between the player and the commissioner, and that the Reds (like Rose, a citizen of Ohio) were not a real party to the case, the court emphasized that all parties agreed that the merits of the dispute turned on whether the Commissioner had followed his own procedural rules for handling investigations into claims that those subject to his jurisdiction engaged in conduct detrimental to the best interests of baseball. The court observed:

In short, Rose's controversy is not with Major League Baseball, but is with the office of the Commissioner of Baseball *for the Commissioner's alleged failure to follow his own procedural rules* in conducting the investigation of Rose's alleged gambling activities. Clearly, complete relief can be afforded with regard to the primary relief sought in the complaint -- preventing Commissioner Giamatti from conducting a disciplinary hearing -- without the need for any order against Major League Baseball or its constituent major league professional baseball clubs.⁵²

⁴⁷ *Id.* at 1219.

⁴⁸ Kuhn did not void the contract between the Braves and Matthews as part of his discipline. In the authors’ opinion, to do so would have violated the 1976 MLB CBA granting eligible players’ unrestricted free agency rights. Matthews had played no role in the tampering by Turner.

⁴⁹ Major League Agreement, Article 2, section 3.

⁵⁰ *Atlanta Nat’l League Baseball Club, Inc.* 432 F. Supp. at 1225.

⁵¹ *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989).

⁵² *Id.* at 918-19.

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 commissioners’ 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 Article 46 discipline under the traditional standards governing labor arbitrations.⁵³ However, absent clear language in a CBA, as is the case with Article 46 -- why should a player be more limited in his rights to judicial review of discipline than a non-union employee or owner?

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.⁵⁴ 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.⁵⁵ Under the labor model for these three leagues, 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 in these three leagues.

The NFL bargaining history is different. Since its first CBA in 1968, the independent arbitration model has been utilized in most aspects of dispute resolution. The express exception is 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

⁵³ See discussion *infra*, notes 111-112 and accompanying text.

⁵⁴ The first players’ union certified by the NLRB was the NFLPA in 1970, following the assertion of jurisdiction by the NLRB over professional league sports in *American League of Professional Baseball Clubs*, 180 NLRB No. 30 (1969).

⁵⁵ 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, in 1975 the players’ right to take the Messersmith/McNally free-agency grievance before that arbitrator changed baseball forever.

“appeal” that discipline, his recourse is to a hearing officer designated by the Commissioner. The hearing officer is frequently the Commissioner himself.⁵⁶

A. The Federal Arbitration Act

Under the common law, agreements to waive recourse to courts were generally unenforceable as contrary to public policy.⁵⁷ To facilitate the concept of neutral arbitration as an alternative means of dispute resolution, in 1925 Congress enacted the FAA.⁵⁸ For contracts subject to regulation under Congress’ interstate commerce power, the FAA validates 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.⁵⁹ 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.⁶⁰ Although an arbitration-eligible player and his club did not agree on the salary, the salary awarded by the arbitrator is understood to reflect the decision of the parties, and becomes part of the employment contract.

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 controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

⁵⁶ Compare NFL COLLECTIVE BARGAINING AGREEMENT, art. 43 (2011) with art. 46; see *supra* note 6 and accompanying text.

⁵⁷ See *supra* note 30.

⁵⁸ Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

⁵⁹ Legislative history reinforces this conclusion.

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.

See S. Rep. No. 68-536 (1924).

⁶⁰ See MAJOR LEAGUE BASEBALL, COLLECTIVE BARGAINING AGREEMENT, art. VI, § E, http://mlb.mlb.com/pa/pdf/cba_english.pdf.

(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.⁶¹

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.⁶²

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

Congress federalized labor policy towards collective bargaining with the passage of the National Labor Relations Act in 1935. In the 1947 amendment to the Act (LMRA), Congress sought to improve the process for dispute resolution.⁶³ A critical provision in this regard, section 301, conferred subject matter jurisdiction in federal courts. This change replaced state common law contract rules with a federal common law to enforce and interpret collective bargaining agreements.⁶⁴ CBAs generally displace the doctrine of

⁶¹ 9 U.S.C. § 10. See also *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds by 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).

⁶² 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 interstate or foreign commerce.” See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 127 (2001) (rejecting this theory).

Because this Article contrasts the standards of review in labor arbitration used in several sports cases with the standards for review of decisions under the law of private association, the FAA's standards of review are only relevant to the discussion in this Article insofar as they are incorporated into the standards used by federal judges to review labor arbitrations. Because the LMRA does not explicitly specify the standard of judicial review (in contrast to the earlier adopted FAA), any commercial arbitration standards applicable to labor arbitration exist by virtue of common law reasoning of federal courts implementing the LMRA. The Texas district court in *Elliott* granted relief to the NFLPA, see note 10 *supra*, in part because he concluded that the “arbitrator” (the NFL executive designated by the commissioner to hear an appeal lieu of impartial arbitration) had acted contrary to § 10(a)(3) of the FAA, 9 U.S.C. §10(a)(3), “in refusing to hear evidence pertinent and material to the controversy.” In contrast, the Second Circuit in *Brady* observed that it had “never held that the requirement of ‘fundamental fairness’ applies to arbitration awards under the LMRA.” *Brady II*, 820 F.3d at 553 n.13.

⁶³ Labor Management Relations Act, 29 U.S.C. § 141 (1947).

⁶⁴ 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.”).

employment of will at common law, thus 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.”⁶⁵

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.⁶⁶ Second, in *United Steelworkers v. American Manufacturing Co.*,⁶⁷ 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 significantly further than was required to implement the congressional declaration to effectuate grievance settlement “by a method agreed upon by the parties.”⁶⁸ It discussed at length the many benefits to labor, management, and the general public of the impartial arbitrator.⁶⁹ 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 less expensive 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.⁷⁰

These standards are premised on a fundamental policy assumption concerning the independence, neutrality and expertise of the arbitrator.⁷¹ For example, Justice Douglas states in the *Enterprise Wheel* opinion:

⁶⁵ See *id.* § 173(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.”).

⁶⁶ *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (reversing lower court’s refusal to defer to arbitrator regarding a non-meritorious claim).

⁶⁷ *United Steelworkers of America v. American Mfg. Co.*, 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).

⁶⁸ 29 U.S.C. § 173.

⁶⁹ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-82 (1960).

⁷⁰ *Id.* at 578.

⁷¹ 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

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.⁷²

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 “evince a most forceful evidence of a purpose to exclude the claim from arbitration.”⁷³ 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 regarding whether 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*

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.”

Compare National Football League Player’s Ass’n v. National Football League, 88 F. Supp. 3d 1084, 1089 (D. Minn. 2015) (*Peterson*) with Oxford Health Systems v. Sutter, 133 S. Ct. 2064, 2068 (2013) (“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.”) (suggesting the standards under both are essentially the same, even in a non-labor arbitration). A party seeking relief under that provision bears a heavy burden. *Id.* at 2068 (“It is not enough ... to show that the [arbitrator] committed an error—or even a serious error.”). 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.” *Id.* 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 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.

⁷² *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

⁷³ *Id.* at 585.

Trilogy instead instructs judges to forego this inquiry and find a matter to be arbitrable unless the parties have clearly stated that it is precluded.

To further the second clear statement 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 that the award disregarded the “essence” of the parties’ collective bargain in favor of the arbitrator’s “own brand of industrial justice,”⁷⁴ or that the award was “affirmative misconduct” of the sort that would justify the setting aside of a commercial arbitration award under section 10(c) of the FAA.⁷⁵ Alas, lower courts continue to ignore the Court’s instructions to restrain their impulse to second-guess impartial arbitrators,⁷⁶ 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.⁷⁷

C. Limits to freedom of contract

A fundamental principle of labor relations law is the ability of an employer and the workers’ chosen union to choose to fashion an agreement on wages, hours, and working conditions. Logic and experience suggest that the congressional policy promoting regulation of labor through collective bargaining is more easily achieved when parties are allowed to bargain themselves. External limitations on the freedom of contract can require the parties to forego the most efficient bargain. Because external limitations can increase the difficulty of coming to an agreement, they can also increase the likelihood of impasses, strikes and lockouts.⁷⁸

There are, however, 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 wage and maximum hour requirements, and

⁷⁴ *Id.* at 597.

⁷⁵ *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) (“procedural” questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator). *Misco* observed that the FAA may not directly apply to labor arbitration, but applied that standard in the exercise of the Court’s power to shape a federal common law for labor arbitration. *Id.* n.9. Still, *Misco*’s highly deferential attitude toward independent labor arbitrators, see note 71 *supra*, provides reasons for a court to be hesitant in importing “fundamental fairness” concerns from the FAA into labor arbitrations reviewed under the LMRA. For starters, the very context of § 301’s jurisdictional grant over cases involving “contracts between an employer and a labor organization,” suggests that courts should not superimpose an extracontractual definition of “fairness” in arbitrations beyond the actual standards and procedures for which the parties bargained.

⁷⁶ ROBERT A. GORMAN AND MATTHEW W. FINKIN, *LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* § 25.1, 817 (2d ed. 2004).

⁷⁷ *Hill v. Norfolk & West. Ry.*, 814 F.2d 1192, 1194 (7th Cir. 1987).

⁷⁸ *Wood v. National Basketball Association*, 809 F.2d 954, 961 (2d Cir. 1987).

occupational health and safety regulations.⁷⁹ There are likely many examples of industrial bargains that could be facilitated if unions were able to waive specific safety standards (the union considers unessential to its particular industry) in exchange for other, favorable, management concessions. The inability to negotiate conditions guaranteed to workers under federal law precludes this possibility. Federal labor law also precludes unions from reaching agreements that breach the union's duty of fair representation to all workers in the bargaining unit.

Additional exceptions have been created by the National Labor Relations Board (NLRB) 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."⁸⁰ For example, in the leading Board precedent, the parties were at an impasse with possible industrial action and the union shifted their approach by reaching a satisfactory agreement with one of the four employers with whom it was negotiating. 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," the Board held that the agreement could not be concluded until an appropriate time in the negotiation.⁸¹

In sum, although labor law generally seeks to fulfill the mutual aims 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 path making decisions of the *Steelworkers Trilogy*, makes 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."⁸² Because federal courts will enforce no-strike promises in collective bargains and will not substantively review the correctness of an arbitral award, Abrams

⁷⁹ 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.").

⁸⁰ *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)).

⁸¹ *Retail Associates*, 120 N.L.R.B. at 394.

⁸² Roger I. Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 235 (1977).

observes that because “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.”⁸³

In *Hines v. Anchor Motor Freight, Inc.*, the Supreme Court noted that a final and binding arbitration award is vulnerable if tainted by the breach of the union’s duty of fair representation to its workers. The Court reasoned that where “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.”⁸⁴ As Abrams notes, this holding means that the “preferred status of labor arbitration is thus not immutable.”⁸⁵ He suggests 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.⁸⁶

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. The Court does not follow such a course. Instead, the *Steelworkers Trilogy* articulates the substantive benefits of independent arbitration that warrant legislative, administrative, and judicial support. These benefits include the fact that the arbitrator, as the chosen instrument of the parties, is 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.”⁸⁷ Another significant benefit of independent arbitration is that parties tend to view the totality of arbitral decisions and conclude that they are acceptably based on the terms to which they agreed.

Of course, parties often agree to withdraw a matter from impartial arbitration, using clear language to do so. A common practice is to make clear that a matter otherwise subject to arbitration will 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,⁸⁸ unsuccessful mediation efforts conclude with a coin flip. In some contexts, the parties recognize that maintaining the overall labor relationship outweighs a process to achieve the correct result in individual cases, resulting in a specialized tribunal equally divided between management

⁸³ *Id.* at 236.

⁸⁴ *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976).

⁸⁵ Abrams, *supra* note 82, at 235.

⁸⁶ *Id.* at 263.

⁸⁷ *Id.* at 236.

⁸⁸ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

and labor, who are expected to resolve multiple industrial disputes through bargaining and accommodation.⁸⁹

Although courts recognize the benefits of impartial arbitration, other policies supporting freedom of contract permit parties to a collective bargain, if they choose, to reject these general principles. Parties are thus free to agree to resolve disputes by means other than impartial arbitration. But because impartial arbitration serves these worthy values, the parties must state their intent to preclude arbitration clearly and unequivocally.

IV. THE ROLE OF CLEAR STATEMENT IN SPORTS ARBITRATION

In 1976, a sports arbitral award in the *Messersmith/McNally* case⁹⁰ transformed both baseball, and eventually modern labor relations in sports. The award ended 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. Two conclusions are inescapable: these rules largely preserve the ability of collective bargaining participants to craft results they want if they use language that is sufficiently clear, and judicially-created rules of clear statement allow judges to favor certain results and disfavor others.

For many years, MLB players were bound perpetually to the team with whom they had signed their initial contract, based on the owners' understanding of language in the collectively bargained uniform player contract explicitly stating that the Club "may renew this contract for the period of one year on the same terms." In the *Messersmith/McNally* decision, the union challenged this interpretation, and the arbitrator interpreted the contract 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 all other baseball clubs. The arbitrator largely relied on a principle requiring clear and express language to that effect, if the option clauses were to be perpetual.⁹¹

This radical departure from past practice would not have been achieved had the arbitrator instead 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.⁹²

The owners would also have prevailed if the arbitrator adopted another standard technique for resolving ambiguities where parties claim different understandings of the

⁸⁹ Our thanks to Professor Paul Whitehead for these examples from his experience as General Counsel to the United Steelworkers of America.

⁹⁰ *Messersmith/McNally* Grievance Arbitration, 66 Lab. Arb. Rep. 101 (1975) [hereinafter *Messersmith*].

⁹¹ *Id.* at 113-14.

⁹² *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

contract's text. 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. In these circumstances, the interpretive precepts established by the Restatement of Contracts⁹³ direct that the term should be construed in accordance with the meaning attached by the owners.

Instead, the arbitrator's decision was based on the principal of clear statement. Courts and arbitrators typically disfavor perpetual options, both because their indefinite length limits economic flexibility and out of fear they reflect undue bargaining power.⁹⁴ Balancing these concerns against principles of contractual freedom, perpetual options are permitted but only with clear language expressing such intent.⁹⁵

This decision had major implications for baseball. MLB owners sought a federal court judgment vacating the arbitral award in *Kansas City Royals v. MLB Players Ass'n*.⁹⁶ It was clear under the *Steelworkers Trilogy* that a direct assault on the merits of the arbitrator's decision as a matter of contract law would be unsuccessful. Indeed, the court of appeals had little difficulty upholding this aspect of the award.⁹⁷

A more significant challenge on appeal was the owners' argument that the dispute was not arbitrable.⁹⁸ The collective bargaining agreement explicitly stated that it did "not deal with the reserve system" featuring no competition for player services.⁹⁹ 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."¹⁰⁰

⁹³ RESTATEMENT (SECOND) OF CONTRACTS § 201 (AM. LAW INST. 1981).

⁹⁴ *Messersmith*, 66 Lab. Arb. Rep. at 113.

⁹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981). 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* (Washington, D.C.: Bureau of National Affairs, 2003), 192. The result could also have been justified based on a related clear statement canon, *contra preferendum*, which requires ambiguities to be interpreted against the party who drafted them. E. ALLEN FARNSWORTH, CONTRACTS 518-19 (2d ed. 1990). In this case, the contract language in question was drafted by the owners.

⁹⁶ *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615 (8th Cir. 1976).

⁹⁷ *Id.* at 631.

⁹⁸ The arbitrator had considered his jurisdiction to arbitrate the underlying contract interpretation, and had found that the CBA conferred such jurisdiction on him. *Messersmith*, 66 Lab. Arb. Rep. at 103-10.

⁹⁹ *Id.* at 103.

¹⁰⁰ *Kansas City Royals Baseball Corp.*, 532 F.2d at 621.

In sum, the court refused to determine whether, as the LMRA literally requires, arbitration was the final method of dispute resolution of the parties. Rather, the court found that “what a reasonable party might be expected to do cannot take precedence of what the parties actually provided for in their collective bargaining agreement.”¹⁰¹ 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 insights about the proper scope of judicial review of disputes between unionized players and the league commissioner over disciplinary issues. First, each sports league’s collective bargaining agreement has provisions for impartial grievance arbitration. Second, 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 *Steelworkers Trilogy* standards. Judges may only vacate the award if persuaded that the award did not draw its essence from the agreement and was instead the arbitrator’s personal imposition of industrial justice. Third, sports agreements should not be read to give players significantly fewer rights than non-unionized league employees and owners, absent clear and express language to that effect.¹⁰² In this section, we discuss the proper standard of judicial review, when a sports league collective bargaining agreement provides a clear intent to exclude certain kind of discipline from impartial arbitration, and instead assigns this disciplinary power to the league’s Commissioner. We conclude that the appropriate standard of review -- the standard that would apply to the Commissioner in the absence of a collective bargain -- is the law of private associations.¹⁰³

Each sports leagues’ CBA, to varying degrees, explicitly demonstrates a clear intent that certain matters are not subject to impartial arbitration, but are reserved for the commissioner or his designee.¹⁰⁴ The NFL CBA provides that disputes between the parties

¹⁰¹ *Id.* at 630.

¹⁰² 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 employee of the Rams and other clubs. *Id.* at 813. 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.

¹⁰³ For a discussion of these standards, see text accompanying notes 1-7, *supra*.

“will be resolved exclusively” by a procedure of impartial arbitration, “except wherever another method of dispute resolution is set forth elsewhere in this Agreement.”¹⁰⁵ Pursuant to that last provision, Article 46 of the 2011 CBA provides 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.¹⁰⁶

In lieu of recourse to an independent arbitrator to review the initial Commissioner discipline, the NFLPA agreed that an appeal of that discipline imposed under Article 46 will be reviewed by the Commissioner, who will designate a hearing officer, 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. There is no bar to the Commissioner serving as the hearing officer, and in fact that procedure is often the practice. No legal standard for the “hearing officer’s” review of the initial discipline is stated in Article 46.¹⁰⁷ Nor is there a legal standard provided for judicial review of the hearing officer’s final determination.

As written, Article 46 demonstrates intent to exclude “best interest” player discipline from review by an independent arbitrator. Such an 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.¹⁰⁸

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.¹⁰⁹

¹⁰⁴ See, e.g., the non-reviewable power of the NBA Commissioner to impose discipline for “on court” behavior by players, subject to a financial threshold, or to impose “best interest” discipline if the aggregate cost of the discipline to the player is less than \$50,000. NBA-NBPA COLLECTIVE BARGAINING AGREEMENT, Article XXXI, Section 9(a), *available at* <http://3c90sm37lsaecdwt32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

¹⁰⁵ NFL COLLECTIVE BARGAINING AGREEMENT art. 43, § 1 (2011).

¹⁰⁶ *Id.* at art. 46, § 1(a).

¹⁰⁷ Barbara S. Jones, *In the Matter of Ray Rice* (Nov. 28, 2014), https://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf. In the Ray Rice arbitration, 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.” In contrast, the standard of review by an independent arbitrator under Article 43 is just cause.

¹⁰⁸ 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.

¹⁰⁹ 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.

If the parties want to preclude independent arbitral review of the Commissioner's decision, and do not want judicial review under the common law standard analyzed above in Part II of this article, they can in the future agree on an express standard of review of the Commissioner's decision through careful and appropriate drafting of the CBA's text.¹¹⁰ However, in lieu of such drafting, it is puzzling 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 inappropriate for reviewing the unique "best interest" decisions of a sports league commissioner where the decision has been withdrawn from arbitration by the parties.

The NFL's Article 46 procedure introduces no independent center of review, a premise fundamental to the *Steelworkers'* policy. Typically, the losing party's principal redress for an arbitral award about which they strongly disagree is to fire the arbitrator, a process also unavailable under Article 46. 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 non-union employees. Because, with regard to actions taken pursuant to Article 46, the NFL is in fact acting in its capacity as a private association, the appropriate standard of judicial review likewise should be that of a private association.

Consider the "*Deflategate*" incident where the NFL Commissioner found two club employees had conspired with star quarterback Tom Brady to illegally deflate footballs;¹¹¹ 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

See supra note 17, note 55 and accompanying text.

¹¹⁰ The text of the Major League Baseball (MLB) collective bargaining agreement that the parties most recently agreed to is not yet publicly available. The 2012-16 agreement contains the following:

Anything in the Grievance Procedure provided for in the Basic Agreement to the contrary notwithstanding, complaints or disputes as to any rights of the Players or the Clubs with respect to the sale or proceeds of sale of radio or television broadcasting rights in any baseball games by any kind or method of transmission, dissemination or reception shall not be subject to said Grievance Procedure. However, nothing herein or in the Grievance Procedure shall alter or abridge the rights of the Parties, or any of them, to resort to a court of law for the resolution of such complaint or dispute.

MLB Basic Agreement, Art. XI (A)(1)(c), *available at* <http://www.mlbplayers.com/pdf9/4923509.pdf>. This language strongly suggests the parties understanding that the substantive law governing disputes over broadcasting rights would be determined by the applicable law in the absence of the collective bargaining agreement. The matter was judicially reviewed with a decision on the merits in favor of the clubs. *Baltimore Orioles v. MLB Players Ass'n*, 805 F.2d 663 (7th Cir. 1986).

¹¹¹ *Brady*, 820 F.3d 527, 532-33 (2d. Cir. 2016).

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,¹¹² 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 and protections in the CBA). Indeed, if they so choose, 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.

¹¹² A challenge to the Commissioner's Article 46 discipline under the law of private associations may be brought by the NFLPA in federal court, without regard to diversity. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), the Supreme Court addressed the issue of what substantive law the court should apply to appeal. Justice Douglas wrote for the majority:

The question then is, what is the substantive law to be applied in suits under s 301(a)? We conclude that the substantive law to apply in suits under s 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of s 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

Id. at 456-57 (citations omitted).

Applying this reasoning to a Section 46 appeal, a district court could create its own substantive law for standards of review. (See discussion in note 107, *supra*, regarding determination of this question in the Ray Rice review.) This was the salutary effect of *Lincoln Mills*, ensuring for example that a provision in a contract between the Jones & Laughlin Steel Company and the United Steelworkers in Pennsylvania would be interpreted the same as an identical provision in a contract between the union and United States Steel in Indiana. In sports, however, it would seem the better practice, in order to achieve consistency throughout the league, for the court to look to the state law governing the CBA to determine the applicable standards of review of the decisions of private associations. In the case of the NFL CBA, this would be New York Law. Article 70 of the 2011 CBA provides that New York law governs the interpretation of the CBA. Note that the Douglas opinion renders this state law, so applied, as federal law, and not "an independent source of private rights." *Id.*

Although such a provision is permitted, it should not be encouraged. Judges can be tempted to distort the *Steelworkers Trilogy* standard when faced with a review of a decision by a partial management official as opposed to an independent arbiter. Indeed, this is what we see today in the NFL disciplinary cases. Three district judges, presented with what they believe is an unfair result, overturned what they are improperly calling an “arbitral award” by the Commissioner or his designee. In all three cases, the circuit courts reversed these decisions.¹¹³

The 2017 reversal of the initial district court decision in *Elliott* is illustrative. Judge Amos Mazzant took exception to procedural rulings by Hearing Officer Harold Henderson, a retired senior NFL executive. The rulings denied the player the opportunity to cross-examine the victim of alleged domestic abuse, or to cross-examine Commissioner Goodell as to the basis of his reasoning.¹¹⁴ Consider a hypothetical award by an independent and experienced labor arbitrator in a disciplinary case resulting in suspension without pay against a unionized steelworker. What is the likelihood that a federal judge would really vacate an award because the arbitrator exercised discretion to rely on third-party interviews, and declined to call the company CEO who was involved in the initial disciplinary decision? Indeed, Judge Mazzant acknowledged that “under ordinary circumstances, the denial of witnesses and documentary evidence falls within the discretion of the arbitrator.”¹¹⁵ However, he found extraordinary facts and serious misconduct: specifically, that the NFL staff withheld from Commissioner Goodell information that the investigator who actually interviewed the alleged victim had concluded that the victim was not sufficiently credible to warrant discipline.¹¹⁶ What are the “extraordinary facts” that differentiate this case from a garden-variety labor arbitration? In this case, that the hearing officer is a part of management and not an independent arbitrator. The claims of procedural misconduct prior to the Commissioner’s decision were presented to the Hearing Officer; Henderson refused to allow cross-examination of the principal investigator and the Commissioner. This refusal prevented the union, in Judge Mazzant’s opinion, from establishing that the Commissioner’s initial decision was arbitrary and capricious.¹¹⁷

The district court concluded that the “circumstances of this case are unmatched by any case this Court has seen,” with the only citation for this extraordinarily broad conclusion to the *Brady* case.¹¹⁸ The conclusion that, in labor arbitration cases, federal judges can consider the “entire set of circumstances” and reverse an arbitrator’s procedural rulings that the judge believes to lack fundamental fairness is a remarkable example of bootstrap reasoning.

¹¹³ See *Peterson, Brady, and Elliott*, *supra* note 5.

¹¹⁴ *NFL Players Ass’n v. NFL*, No. 4:17-CV-00615, 2017 U.S. Dist. LEXIS146027, at *4-5 (E.D. Tex., Sept. 8, 2017) (*Elliott PI*).

¹¹⁵ *Id.* at *20.

¹¹⁶ *Id.* at *22.

¹¹⁷ *Elliott PI*, 2017 U.S. Dist. LEXIS 146027, at *22.

¹¹⁸ *Id.* at *25.

For authority, Judge Mazzant cited the Fifth Circuit’s opinion in *Forsythe Int’l, S.A. v. Gibbs Oil Co.*¹¹⁹ In that decision, the appellate court reversed a district judge’s arbitral vacatur, despite strong evidence of fraud by one of the parties. Despite the district court’s conclusion of egregious discovery abuse, the court of appeals in *Forsythe* found that “the necessarily limited judicial review of the arbitration award yields no justification for disturbing it.”¹²⁰ To be fair, the opinion states that judicial review was based on “whether the arbitration proceedings were fundamentally unfair.”¹²¹ *Forsythe* emphasized, however, that the statutory provision authorizing vacatur only applied to where the award was procured by “corruption, fraud, or undue means,” which was not present when the arbitrator was informed about employer misconduct.¹²² (In *Elliott*, the hearing officer was informed about the misconduct and nonetheless upheld the discipline).¹²³

The broad language employed in *Forsythe*, in turn, came from another Fifth Circuit decision,¹²⁴ which cited yet an earlier Fifth Circuit decision that vacated an award on procedural grounds, but only because the panel received ex parte communication in direct contravention of standard arbitration rules incorporated in the parties’ agreement.¹²⁵ The first relevant Fifth Circuit precedent on point in turn cited the Second Circuit’s judgment in *Bell Aerospace Co. Div. of Textron, Inc. v. United Auto Workers*, where the court observed that the arbitrator was not required to “follow all the niceties observed by the federal courts” but “only grant the parties a fundamentally fair hearing.”¹²⁶ But *Bell Aerospace*, which appears to be the foundational precedent, expressly states that federal judges “may vacate the award of an arbitrator only on the grounds specified in 9 U.S.C. § 10 (1970).”¹²⁷ Indeed, the Fifth Circuit’s opinion in *Forsythe*, on which Judge Mazzant relied in giving relief in *Elliott*, itself makes clear that the broad term “fundamentally unfair” does not give federal judges the discretion to determine for themselves what is “fair,” but rather was a judicial short-hand for the statutory standards for vacatur: that (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of

¹¹⁹ *Id.* at *19, citing 915 F.2d 1017, 1021 (5th Cir. 1990). Note that *Forsythe* reviewed an arbitration under the FAA, not a labor arbitration under the LMRA.

¹²⁰ *Forsythe*, 915 F. 2d at 1019.

¹²¹ *Id.* at 1020.

¹²² *Id.* at 1022, citing 9 U.S.C. § 10(a) (emphasis in court opinion).

¹²³ *Elliott PI*, slip op. at 3.

¹²⁴ *Teamsters, Chauffeurs, etc., Local Union 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 906 (5th Cir. 1984) (using same broad language – “review is restricted to determining whether the procedure was fundamentally unfair” – to uphold award because there was notice and an opportunity to be heard).

¹²⁵ *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979) (requiring a “fundamentally fair hearing”, again focusing on notice and an opportunity to be heard).

¹²⁶ 500 F.2d 921, 923 (2d Cir. 1974).

¹²⁷ *Id.*

partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers.¹²⁸ In similar reasoning regarding commercial arbitration, the Fifth Circuit expressly rejected an effort to vacate an arbitral award that was arbitrary and capricious, refusing to add additional grounds to the narrow justifications for judicial review provided in the Federal Arbitration Act.¹²⁹

After procedural wrangling in the *Elliott* case led the dispute back to New York, where the NFL had filed a petition to enforce the arbitral award, District Judge Katherine Failla reached a contrary conclusion to Judge Mazzant's as to the scope of judicial power to review decisions the judge finds to be "fundamentally unfair." Noting that the Second Circuit had explicitly left the question open,¹³⁰ Judge Failla persuasively reasoned from the Supreme Court's teaching that courts reviewing arbitral awards under the LMRA may not vacate an award even if the arbitrator "committed serious errors"¹³¹ The essence of labor arbitration is the enforcement of terms of the agreement between labor and management, and "courts should not superimpose an extra-contractual definition of 'fairness' in arbitrations beyond the actual standards and procedures for which the parties bargained."¹³² Relevant to this case, and FAA precedent that faulted a commercial arbitral panel for failing to explain their evidentiary ruling that a key witness' testimony was unnecessary as cumulative,¹³³ Judge Failla noted that the LMRA's purpose of facilitating efficient dispute resolution (of particular concern with in-season discipline in sports) would be contravened

¹²⁸ *Forsythe*, 915 F.2d at 1021, citing 9 U.S.C. § 10(a)-(d). The Second Circuit has addressed the relationship between the standards for commercial arbitration set forth in the FAA and the standards for labor arbitration applicable in proceedings under the LMRA. *Coca-Cola Bottling Co. of N.Y. v. Soft Drink & Brewery Workers Union Local 812 Int'l Bhd. of Teamsters*, 242 F.3d 52, 54-55 (2d Cir. 2001) held that the FAA's body of law is "analytically distinct from" that of § 301, and thus even though "the body of law developed under [§] 301 will at times draw upon provisions of the FAA," it does so "by way of guidance alone."

The FAA does permit review if the arbitrator is "guilty of misconduct in... refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a) (3). Although this provision could be read broadly to permit federal judicial vacatur on procedural grounds for any material error in the arbitrator's evidentiary rulings, from early on federal courts have adopted a much narrower and deferential approach. *See, e.g., Hyman v. Pottberg's Ex'rs*, 101 F.2d 262, 265 (2d Cir. 1939) (arbitrators should have admitted documents in possession of claimant, but failure to do so was not misconduct under §10(a)(3)). In one reported case, the court did overturn an award where a key witness was unavailable for medical reason and the judges found that the arbitrators did not explain why his testimony would be cumulative. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

¹²⁹ *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385 (5th Cir. 2004).

¹³⁰ *Brady*, 820 F.3d at 553 n.13.

¹³¹ *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

¹³² *Elliott NY*, slip op at 16.

¹³³ *Tempo Shain*, *supra* note 128.

by a more searching standard of judicial review that would induce arbitrators to prepare detailed and legalistic decisions to protect their awards from judicial reversal.¹³⁴

Judge Failla also expressed questions of fairness about whether this standard would allow highly-paid unionized professional athletes to obtain judicial relief unavailable to ordinary workers.¹³⁵ Our concern is that the expanding scope of federal judicial review pursued by the NFLPA is a two-edged sword if “fairness” is the appropriate standard to review decisions of labor arbitrators (given that the parties have been treating (in our view incorrectly) league commissioners or their designees as such. This creates unwarranted opportunities for management (which is usually better resourced than unions in their ability to pursue appeals on disciplinary issues) to find sympathetic federal judges willing to overturn arbitral awards in favor of workers or players on grounds that what the judge perceives as a misguided award was caused by “fundamental unfairness” in the proceeding.¹³⁶

Sound policy reasons suggest that the well-developed common law of private association that applies to owners and non-union employees should also apply to decisions by Commissioners applicable to players, where the Commissioner’s decision is not subject to impartial arbitration (absent express language in the CBA to the contrary). 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 owners, nor 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.¹³⁷ Well-reasoned judgments by a sports league commissioner that are faithful to the league’s

¹³⁴ *Elliott NY*, slip op. at 17, citing Charles B. Craver, *Labor Arbitration As A Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 595 (1990).

¹³⁵ *Id.*, citing Michael Z. Green & Kyle T. Carney, *Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits When A Typical Hourly Union Worker Cannot Obtain This Unusual Court Access?*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 403, 442–43 (2017).

¹³⁶ Professor Mark Greenbaum expresses the view that if the appeals court adopted the union’s argument that the Federal Arbitration Act’s fundamental fairness doctrine warrants vacating Henderson’s decision, it would give all unions increased ability to challenge other unsatisfactory arbitration awards. Rhodes, *supra* note 11. The reason that the legendary counsel to the United Steelworkers, David Feller, so aggressively pursued the principle of judicial deference to arbitrators in the *Steelworkers Trilogy* reflects the more conventional union perspective that judicial review tends to favor management.

¹³⁷ In one respect, treating sports league commissioner’s decisions as equivalent to that of a labor arbitrator may result in more favorable treatment for the employee. As noted in Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Appellee’s Petition for Panel Rehearing or Rehearing *en banc*, *NFL Management Council v. NFL Players Ass’n*, No. 15-2801(L) (2d Cir.), at 2, a fundamental principle of labor arbitration is that an arbitrator can only consider evidence available to the employer at the time of discipline. See *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 39-40 & n.8 (1987). The brief, *id.*, also cites a leading treatise for the proposition that additional reasons cannot be added later to strengthen the employer’s case. See NORMAN BRAND & MELLISA H. BIREN, *DISCIPLINE AND DISCHARGE IN ARBITRATION* Ch. 2.II.A.3, p. 50 (2d ed. 2008). In contrast, the Commissioner would only be precluded under private association law from considering additional facts if the league’s rules or practices so provided.

rules and precedents will be upheld under either standard. Decisions that impose the Commissioner’s 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,¹³⁸ 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.¹³⁹ Alternatively, in the *Finley* case discussed above, had the court of appeals felt that the Commissioner’s act was unjust, the court could have decided the action 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.¹⁴⁰ Examination of Chief Judge Katzmann’s useful dissent in *Brady* reveals it was largely due to the Commissioner’s failure to reconcile the well-established and relatively minor penalty for wide receivers using improper “stickum,” which gives them an advantage in catching a football, with what he perceived as a similar offense in deflating a football, thereby giving 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

¹³⁸ *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987).

¹³⁹ *United States Soccer Federation, Inc. v. United States Nat’l Soccer Team Players Ass’n*, 838 F.3d 826 (7th Cir. 2016).

¹⁴⁰ 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. The 8th Circuit noted that “The Players Association’s primary argument before Arbitrator Henderson was that custom and practice under the Personal Conduct Policy in effect at the time of Peterson’s misconduct limited the Commissioner’s disciplinary authority to a maximum two-game suspension for a first-time domestic violence offense” *Peterson*, 831 F.3d at 991. 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. *Id.* at 992. Given the breadth of the Commissioner’s best interests authority, 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. See *Milwaukee American Ass’n v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931) (parties intended Commissioner to be “proverbial *pater familias*”),

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 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."¹⁴¹

An impartial expert labor arbitrator is not bound by precedent and does not have to explain any deviation from similar cases. That is because the parties have bargained for the arbitrator's judgment. In contrast, under the law of private association, those charged by the association's governing documents with internal decision making are obliged to follow rules 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.¹⁴² As discussed in *Finley*,¹⁴³ the court of appeals reviewing the Commissioner's exercise of the best interests power against an owner was comfortable in evaluating the Commissioner's contention that previously approved cash sales of players were of a different quality and magnitude than the ones disapproved in the case *sub judice*. In contrast, the *Brady* court felt constrained by the context of labor law. The majority in *Brady* expressly noted that the CBA did not require the "arbitrator" to explain his reasoning.¹⁴⁴ The majority viewed the inability of the NFL to explain why Brady's misconduct was so severe as irrelevant. However, this inability may well have persuaded one of these judges that Commissioner Goodell's decision was not consistent with league rules (the standard for private association challenges), even if – perceiving him as a labor arbitrator -- 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."¹⁴⁵ Judge

¹⁴¹ *Brady*, 820 F.3d at 552 (Katzmann, C.J., dissenting) (quoting from League Policies for Players).

¹⁴² *Gulf South Conference v. Boyd*, 369 So.2d 553, 553 (Ala. 1979).

¹⁴³ See text accompanying notes 39-44, *supra*.

¹⁴⁴ *Brady*, 820 F.3d at 540.

¹⁴⁵ *Id.* at 539.

Parker's majority decision appears to reject this claim on the merits. It emphasized a provision of the NFL rules document stating that suspensions may also be imposed based on the circumstances.¹⁴⁶ 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.”¹⁴⁷ This seems to be a correct way of re-wording the “draws its essence from the contract” standard for labor arbitrators. In contrast, the law of private associations would not likely uphold an official's unpersuasive and unjustified interpretation simply because it was “barely colorable.”

The vulnerability of the Article 46 discipline to judicial review under the law of private association is even stronger in the *Elliott* dispute. The NFLPA challenged Commissioner Goodell's six game suspension for domestic abuse on the basis of procedural unfairness. The specific grounds that the complaining witness was not credible, and that the proceedings were fundamentally unfair, because the league's internal hearing officer refused to allow cross-examination of the putative victim or the Commissioner. There is ample precedent under the law of private association to obtain judicial review if the NFLPA's lawyers could persuade a reviewing judge of fundamental procedural unfairness.¹⁴⁸

Another issue concerns the “internal” standard of review that is used by the arbitrator or internal officer. Article 46 is silent on this question. In three recent internal decisions under Article 46, the designated hearing officers used three different standards.¹⁴⁹ In *Bountygate*,¹⁵⁰ 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 determining whether the initial disciplinary decision should be upheld. In *Ray Rice*,¹⁵¹ 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

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Ezekial v. Winkley*, 572 P.2d 32, 35 (Cal. 1977) (citing cases); *Cipriani Builders, Inc. v. Madden*, 912 A.2d 152, 161 (N.J. App. Div. 2006) (requiring a “fair opportunity of the member to respond to the charges”). See generally notes 29-33, *supra*, and accompanying text.

¹⁴⁹ 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. See NFL COLLECTIVE BARGAINING AGREEMENT art. 42, 43(3)(b) (2011).

¹⁵⁰ Paul Tagliabue, *In the Matter of New Orleans Saints Pay-for Performance/ “Bounty”* (Dec. 11, 2012), <http://www.nfl.com/news/story/0ap1000000109668/article/paul-tagliabues-full-decision-on-saints-bounty-appeal>.

¹⁵¹ Barbara S. Jones, *In the Matter of Ray Rice* (Nov. 28, 2014), https://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf.

that “the player has not demonstrated that the process and procedures surrounding his discipline were not fair and consistent.”¹⁵²

If the law of private association were to apply to review Article 46 discipline, a player seeking judicial review would have alternative theories to attack the Hearing Officer’s decision: (1) That it improperly affirmed an initial disciplinary decision that was itself arbitrary and capricious, or tarred with fundamentally unfair procedures, 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; the reasoning of the hearing officer in *Rice* is open to question¹⁵³). 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 expressly 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 legally-trained tribune 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.

¹⁵² Letter Decision from Harold Henderson to Jeffrey L. Kessler & Daniel L. Nash (Dec. 12, 2014), at 8 (on file with authors).

¹⁵³ The absence of an articulated standard of review in Article 46 is an inherent deficiency in the CBA. It is understandable if one assumes the Commissioner will be reviewing his own decision. What standard would one apply in second guessing themselves? However, it has become more often the case that the appeal is directed to a hearing officer, either a management official, or an independent person, such as a judge (e.g., *Rice*). The absence of an articulated standard of review by the hearing officer, in and of itself, is an argument why courts should not review Article 46 motions to vacate as bound by the guardrails of the *Steelworkers Trilogy*.

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.