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Nephi Hardman

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Arbitration Awards in an Environment of Compulsory Unionization: Is the High Degree of Deference Warranted?

I. INTRODUCTION

Advocates of compulsory unionization have long maintained that conditioning continued employment upon union membership is not discriminatory so long as anyone may join the union; a *closed* shop is justified so long as there is an *open* union.¹ The idea, stripped down to its essentials, is that *unions must play fair*; whatever obligation there is at the outset for unions to practice non-discriminatory admission practices,² that obligation grows when unions hold the keys to the workshop.³

Since unions often hold the keys to the courtroom as well,⁴ they must play fairly when pressing employee grievances. For example, it is well-settled that a union that fails to press black union members' allegations of discrimination runs afoul of both Title VII and § 1981,⁵ once the union is *exclusively* entrusted with filing claims for its members, it must exercise that power fairly.⁶ Under *compulsory*

1. *E.g.*, FRANK T. STOCKTON, THE CLOSED SHOP IN AMERICAN TRADE UNIONS 176 (1911); *see also* JOHN MITCHELL, ORGANIZED LABOR: ITS PROBLEMS, PURPOSES, AND IDEALS AND THE PRESENT AND FUTURE OF AMERICAN WAGE EARNERS 283 (1903).

2. *See, e.g.*, 29 U.S.C. § 158(b)(2) (2006).

3. MITCHELL, *supra* note 1, at 283.

4. Often, but not always, whether and in what circumstances an employee may still file a claim with the EEOC after already having arbitrated a claim of discrimination is a well-researched topic beyond the scope of this Comment. *See generally* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). It is sufficient to note here that in certain circumstances, an employee's claim is barred by res judicata because of the union's previous litigation or arbitration of that claim. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991); *cf.* Jacobs v. CBS Broad., Inc., 291 F.3d 1173, 1177-78 (9th Cir. 2002) (refusing to give res judicata effect to a union decision because of the union's lack of procedural formalities, but reaffirming that union arbitration decisions, properly conducted, do merit res judicata effect from the judiciary).

5. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987). While the holding in *Goodman* has been superseded by 28 U.S.C. § 1658(a), and *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 371, 383-84 (2004), the factual circumstances of *Goodman* continue to show that a union's interests may diverge from an individual worker's interests.

6. *Goodman*, 482 U.S. at 669.

unionism, however, the union holds the courthouse keys for both the willingly *and* unwillingly unionized.⁷

The judiciary, while occasionally distinguishing between the levels of deference given to union-controlled and individual-controlled grievance procedures,⁸ has never used similar rationale to distinguish between the subsets of union-controlled grievance procedures—namely, closed⁹ and open shops.

The distinction drawn in *Alexander v. Gardner-Denver Co.*¹⁰ between individual- and union-entered arbitration agreements provides a workable rationale that could be extended to warrant different treatment of closed- and open-shop arbitration awards. A union's previous arbitration of an employee's racial discrimination claim did not stop the employee from subsequently litigating on his own behalf, because, *inter alia*, "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit," and "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made."¹¹ The same rationale should be applied in the context of arbitration *awards*—in particular, that in at least some cases of individual arbitration awards agreed upon through unionized arbitration, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit," and, further, that "harmony of interest between the union and the individual employee cannot always be presumed."¹²

Thus, because of the increased likelihood of divergent interests between the individual worker and the union in a closed-shop

7. For a review of the statutory law governing closed shops, see *infra* Part III.A.

8. "Occasionally," because the enforcement of arbitration agreements has contemplated whether the individual or the union entered into the agreement, but the enforcement of arbitration awards has not. See *infra* Part II.

9. This Comment uses the expression "closed shop" interchangeably with "compulsory unionism." For a discussion of whether "closed shop" is a misnomer, see *infra* Part III.A.

10. 415 U.S. 36 (1974). The *Gardner-Denver* holding has been narrowed significantly by subsequent decisions and may even "be a strong candidate for overruling" if it is inseparable from its broader interpretation. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1469 n.8 (2009). Here, *Gardner-Denver's* significance derives more from its position as the historical high watermark of distrust in arbitration than from its (limited) continued vitality.

11. *Gardner-Denver*, 415 U.S. at 58 n.19.

12. *Id.*

setting, arbitration awards rendered in a closed shop ought to be viewed with a higher level of scrutiny than they currently receive.¹³ Specifically, courts ought to view closed-shop labor arbitration awards with a “manifest disregard of the law” standard of review that involves actually verifying that an arbitrator has correctly applied the law.

In making that argument, this Comment traces the evolutionary split in case law governing union-based arbitration *agreements* and union-based arbitration *awards*. Under current law, a union may only agree to mandatory arbitration on behalf of its members when the waiver of the right to litigate in the collective bargaining agreement (“CBA”) is clear and unmistakable. In notable contrast, once a labor arbitrator has rendered an award, a judge views the completed award with substantial deference that involves an extreme unwillingness to overturn labor arbitrators’ decisions. By claiming that closed-shop labor arbitration decisions ought to be viewed under a strict “manifest disregard of the law” standard of review, this Comment argues that at least a subset of arbitration decisions should follow the path of arbitration *agreements*.¹⁴

Part II of this Comment explores the divergence between the judiciary’s unwillingness to enforce labor arbitration agreements and its willingness to enforce completed labor arbitration awards. Part III explains how compulsory unionization vitiates the reasons for awarding labor arbitration awards a high degree of deference. Part IV gives a modest suggestion for a standard of review of arbitration awards that would be more appropriate in the context of compulsory unionization. Part V concludes by noting that using a strict level of scrutiny to review such arbitration awards is, ironically, a faithful extension of the Supreme Court’s initial reasoning that gave substantial deference to labor arbitration awards.

13. But this Comment does not argue that arbitration decisions made in an open shop should necessarily receive the same amount of scrutiny they currently receive. This Comment focuses on closed shops because they are more demonstrably illustrative of the possibility of a divergence of interests between individual worker and union, but such a divergence may also be found in an open shop with further research. Therefore, this Comment’s thesis could be restated: closed-shop arbitration awards merit a higher degree of scrutiny than they currently receive, and perhaps open-shop arbitration awards do as well. I disclaim any intention of showing that there is a bright line between closed and open shops that merits higher scrutiny for the former and the status quo for the latter.

14. Part II.A, *infra*, shows that judicial review of arbitration agreements is more protective of the unionized worker than the non-unionized worker.

II. DIVERGENT TRENDS IN JUDICIAL REVIEW OF ARBITRATION AGREEMENTS AND ARBITRATION AWARDS

That the judiciary has come to treat arbitration awards and arbitration agreements differently is important not only as a basic contextual background, but also to show that at least a subset of arbitration awards—those rendered within a closed shop—should follow the pattern of arbitration agreements.

As a preliminary introduction to a discussion of specific cases, it will help to clarify the distinction between the enforcement of an arbitration award and the enforcement of an agreement to arbitrate in the first place. For purposes of this Comment, a court enforces an arbitration *award*¹⁵ when, after the parties have gone through the entire arbitration process, the court refuses to alter the decision made by the arbitrator. In contrast, a court enforces an arbitration *agreement* when, before the parties ever go to arbitration, one of the parties claims that it should not have to arbitrate its claim at all, and the court compels that party to submit to arbitration. Although this Comment ultimately speaks to the level of scrutiny with which courts ought to view *awards*, the history of enforcing *agreements* is relevant: this Part describes how some factors that have classically applied to the enforceability of an arbitration *agreement* would logically apply to the enforcement of an arbitration *award*.

A. *The Development of the “Clear and Unmistakable Waiver of Rights” Standard for Arbitration Agreements*

With the above distinction in mind, the Supreme Court’s jurisprudence on the enforceability of arbitration agreements demonstrates an evolving tension between the “longstanding judicial hostility to arbitration agreements”¹⁶ and federal pro-arbitration laws—namely, the Federal Arbitration Act (FAA)¹⁷ and the Labor Management Relations Act (LMRA).¹⁸ The FAA makes most¹⁹

15. “Award” in this Comment, for purposes of simplicity, encompasses any arbitral decision, whether representing monetary damages or injunctive relief.

16. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

17. 9 U.S.C. §§ 1–16 (2006).

18. 29 U.S.C. § 141 (2006).

19. This Comment does not reach the FAA’s statutory construction debate, exemplified by the majority and dissent in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

arbitration agreements enforceable,²⁰ but generally does not apply to organized labor,²¹ while the LMRA does. The culmination of the following history of enforcing arbitration agreements is a two-tiered system of treatment: a CBA must contain a clear and unmistakable waiver of the right to litigate a claim in order for the arbitration agreement to be enforceable; for non-union workers, there is no such requirement.

1. Hostility gives way to pro-arbitration laws

Predating American independence, English courts regarded arbitration agreements as an automatically suspect encroachment into their domain.²² American courts were still demonstrating a reluctance to enforce arbitration agreements when Congress, in

20. See Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years after Doctor's Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 250–56 (2006).

21. See Thomas E. Carbonneau, *Eighty-Fourth Cleveland-Marshall Fund Visiting Scholar Lecture: The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 253 (2008).

Courts have not applied the FAA to labor arbitration because of the Act's exclusion of "contracts of employment" in § 1. See, e.g., *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Pa. Greyhound Lines, Inc.*, 192 F.2d 310, 313 (3d Cir. 1951); *Domino Sugar Corp. v. Sugar Workers Local Union* 392, 10 F.3d 1064, 1067–68 (4th Cir. 1993). However, the Supreme Court, in *Circuit City Stores, Inc. v. Adams*, has held that the "contracts of employment" exclusion applies "only [to] contracts of employment of transportation workers." 532 U.S. at 119. The extent of the FAA's input in organized labor arbitration (for unions not dealing in the actual transportation of goods) is therefore an open question. Still, labor arbitration is most squarely governed by § 301 of the LMRA, 29 U.S.C.S. § 185. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 449–52 (1957); Carbonneau, *supra*, at 253.

In any case, it is clear that cases decided under the FAA have influenced later cases decided under the LMRA, and vice versa. Compare *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 544 (1964) (resolving a claim brought under the LMRA), with *Necchi S.P.A. v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 696 (2d Cir. 1965) (referencing *John Wiley & Sons* as a source of arbitration-agreement enforcement policy to resolve a claim brought under the FAA). See also *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1127 (3d Cir. 1969) (making a decision under the LMRA while explicitly analogizing to the FAA). Since demarcating the boundary between the LMRA and FAA is beyond the scope of this Comment, it will be sufficient to note that both statutes have influenced the enforceability of arbitration agreements and awards. Beyond that, the question of the exact boundary line between the two acts will have to remain unresolved and in a footnote, as in *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78 n.1 (1998).

22. See *Kill v. Hollister*, 95 Eng. Rep. 532 (K.B. 1746); see also *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320 (C.C. Mass. 1845) (reviewing English cases refusing to enforce arbitration agreements).

response to a lobby of business and industry leaders,²³ passed the United States Arbitration Act in 1925.²⁴ In the pre-*Erie* jurisprudence of that time, the original goal of the FAA was to provide federal courts sitting in a diversity action with some basis for *not overruling* state laws that were already in place to enforce arbitration agreements.²⁵ Although the Supreme Court's decision in *Erie* would ostensibly have eliminated the need for the FAA, the Act took on a life and reason of its own: in 1947 the FAA was re-adopted as positive law,²⁶ and became "no longer a mere gap-filler, but . . . the repository of a nascent federal policy."²⁷

In the same year that the FAA was re-adopted, Congress passed the LMRA in response to President Truman's request for "legislation . . . to provide adequate means for settling industrial disputes and avoiding industrial strife . . . in important, nationwide industries."²⁸ Also known as the Taft-Hartley Act,²⁹ the LMRA was actually a group of amendments to the National Labor Relations Act.³⁰ Along with specific measures to limit the power of unions to

23. Carbonneau, *supra* note 21, at 245.

24. The United States Arbitration Act lost its naming section in 1947 and subsequently became known as the Federal Arbitration Act. Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 580 n.1 (1952); Gavin, *supra* note 20, at 252.

25. Carbonneau, *supra* note 21, at 245–46. For a different view, see Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 175 (2008) ("Congress was determined to make arbitration agreements enforceable everywhere but realized that federal jurisdiction was quite limited in the 1920s.").

26. Sturges & Murphy, *supra* note 24, at 580 n.1; Note, *Enforceability Under the United States Arbitration Act: Collective Bargaining Agreements and Contracts Not "Involving Commerce,"* 63 YALE L.J. 729, 729 n.1 (1954).

27. Carbonneau, *supra* note 21, at 249.

28. Steven E. Abraham, *The Impact of the Taft-Hartley Act on the Balance of Power in Industrial Relations*, 33 AM. BUS. L.J. 341, 348 (1996) (citing FRED A. HARTLEY, OUR NEW NATIONAL LABOR POLICY: THE TAFT-HARTLEY ACT AND THE NEXT STEPS 74–75 (1948)). President Truman eventually vetoed the bill, and the Taft-Hartley Act was passed over his veto. *Id.* at 350–51.

29. *Id.* at 343 n.8.

30. Deborah A. Ballam, *The Law as a Constitutive Force for Change, Part II: The Impact of the National Labor Relations Act on the U.S. Labor Movement*, 32 AM. BUS. L.J. 449, 452 (1995).

disrupt industry,³¹ the LMRA seeks “to provide additional facilities for the mediation of labor disputes affecting commerce.”³²

2. Deference in practice: *The Steelworkers Trilogy*

In 1960, the Supreme Court decided the *Steelworkers Trilogy*. The *Steelworkers Trilogy* is significant to this discussion because arbitration agreements in a CBA (such as that negotiated between the United Steelworkers Union and its employers) won enforcement from the Supreme Court much earlier than those in individual contract disputes.³³ Specifically, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*³⁴ (*Steelworkers I*) began to reverse the general lack of deference given to arbitration agreements.³⁵

In that case, workers of a steel production company alleged that the company had laid employees off for lack of work, and then contracted with independent contractors, some of whom were the laid-off workers, at a lower wage to do the same work.³⁶ The arbitration agreement stated that if there was any question about the scope of the employment contract, the matter was to be resolved by arbitration.³⁷ The Supreme Court found that management’s decision to dismiss employees and then contract with private workers was within the purview of the arbitration agreement and, therefore, precluded litigation in court.³⁸

That same year, the Court continued the trend in *United Steelworkers of America v. American Manufacturing Co.*³⁹

31. For a discussion of these, see generally Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions*, 12 HOFSTRA LAB. L.J. 1 (1994).

32. Pub. L. No. 80-101 (1947). The original full title of the public law constituting the LMRA was “AN ACT To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.” *Id.*

33. *See infra* Part II.B–C.

34. *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (*Steelworkers I*), 363 U.S. 574 (1960).

35. Michael P. Wolf, *Give ‘Em Their Day in Court: The Argument Against Collective Agreements Mandating Arbitration to Resolve Employee Statutory Claims*, 56 J. MO. B. 263, 264 (2000).

36. *Steelworkers I*, 363 U.S. at 576.

37. *Id.* at 575–76.

38. *Id.* at 583–85.

39. *United Steelworkers of Am. v. Am. Mfg. Co.* (*Steelworkers II*), 363 U.S. 564 (1960).

(*Steelworkers II*), by ruling that “courts cannot review the merits of an arbitration award under the guise of examining arbitrability.”⁴⁰ In that case, United Steelworkers sought to compel arbitration of a wage dispute that the employer had refused to submit to arbitration and which the appellate court termed “frivolous” and “patently baseless.”⁴¹ The Supreme Court found that it was not the province of the courts to pass on the merits of something specifically delegated to an arbitral board.⁴² In other words, since the matter of whether or not there was any merit to wage disputes was supposed to be arbitrated in the first place, the courts could not refuse to compel arbitration, even though the lower courts had determined that the claims were frivolous.⁴³

3. *The judiciary formally recognizes tension between union and worker*

Despite the trends to recognize and enforce arbitration agreements, the Court expressed apprehension that such agreements could compromise individual interests. In *Alexander v. Gardner-Denver Co.*,⁴⁴ the Supreme Court addressed the topic of union-versus-non-union enforcement of arbitration agreements in a footnote with broad implications.⁴⁵ There, the Court

voiced concern about “the union’s exclusive control over the manner and extent to which an individual grievance is presented” as well as concern that “[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the

40. Elizabeth A. Roma, Comment, *Mandatory Arbitration Clauses In Employment Contracts and the Need for Meaningful Judicial Review* (hereinafter *Mandatory Arbitration Clauses*), 12 AM. U. J. GENDER SOC. POL’Y & L. 519, 536 n.124 (2004); see *Steelworkers II*, 363 U.S. at 568 (“Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.”).

41. *Steelworkers II*, 363 U.S. at 568.

42. *Id.* at 569.

43. *Id.*

44. 415 U.S. 36 (1974). In *Alexander v. Gardner-Denver Co.*, the Supreme Court declined to enforce a labor arbitration agreement as the sole means for redressing a statutory dispute under a CBA. The worker complained that he had been terminated because of racial discrimination. The Court held, simply, “that there can be no prospective waiver of an employee’s rights under Title VII.” *Id.* at 51. Elaborating, the Court stated that some statutory rights may be waivable, but only those rights related to a “collective activity” or a “majoritarian process[,]” such as the right to strike. *Id.*

45. *Id.* at 58 n.19.

bargaining unit.”⁴⁶

Gardner-Denver decided that an individual was not barred from litigating a discrimination claim in his own right even after his union arbitrated the claim.⁴⁷

Seventeen years later, *Gilmer v. Interstate/Johnson Lane Corp.*⁴⁸ reevaluated the anti-arbitration reasoning that emerged from *Gardner-Denver*. The *Gilmer* Court held that a non-union worker’s statutory claim could be subjected, exclusively, to a mandatory arbitration agreement.⁴⁹ Thus the Supreme Court distinguished the analysis used in *Gardner-Denver* which was that arbitration agreements stemming from statutory claims of non-collective rights are unenforceable.⁵⁰ Regardless of how genuine the distinctions⁵¹ between *Gardner-Denver* and *Gilmer* are, *Gilmer* is emblematic of a newly adopted pro-arbitration policy by the Supreme Court.⁵²

46. Carol Van Sambeck, *The Four Corners Approach to Judging the Enforceability of Arbitration Agreements, Which Waive Statutory Rights to Litigate Employment Discrimination Claims*, 5 APPALACHIAN J.L. 247, 253–54 (2006) (citing *Gardner-Denver*, 415 U.S. at 58 n.19).

47. 415 U.S. at 59–60.

48. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

49. *Id.* at 23.

50. *Gardner-Denver*, 415 U.S. at 51.

51. The *Gilmer* Court distinguished *Gardner-Denver* on three grounds. First, the issue in *Gardner-Denver* was whether resolution of a contractual claim in an arbitral forum precluded subsequent resolution of that claim in a judicial forum. Although the *Gardner-Denver* Court had ruled that arbitration of a contractual claim did not eliminate one’s right to a day in court for a statutory claim, the situation in *Gilmer* involved an employee who had specifically agreed to arbitrate his statutory claims. *Gilmer*, 500 U.S. at 35. Second, *Gardner-Denver* was decided “in the context of a collective bargaining agreement An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.” *Id.* Third, *Gardner-Denver* was not decided under the Federal Arbitration Act. *Id.*

52. See, e.g., Carbonneau, *supra* note 21, at 234 (“The landmark cases in labor and employment arbitration—*Alexander v. Gardner-Denver Co.* (the ‘old time religion’) and *Gilmer v. Interstate/Johnson Lane Corp.* (the ‘new age’ thinking)—attest to the enormous distance that separates past and present concepts of legal due process and fundamental rights.”); Gavin, *supra* note 20, at 255 (“The 1991 landmark decision in *Gilmer v. Interstate/Johnson Lane Corp.* illustrates just how far the Court had come since its refusal to apply the FAA to contracts involving the Securities Act in *Wilko*.” (footnote omitted)); *Mandatory Arbitration Clauses*, *supra* note 40, at 525 (“[T]he [*Gilmer*] Court’s attitude towards arbitration was distinctively different [from the attitude of the *Gardner-Denver* Court]”).

In the 1998 case of *Wright v. Universal Maritime Service Corp.*,⁵³ the Supreme Court tried to reconcile the discordance between *Gardner-Denver* and *Gilmer*. The union employee had brought a statutory lawsuit against his employer for violation of the Americans with Disabilities Act, and the employer had argued that the litigation was precluded by the arbitration agreement included in the union's CBA.⁵⁴ For union-based arbitration agreements, the Court introduced a "clear and unmistakable waiver" test to determine if the arbitration agreement precluded litigation of statutory claims,⁵⁵ thus placing primary importance on the construction of the actual labor contract. Since the union's CBA with the employer contained only a generalized arbitration clause, the employee was entitled to litigate his claim in court.⁵⁶ The Court declined, however, to rule that a statutory discrimination claim could never be relegated to arbitration, expressly reserving that question for another day.⁵⁷

The reason why the "clear and unmistakable waiver of rights" test applied only to CBAs helped to reconcile *Gardner-Denver* with *Gilmer*: although both cases involved an employee's waiver of the right to litigate statutory rights in an arbitration agreement, *Gardner-Denver* involved a union's waiver of statutory rights, while *Gilmer* involved an individual's waiver.⁵⁸

We think the [clear and unmistakable waiver] standard [is] applicable to a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination. . . . [W]hether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.⁵⁹

Wright is significant to the topic of judicial review of arbitration agreements (and arbitration awards) for two reasons. First, it

53. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 75–77 (1998).

54. *Id.* at 72–75.

55. *Id.* at 80.

56. *See id.* at 82.

57. *Id.* at 82 n.2.

58. *Id.* at 80.

59. *Id.*

explicitly stated the key rationale for presuming arbitrability in labor disputes: “arbitrators are in a better position than courts to interpret the terms of a CBA.”⁶⁰ Second and more importantly, the *Wright* Court established a tiered standard for enforcing arbitration agreements under a CBA versus an individual employment contract: a waiver of the right to litigate a statutory claim in court must be clear and unmistakable *if* it is within a CBA; this does not apply for an individual waiver of statutory rights.⁶¹

Presumably, the non-represented employee is bound by the terms of the arbitration agreement that he or she supposedly negotiates, or at least assents to, and therefore that employee should be aware of any waiver contained within that agreement. However, because the union, not its represented employees, negotiates a CBA, any waiver of statutory rights has to be clear so that the employees will be aware of these terms when they vote on the CBA.⁶²

Furthermore, the union provides an additional “layer of bureaucracy” that employees must overcome to assert their rights.⁶³ The *Wright* Court emphasized that the waiver of statutory rights by the union be “clear and unmistakable” so as to eliminate confusion over the power of the union to arbitrate statutory claims in the place of the workers.⁶⁴

*14 Penn Plaza LLC v. Pyett*⁶⁵ may have blunted *Gardner-Denver*’s recognition that a union does not always represent an employee’s best interests, but it left intact *Wright*’s distantly correlative two-tiered approach to enforcing arbitration agreements. At issue was whether a CBA that clearly and unmistakably called for arbitration of an Age Discrimination and Employment Act (“ADEA”) claim was enforceable.⁶⁶ In answering in the affirmative (and reversing the lower courts’ decisions), the Supreme Court rejected the idea that discrimination claims may never be relegated to

60. *Id.* at 78. The Court referenced two cases to support this proposition: *AT&T Tech., Inc. v. Commc’ns Workers*, 475 U.S. 643, 650 (1986), and *Steelworkers I*, 363 U.S. 574, 581–82 (1960).

61. *Wright*, 525 U.S. at 80–81.

62. Van Sambeek, *supra* note 46, at 255.

63. *Id.*

64. *Id.*

65. 129 S. Ct. 1456 (2009).

66. *Id.* at 1461.

arbitration in a CBA.⁶⁷ Inasmuch as the waiver of the right to litigate in the CBA was clear and unmistakable⁶⁸ (and the ADEA contained no independent bar to arbitration), the respondents' age discrimination claims were properly subjected to arbitration.⁶⁹

While *14 Penn Plaza* answered the unresolved question from *Wright* (statutory claims may indeed be subject to mandatory arbitration in a CBA), it simultaneously retreated from *Gardner-Denver's* "broad dicta . . . highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights."⁷⁰ In particular, the *14 Penn Plaza* Court rejected three specific strands of anti-arbitration dicta in *Garden-Denver*. First, "an agreement to submit statutory discrimination claims to arbitration [is not] tantamount to a waiver of those rights."⁷¹ Second, it is a misconception that arbitrators are unqualified to decide legal questions; rather it is within the "arbitrator's capacity to resolve complex questions of fact and law."⁷² Third, while it may be true, as *Gardner-Denver* suggests, that "a union [in arbitration] may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit," that "judicial policy concern" is an insufficient "source of authority" for limiting the application of an arbitration agreement.⁷³

Significantly, *Wright's* two-tiered approach to enforcing arbitration agreements (under a CBA, they must be clear and unmistakable; not so for an individual employee) is only strengthened by the *14 Penn Plaza* holding.⁷⁴ Thus, while *Gardner-*

67. *Id.* at 1464.

68. The *14 Penn Plaza* respondents argued that the waiver was not, in fact, clear and unmistakable, but the Court refused to consider this argument, since it had not been raised below. *Id.* at 1473-74.

69. *Id.* at 1466.

70. *Id.* at 1469.

71. *Id.*

72. *Id.* at 1471.

73. *Id.* at 1472.

74. In the following quotation, the first sentence, taken out of context, would seem to belie this assertion, but the second sentence qualifies the first and sanctions *Wright's* tiered approach: "Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be 'explicitly stated' in the collective-bargaining agreement." *Id.* at 1465 (quoting *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998)).

Denver's broad dicta make it "a strong candidate for overruling,"⁷⁵ the emergent standard of review for arbitration agreements indirectly contemplates the possibility of disunity between the union and employee: the requirement that there be a "clear and unmistakable" waiver of the right to litigate in a CBA assures that the individual employee will be personally aware of the arbitration agreement when she votes on the CBA, even though it is the union that negotiates the CBA.⁷⁶ Thus, by imposing additional requirements on arbitration agreements contained within CBAs, the judiciary has made it harder to have an enforceable arbitration agreement within a CBA than in an individual worker's contract.

B. The Development of the "Manifest Disregard of Law" Standard for Arbitration Awards

1. Historically, arbitration awards receive general acceptance

While arbitration agreements have ultimately become enforceable for unions only after proving a clear and unmistakable waiver of rights, arbitration *awards* have historically enjoyed—and still receive—a higher level of deference. English courts gave "full effect to [arbitration] agreements . . . after they had ripened into arbitrators' awards."⁷⁷ American courts likewise seldom overturned the completed award of an arbitrator.⁷⁸ That the parties had voluntarily⁷⁹ submitted to the arbitration itself (rather than in the context of a future, executory agreement) infused the arbitration award with a contract-like character that won approval and enforcement from both English and American courts.⁸⁰ The FAA, in

75. *Id.* at 1469 n.8.

76. *See supra* note 62 and accompanying text.

77. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982 (2d Cir. 1942).

78. Gavin, *supra* note 20, at 251 n.15 (citing IAN R. MCNEIL, *AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNALIZATION* 20 (1992)).

79. "Voluntarily" because either party could revoke the executory arbitration agreement at any time. *Id.* at 252.

80. One reason for the substantial deference given arbitration awards under the common law of early American and English courts may have been the contract-like character of the completed award. An 1845 Massachusetts court decision may reference contractual principles when it delineates between "awards . . . fairly and lawfully made" and compulsion of "a reluctant party to submit to [an arbitral] tribunal":

turn, though not drafted specifically to address the issue of judicial review of arbitration awards,⁸¹ did outline four bases for overturning a completed award: (1) “the award was procured by corruption [or] fraud”; (2) the award evidences “partiality or corruption” of the arbitrators; (3) the arbitrators are “guilty of misconduct” or prejudicial behavior, such as “refusing to postpone [a] hearing” or hear pertinent evidence; and (4) “the arbitrators [have] exceeded their powers, or . . . imperfectly executed them.”⁸²

2. “*Manifest disregard of law*” emerges as a check on arbitration awards

In 1953, the Supreme Court decided *Wilko v. Swan*.⁸³ Although in dicta,⁸⁴ the *Wilko* Court created the “manifest disregard of law” standard: a court will not overturn an arbitration *award* unless the arbitrator’s decision displays a “manifest disregard” of law.⁸⁵ The

Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.

. . . [I]f a submission has been made to arbitrators . . . with an express stipulation, that the submission shall be irrevocable, it still is revocable and countermandable, by either party, before the award is actually made, although not afterwards.

Tobey v. County of Bristol, 23 F. Cas. 1313, 1320–21 (C.C. Mass. 1845).

81. 9 U.S.C. §§ 1–16 (2008).

82. 9 U.S.C. § 10(a)(1–4) (2008).

83. *Wilko v. Swan*, 346 U.S. 427 (1953). The investor claimed that the company had made false representations and thereby induced him to purchase stock on false pretenses. The Court found that the arbitration agreement specifically violated the Securities Act of 1933, which forbade mandatory arbitration in stock-purchase agreements, and therefore refused to compel arbitration. *Id.* at 428–31, 434–38. *Wilko* was eventually overruled for reasons unrelated to this Comment by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

84. Justice Jackson found the Court’s exposition of possible reasons to overturn an arbitral award to be unnecessary to the decision; he therefore wrote a separate concurrence to demonstrate his support for the limited holding that the Securities Act of 1933 precludes pre-dispute arbitration agreements. *Wilko*, 346 U.S. at 438–39 (Jackson, J., concurring).

85. *Id.* at 436–37.

“manifest disregard of law” standard has become the touchstone for judicial review of arbitral awards.⁸⁶ Notably, section 10 of the FAA, which lists the bases for vacating an arbitration award, mentions nothing of “manifest disregard of law”—lower federal courts seeking to implement this standard of review have shoe-horned it in with 9 U.S.C. § 10(a)(4): an arbitration award may be vacated if “the arbitrators exceeded their powers.”⁸⁷ Thus, although “manifest disregard of law” was coined in a case that did not deal with arbitration awards, it has become the shorthand for the FAA’s undergirding principle of judicial review of arbitration awards.

3. *Steelworkers III lays the foundation for giving CBA-based arbitration awards extra deference*

While *Wilko* produced an easily repeatable standard for judicial review of arbitration awards, *Steelworkers III*⁸⁸ set the stage for CBA-based arbitration awards to receive extra deference. In contrast to its companion cases in the *Steelworkers* Trilogy, the *Steelworkers III* decision enforced an arbitration *award*—not an agreement—that had been overturned by a lower court.⁸⁹ Four aspects of *Steelworkers III* are noteworthy in this context—four markers why CBA-based arbitration awards have received extra deference.

a. *The premise of Steelworkers III: the bargained-for arbitration award.* In enforcing the arbitration award, the Supreme Court explicitly stated a basic premise relating to CBA-based arbitration awards: the arbitrator’s award was *bargained for* in the sense that it represents what the parties (employer and union) *get* in exchange for

86. See, e.g., *First Options v. Kaplan*, 514 U.S. 938, 942 (1995).

87. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933–34 (2d Cir. 1986). This case has been criticized insofar as it portrayed “manifest disregard of the law” as an additional, judicially created ground for overturning an arbitration award. *AmeriCredit Fin. Servs. v. Oxford Mgmt. Servs.*, 627 F. Supp. 2d 85, 93 (E.D.N.Y. 2008). The criticism is well founded: in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court ruled that the FAA’s stated grounds for vacating an arbitration award are exclusive. 128 S. Ct. 1396, 1402–03 (2008). Thus “manifest disregard of the law” is significant as a standard of review only to the extent that it serves as a shorthand for the FAA’s stated grounds for vacatur. Whether the *Hall Street* decision will produce a measurable change in judicial scrutiny of arbitration awards remains to be seen.

88. *United Steelworkers of Am. v. Enter. Wheel and Car Corp. (Steelworkers III)*, 363 U.S. 593 (1960).

89. *Id.* at 595–96, 598–99.

what they *give* under the collective bargaining agreement.⁹⁰ “It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”⁹¹

b. The rationale of Steelworkers III: pro-arbitration policy and superior qualification. Next, the Supreme Court made explicit its rationale for upholding the arbitration award: if courts interfered in the arbitration award, then that would undermine the policy of settling labor disputes by arbitration.⁹² Arbitrators, furthermore, are qualified to resolve such disputes because of their specialized knowledge in the industry.⁹³

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.⁹⁴

c. The mixed authority of Steelworkers III: references to arbitration agreements. Notably, the Court cites *Steelworkers I*, an arbitration agreement-enforcement case, to explain its reasoning for enforcing an arbitration award.⁹⁵ Ostensibly, employment of specialized knowledge to foster industrial stability favors upholding both arbitration agreements *and* arbitration awards. “As we stated in [*Steelworkers I*], . . . decided this day, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process.”⁹⁶ This is significant because it shows

90. *Id.* at 599.

91. *Id.*

92. *Id.* at 596, 599.

93. *Id.* at 596.

94. *Id.*

95. *Id.*

96. *Id.*

that, at least at one point in time, the Supreme Court employed the same reasons to justify enforcing arbitration agreements as it did to justify enforcing arbitration awards.

d. The timing of Steelworkers III: before the divergence of levels of scrutiny for arbitration awards and arbitration agreements. The *Steelworkers* Trilogy was decided fourteen years before the arbitration agreement rationale and arbitration award rationale began to diverge, when the *Gardner-Denver* Court observed in a footnote that under a CBA, “the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.”⁹⁷ It would be an additional twenty-four years before the *Gardner-Denver* footnote ripened into a split approach to arbitration agreement enforcement in *Wright*; namely, that in order to enforce arbitration agreements under a CBA (but not for an individual worker), there must be a “clear and unmistakable waiver” of the right to litigate a statutory claim in court.⁹⁸ The arbitration award-enforcement cases since *Steelworkers III* (discussed immediately below) show that no analogous judicial suspicion has arisen with respect to arbitration awards given under a CBA. In fact, they are subject to less judicial scrutiny.

4. *The “manifest disregard of law” standard takes on a different meaning for CBA-based arbitration awards*

Nine years after *Steelworkers III*, the Third Circuit decided *Ludwig Honold Manufacturing Co. v. Fletcher*, and ruled that the district court erred by overturning the ruling of an arbitrator concerning the promotion of a union employee.⁹⁹ Although the *Fletcher* court claimed to recycle the “manifest disregard of the law” standard from *Wilko*,¹⁰⁰ the court found that the presence of a CBA reduced the scrutiny that arbitration awards should be subject to:

97. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974).

98. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 (1998).

99. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1125, 1133 (3d Cir. 1969).

100. *Id.* at 1127–28 (citing *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) (overruled on other grounds by *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989))). *Wilko* was decided under the FAA, 346 U.S. at 436, while *Fletcher* was decided under the LMRA, 405 F.2d at 1125 n.1. For a brief discussion of the overlap of rationale, see *supra* note 21.

[P]erceiving that the Supreme Court's announced standards in reviewing commercial awards call for the exercise of judicial restraint, we must conclude that such a philosophy of restricted review compels even *less* judicial interference in matters arising from *labor* arbitration. At the very least this means that the interpretation of *labor arbitrators* must not be disturbed so long as they are not in "manifest disregard" of the law, and that "whether the arbitrators misconstrued a contract" does not open the award to judicial review.¹⁰¹

Thus, the *Fletcher* court openly adopted a highly deferential standard of review for arbitration awards made within a CBA.

Although not dealing specifically with judicial review of arbitration awards in the CBA context, *Sun Ship, Inc. v. Matson Navigation Co.*¹⁰² further eroded the meaning of the "manifest disregard of law" standard. In *Sun Ship*, the Third Circuit cited its previous ruling in *Fletcher*¹⁰³ for the proposition that a court may not "consider whether the arbitrators committed an error of law."¹⁰⁴ Judicial review of arbitrators' contractual interpretations was likewise broadly proscribed.¹⁰⁵ Since a Third Circuit judge may not consider whether arbitrators have made errors of either law or contract interpretation under the current terms of "manifest disregard of law," the juridical apple has fallen far from the initial tree. Ironically, then, the "manifest disregard of law" standard has become synonymous with a standard that nearly forecloses judicial review entirely—a super-deference.

*Upshur Coals Corp. v. United Mine Workers, District 31*¹⁰⁶ represents a similar development in the Fourth Circuit in the CBA context. The court reversed the decision of the District Court, finding that the District Court had improperly undertaken to interpret the language of a CBA and of legal precedent.¹⁰⁷ The *Upshur Coals* Court acknowledged, "The arbitrators' interpretation

101. *Fletcher*, 405 F.2d at 1128 (citations omitted) (emphasis added).

102. *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986).

103. *See supra* notes 99–101 and accompanying text.

104. *Sun Ship*, 785 F.2d at 62 (citing *Fletcher*, 405 F.2d at 1127–28).

105. *Id.* (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 n.4 (1956) ("The court may not take issue with the arbitrator's interpretation of the contract.")).

106. *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225 (4th Cir. 1991).

107. *Id.* at 226, 230.

of the contract, and of [legal precedent] may not have been correct,”¹⁰⁸ but “[a]s long as the arbitrator is even arguably construing or applying the contract’ a court may not vacate the arbitrator’s judgment.”¹⁰⁹

In *International Association of Machinists, No. 145 v. Modern Air Transport, Inc.*, the Fifth Circuit likewise adopted a rationale that gave super-deference to arbitration awards made under a CBA.¹¹⁰ The court found that since “[i]t is the arbitrator’s construction which was bargained for,” the proper role of the judiciary was to evaluate whether or not the arbitrators had exceeded their authority, not whether they had correctly interpreted the collective bargaining contract.¹¹¹ This bifurcation is important: a court *may* review whether or not an arbitrator was authorized to arbitrate a certain issue, but a court *may not* review (save in very limited instances) whether the arbitrator gave a proper interpretation of the CBA.¹¹² In this case, the court found that an arbitrator was still acting in his authority, even though it would have interpreted the contract differently.¹¹³ The *Machinists* court’s super-deference exceeded the standard of review of abuse of discretion in that it deferred to the arbitrator’s interpretation of both the CBA *and* legal precedent.

5. *Cole v. Burns repackages the reasons for giving extra deference to CBA-based arbitration awards*

Cole v. Burns is noteworthy, because, although its discussion of the reasons for giving CBA-based arbitration awards a high degree of deference¹¹⁴ is dicta, it re-establishes the judiciary’s prevailing reasons for treating CBA-based arbitration decisions differently from (with more deference than) other arbitration awards. The opinion outlines three broad arguments: first, arbitration is the alternative to striking for workers employed under a CBA; second, a CBA is akin to a micro social contract wherein the arbitrator’s award is an extension of the agreement itself; third, arbitration within a CBA is more likely

108. *Id.* at 231.

109. *Id.* at 229 (citing *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 38 (1987)).

110. 495 F.2d 1241, 1244–45 (5th Cir. 1974).

111. *Id.* at 1244 (quoting *Steelworkers III*, 363 U.S. 593, 599 (1960)).

112. *Id.* at 1244–45.

113. *Id.* at 1244.

114. 105 F.3d 1465, 1473–79 (D.C. Cir. 1997).

to result in a just award than arbitration in the case of the non-unionized worker or even in the case of a judge.

a. *CBA-based arbitration awards merit extra deference because labor arbitration is the alternative to mass, industry-wide strikes.* First, *Cole* asserts that “[i]n the commercial case, arbitration is the substitute for litigation. Here [under a CBA] arbitration is the substitute for industrial strife.”¹¹⁵ This resonates with the original sentiment for passing the LMRA. In the years immediately following World War II, “more than five million [American] workers participated in the largest strike wave ever in an advanced capitalist nation.”¹¹⁶ Congress perceived a need to rein in the power of organized labor to strike so freely, and so passed the Labor Management Relations Act,¹¹⁷ which includes a pro-arbitration provision that applies specifically to labor unions.¹¹⁸ Thus *Cole*’s arbitration-or-strike dichotomy has a pedigree that dates back at least to the passage of the LMRA.

Unfortunately, neither *Cole* nor *Steelworkers III* (which originally stated the arbitrate-or-strike dichotomy) makes explicit the connection between (1) the proposition that arbitration is needed to avert industry-stopping strikes, and (2) the idea that CBA-based arbitration decisions should be awarded a high degree of deference. Presumably, the connection is that if arbitration decisions are not given substantial deference, then organized labor will have no incentive to arbitrate and will strike instead.

b. *CBA-based arbitration awards merit extra deference because the CBA is a mini-social contract.* Second, *Cole* combines rationale from *Steelworkers I* and *III* to show that the authority of a CBA transcends the mere words of the contract to the point where it is a mini-social contract, the constitution and government for an entire micro-society. There are two aspects of the CBA, as envisioned in *Cole* (and its cited sources), that are more like a mini-social contract than a mere lengthy contract. First, the CBA is expected to form a new

115. *Id.* at 1473 (quoting *Steelworkers I*, 363 U.S. 574, 578 (1960)).

116. Harris Freeman, *Program Notes: In the Shadow of Antilabor Law: Organizing and Collective Bargaining 60 Years After Taft-Hartley*, 11 WORKINGUSA 1, 2 (2008).

117. *Id.*

118. 29 U.S.C. § 185 (2006).

common law that goes beyond interpretation of the agreement. “The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern myriad cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.”¹¹⁹ Second, the CBA-designated arbitration agreement imbues the arbitrator with authority that is disconnected and independent of her ability to interpret statutory law or contracts.

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.¹²⁰

The *Cole* court further found that a bad contract interpretation by the arbitrator is oxymoronic: “Thus, a ‘misinterpretation’ or ‘gross mistake’ by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award *is* their contract.”¹²¹ Because a union has specifically bargained for the agreement to arbitrate as part of the CBA, the arbitration award is an inseparable part of the employment social contract thus brought into being.

c. CBA-based arbitration awards merit extra deference because they are more likely to result in a correct decision than a judicial award. Third, *Cole* lists various reasons why arbitration within a CBA is more likely to result in a better or more just award than other forms of arbitration or even a formal judgment. An arbitrator has specialized knowledge of the law of the shop that qualifies him beyond even the “ablest judge” because the arbitrator can take into account “such factors as the effect upon productivity . . . [and] the

119. *Steelworkers I*, 363 U.S. 574, 578–79 (1960).

120. *Steelworkers III*, 363 U.S. 593, 599 (1960).

121. *Cole v. Burns*, 105 F.3d 1465, 1475 (D.C. Cir. 1997) (citing Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977)).

morale of the shop.”¹²² And with respect to arbitration conducted by the non-unionized employee, a union is more likely to obtain a fair award at arbitration because the union is a repeat customer, while the individual employee generally has only one shot.¹²³ Because the union is a repeat player, it is better able to pick a non-biased arbitrator.¹²⁴ While an individual employee may be presented with an arbitration clause “on a take-it-or-leave-it basis,” a union not only bargains for the arbitration agreement, but can return to the bargaining table after an unfavorable award to restructure the employment agreement.¹²⁵

Cole concludes that an arbitration award rendered for an individual *not* under a CBA would be subject to a rigorous “manifest disregard of the law” standard of review that would include actively asking if the arbitrator had applied the correct law.¹²⁶ Thus, the *Cole* court envisioned a return to the more intuitive definition of “manifest disregard of the law” (i.e., an actual inquiry into whether the law has been disregarded), but only for workers not within a union.

C. In Sum: Divergent Trends in the Enforcement of CBA-based Arbitration Agreements and CBA-based Arbitration Awards

Thus, the rationales surrounding enforcement of arbitration agreements and enforcement of arbitration awards have developed divergently. When the *Steelworkers* Trilogy was decided in 1960, the Supreme Court offered similar rationale for all three cases, even though two dealt with enforcement of an arbitration agreement (*Steelworkers I* and *II*), and one dealt with enforcement of an arbitration award (*Steelworkers III*). By the time *Wright* was decided thirty-eight years later, an *agreement* to arbitrate under a CBA had to be clear and unmistakable—a higher threshold than that imposed for arbitration of an individual claim. Meanwhile, an arbitration award made in the context of a CBA fell under a modified “manifest disregard of the law” standard of review that is less rigorous than the

122. *Id.* (quoting *Steelworkers I*, 363 U.S. at 582 (1960)).

123. *Id.* at 1475–76.

124. *Id.* at 1475.

125. *Id.* at 1477.

126. *Id.* at 1487.

“manifest disregard of the law”¹²⁷ test that courts apply to individuals.

III. AN ENVIRONMENT OF COMPULSORY UNIONIZATION VITIATES THE REASONS FOR GIVING CBA-BASED ARBITRATION AWARDS A HIGH DEGREE OF DEFERENCE

A. A Review of Compulsory Unionization Laws

The LMRA is a group of amendments to the National Labor Relations Act.¹²⁸ Closed-shop arrangements were legal under the original NLRA passed in 1935: “[N]othing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . .”¹²⁹ Thus the unamended NLRA left the door open—intentionally or otherwise¹³⁰—for state laws providing for compulsory unionization. When the LMRA was passed twelve years later, § 14(b) was added to the NLRA, forbidding “agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”¹³¹ This did not, however, prove the end of compulsory unionization. Unions were still able to form “union shop” agreements in which a non-union employee could be hired on the condition that he or she join the union within a certain amount of time. Hence, while “closed shop” may be a misnomer in a technical sense (the shop is not *closed* from the outset to prospective non-union employees), the practical effect of union shop laws is the same: ultimately the worker must join the union or cease employment under either arrangement.

127. But “manifest disregard of the law” may no longer be a viable shorthand name for the judiciary’s approach to overturning arbitration awards since the Supreme Court’s decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Whether this will result in a substantive change to that approach remains to be seen. *See supra* note 87.

128. *See supra* notes 20–26 and accompanying text.

129. Nat’l Labor Relations Act 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 158 (2009)).

130. One commentator has implied that it may have been unintentional. *See* Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 104–05 (2005).

131. 29 U.S.C. § 164(b) (2008).

In 1985, however, the Supreme Court decided *Pattern Makers' v. NLRB*, in which it ruled that even where a closed-shop authorization election has been held, employees could not be fined for resigning from the union.¹³² The Court found that fining former union members effected restraint and coercion on the part of the union, in violation of § 8(b)(1)(A) of the NLRA.¹³³ For reasons that will be discussed in Part B below, *Pattern Makers'* has *not* been the death knell for the closed shop; union and worker behavior have largely continued unaltered since the Supreme Court's ruling. By using the phrases "compulsory unionism" or "closed shop," this Comment merely asserts that after a closed-shop authorization election, at least some workers who otherwise would not have joined the union do so against their preference. Other legal commentators likewise continue to use the phrase "closed shop."¹³⁴

Currently, twenty-two states have laws that forbid closed-shop arrangements.¹³⁵ In the remaining states, workers wishing to establish a closed-shop workplace must vote.¹³⁶ Two kinds of elections must take place. First, a majority of workers must vote to create a union.¹³⁷ This is called a *certification* election. Second, once a union has been certified, the workers in a workplace may vote to

132. 473 U.S. 95, 115–16 (1985).

133. *Id.* at 114.

134. For example, the American Law Reports annotation "Closed Shops and Closed Unions," though written in 1946, has been revised as recently as 2008 and continues to say:

Whatever may have been the law in earlier times, today it is settled in most jurisdictions that as a general proposition, a closed-shop agreement, that is, a collective labor agreement which binds the employer to employ only members of a single labor union, is a valid contract, and not void as in restraint of trade or against public policy.

160 A.L.R. 918 (1946) (footnotes omitted). Thus, "[t]he closed shop is a generic term. It covers a variety of practices which contain a common element. That element is that to obtain or retain a job an employee must join a trade union, or in other words, union membership is a condition of employment." CHARLES HANSON ET AL., *THE CLOSED SHOP: A COMPARATIVE STUDY IN PUBLIC POLICY AND TRADE UNION SECURITY IN BRITAIN, THE USA AND WEST GERMANY* 5 (1982). By using the phrase "closed shop" in the "generic" sense, this Comment does not focus on the exception created in *Pattern Makers'*, but rather on the continuing reality of "join or quit," demonstrated in Part B of this section.

135. Hogler, *supra* note 130, at 136.

136. HANSON ET AL., *supra* note 134, at 175.

137. That a majority of workers would be required to agree for there to be any union (whether or not the union is to represent them) is a consequence of the exclusivity rule: a union is the exclusive representative of all employees in a workplace in matters of bargaining for wages and benefits. *See generally* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

close the shop (requiring union membership (barring proactive resignation from the employee) and paying union dues as a condition for continued employment). This is called an *authorization* election. Because of this, if more than half of the workers vote to authorize a closed shop, all other employees must join the union, cease employment, or proactively resign union membership.¹³⁸ The next two parts will demonstrate that because of this arrangement, in the twenty-eight states that permit closed-shop arrangements, the *Gardner-Denver* Court's observation that there may exist tension between the union and the employee¹³⁹ is more probable.

B. The Effect of Closed-Shop Conditions

The closed-shop work setting leads to a high enough likelihood of opposition and enmity between employer and union to warrant greater scrutiny than the current "manifest disregard of law" standard of review.¹⁴⁰ Although some of the analysis supporting this proposition is supportable (and supported) by empirical evidence, this premise is axiomatic at its core. The following three lemmas form a bulwark for this premise: (1) at least some closed-shop certifying elections are decided by non-unanimous vote, in which some workers will either be compelled to join the union against their will or cease employment; (2) conditions before a closed-shop certifying election have a tendency to produce enmity between employees because of (a) strikes in which some of the non-union workers (scabs) continue to work, (b) violence against scabs during strikes, or (c) campaigning by parties on each side of the issue; and (3) once the closed shop has become a reality, it is unrealistic to expect the employee-to-employee opposition to immediately vaporize.

138. Hanson and his co-authors describe the reality of join-or-quit in great detail. HANSON ET AL., *supra* note 134, at 111–42. However, since they wrote before the Supreme Court's decision in *Pattern Makers*, they fail to include the option of active resignation from the trade union. See *infra* notes 145, 148.

139. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974).

140. This Comment does not assert, however, that a higher standard of review is not also justified under an open shop. As mentioned in note 13, *supra*, this Comment focuses on closed shops because they are more demonstrably illustrative of the possibility of a divergence of interest between worker and employer than open shops.

1. At least some closed-shop authorizing elections are decided by non-unanimous vote, in which some workers will be compelled to either join the union against their will or cease employment

The part of this proposition that pertains to non-unanimous votes is, predictably, much weaker than it could be. One study of union-certification elections¹⁴¹ voting demographics uncovered a very mixed field sentiment on the desirability of unions among voting workers.¹⁴² Among thirty-three elections studied, the highest percentage of workers voting for union-representation was seventy-six percent.¹⁴³ Twenty-two out of the thirty-three elections voted against union representation, and overall, only forty-five percent of all workers were in favor of union representation.¹⁴⁴ While dispositions toward unions varied from election to election, the only constant was that voting among workers was *not* unanimous.

Though lack of unanimity is easy to demonstrate, as mentioned above, it is not true, in the technical sense, that workers are forced to join the union in a closed shop. Despite the Supreme Court's sweeping ruling in *Pattern Makers*, "join or quit" continues to be the prevailing mentality in workplaces that have held a successful closed-shop authorization election.¹⁴⁵ The following three factors may be responsible for this: First, it is not clear to workers that they have the option of withdrawing from a union because they are still required to pay union dues under a closed shop.¹⁴⁶ Second, union

141. Union certification elections are not the same thing as closed-shop authorization elections, although they have a similar dynamic. In a union certification election, employees vote not whether to make their workplace a closed shop, but whether to have a union representing workers at all. BARBARA KATE REPA, *YOUR RIGHTS IN THE WORKPLACE* 460 (2007). Even in an open shop, the union is the exclusive representative of the workers to the employer in terms of wage bargaining.

142. JULIUS G. GETMAN, STEPHEN B. GOLDBERG, AND JEANNE B. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 41 tbl.2-2 (1976).

143. *Id.*

144. *Id.* at 40, 41 tbl.2-2.

145. The National Right to Work Legal Defense Foundation, Inc. lists "Can I be required to be a union member or pay dues?" at the top of its FAQ list, <http://www.nrtw.org/>. Pundits from the other side also seek to clarify this misconception. *See, e.g.*, [WrongforMichigan.org](http://www.wrongformichigan.org/Get_The_Facts.htm), http://www.wrongformichigan.org/Get_The_Facts.htm ("The Right to Work supporters keep talking about 'compulsory' unionism. Do all workers have to be union members when there is a union security clause in a contract?"). Evidently, advocates on both sides have found that the matter requires clarification.

146. In *Communication Workers v. Beck*, the Supreme Court ruled that self-removing employees may still be required to pay agency dues, or the amount of union dues that covers

members often refuse to work alongside non-union members, thus forcing employers to choose between hiring all union workers, or no union workers at all.¹⁴⁷ Third, since *Pattern Makers'* was handed down in 1985, the bulk of the historical dialog on the fairness of closed-shop laws assumes that union membership may be required. For example, in 1957, the AFL-CIO published the following:

Nobody is deprived of any job because of the union shop, unless the individual himself decides to make non-membership in a union a condition for accepting a job.

Joining a union is only one of many qualifications involved in getting a job. For instance, the worker may be required to have a certain level of education . . . he may have to be willing to wear certain types of uniform or work clothes. . . .¹⁴⁸

Other factors may also be relevant, such as the fact that employees must *proactively* resign from a union after a successful closed-shop authorization election,¹⁴⁹ or that the prevailing terms “open shop” and “closed shop” have a somewhat non-intuitive meaning. This Comment merely asserts that, unless an employee deliberately resigns from the union, the losing party in a successful closed-shop authorization election joins the union against his will.

collective bargaining, contract administration, and grievance adjustment with the employer. 487 U.S. 735, 762–63 (1988). An employee who does not want to pay the entire fee is required to follow a formal objection procedure. *See Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

147.

Closed shop bylaws are common in industries such as construction and entertainment, where jobs are often temporary and the maintenance of closed shop conditions is important to ensure stability of employment. Members generally comply with the bylaws by protesting at the presence of non-union employees, by walking off the job where non-unionists are present or by refusing to work with employers using non-union labor.

HANSON ET AL, *supra* note 134, at 172. Of course, this option is available to union members in both closed- and open-shop settings.

148. WILLIAM TAYLOR HARRISON, *THE TRUTH ABOUT RIGHT-TO-WORK LAWS* 72 (1959) (quoting AFL-CIO, *FACTS VS. PROPAGANDA* (1957)).

149. *See generally Int'l Ass'n of Machinists*, 133 F.3d at 1012.

2. *Conditions before a closed-shop authorization election may tend to produce enmity among employees*

a. *Strikes and hard feelings against scabs.* From an axiomatic¹⁵⁰ perspective, unions—including those that choose to hold an authorization election—will resent scabs. Indeed, the unions that have the greatest reason to show antipathy toward scabs may be more likely to hold an authorization election, since closing the shop may be a more desirable goal when an unsuccessful (scab-broken) strike is in the memorable past.

During a congressional hearing on union policy, one union worker testified,

The “free rider” is the living example of the bad side of human nature which takes everything it can get for free . . . I merely say that as long as a fellow worker of mine, working side by side with me in a shop . . . as long as he is getting exactly the same benefits that I am getting from the activities of our organization . . . that is preposterous, merely because I happened to be a person, an individual, that has some integrity and is willing to pay my share, my dues, that some person . . . that has no sense of responsibility to his fellow man, . . . should actually be allowed just to sit there and not only let things go by but actually laugh in my face.¹⁵¹

One survey found that seventy percent of union workers found it ethical to put pressure on non-unionists to join the union by refusing to work with them.¹⁵²

b. *Strikes and hard feelings felt by scabs.* Scabs are treated poorly by striking workers. A good example of this species of ill treatment is the factual setting of *United Mine Workers v. Gibbs*, in which union

150. The continued reference to self-evident or axiomatic lemmas may be annoying and frustrating to academic researchers. The author apologizes and makes three observations. First, no *quantitative* research has been performed (that he could find) on the frequency or prevalence of hard feelings between unionists and non-unionists, residual enmity after a strike, or (ultimately) overall likelihood of a union to treat its members unfairly; indeed, the author questions whether one could fairly expect such topics to be researchable. Second, while anecdotal evidence is plentiful, the plural of anecdote is not data. Therefore, this Comment purposefully places its axiomatic reasoning before isolated quotations and statistics that corroborate—but do not directly establish—the assertion of residual hard feelings. Third, by explicitly stating its underlying assumptions, this Comment invites reasoned academic dialog and criticism that gets at the foundation of the desirability of union-led grievance procedures.

151. CHAMBERLIN ET AL., *LABOR UNIONS AND PUBLIC POLICY* 72 (1958) (quoting Testimony of Paul E. Monahan, representing the United Railroad Workers of America, CIO).

152. HANSON ET AL., *supra* note 134, at 83.

members physically beat an organizer of a different union for trying to organize mine work in opposition to a strike.¹⁵³

c. Campaigning by parties on each side of the issue. Even in the absence of a strike, a campaign may foment feelings of opposition between employees. After a close but unsuccessful certification election in Albion, Indiana, a news report found that although

[t]he matter was settled, . . . the bruising battle in Albion . . . turned friend against friend. One employee says that the card check process made her a target and she was threatened by other employees who wanted the union. “I had my reasons for the way that I voted. You know that’s nobody else’s business, and had it not been for the card check, nobody would have known if I was for or against.”¹⁵⁴

Thus, because the procedure for campaigning for unions provides a forum for employees to demonstrate their attitudes toward unionization, there may be residual hard feelings, especially in a close election.¹⁵⁵ While the Albion example involved a union *certification* election, this Comment argues that the same conditions exist in amplified form surrounding an *authorization* election for two reasons. First, after a successful authorization election, not only will the union represent all workers in matters of wages, but the union will also control, in large measure, employee grievance procedures and employee discipline. Second, a successful authorization election means that all employees will have to pay dues. Therefore, one might expect *at least as much* inter-employee opposition to result from an authorization election as from a certification election.

3. Once the closed shop has become a reality it is unrealistic that employee-to-employee opposition will immediately vaporize

After a closed-shop authorization election—and its attendant campaigning and history—it is *self-evidently* unrealistic to expect the residual enmity to dissipate. While unions are required to practice

153. 383 U.S. 715, 718–19 (1966). For more on violence against scabs and union violence in general, see JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS* (2006).

154. *Fox News*, (Fox television broadcast Mar. 26, 2009), *available at* <http://www.youtube.com/watch?v=LXGRTWnXbK4> (on file with author).

155. Close elections do occur. In one study of thirty-three union certification elections, six were decided on margins of less than five percent, including one election that was precisely a 50–50 split. *See* GETMAN ET AL., *supra* note 142, at 41 tbl.2-2.

non-discrimination in the representation of their employees, current laws make it difficult to prove overt discrimination on the part of the union:

Closely allied to closed shop bylaws are clauses included in the collective agreement which permit the union to object to any employee who adversely affects employer and employee relations. The union will object to a non-member and the employer in compliance with the collective agreement will dismiss him. It would, of course, be extremely difficult to prove that dismissal was a result of non-membership in the union and, thus, discriminatory.¹⁵⁶

Since union bylaws allow a union to voice objection to the hiring of anyone “who adversely affects employer and employee relations,”¹⁵⁷ it is not necessarily the case that an unpopular employee would be effectively shielded by statute from retaliatory action.

For the foregoing reasons, there is a higher likelihood of enmity between employer and union in a closed-shop setting.

C. Why Closed Shops Vitiates the Traditional Reasons for Giving Labor Arbitration Awards a High Degree of Deference

Part B’s main assertion is that closed shops are more likely to foment opposition among employee and union; *this* section places that assertion in the context of the three main reasons for awarding CBA-based arbitration decisions the type of extra deference mentioned in Section I: industrial consequences, furthering a mini-social contract, and achieving increased fairness via arbitration. All three of these reasons fail in a closed-shop arrangement.

1. Granting arbitration awards a high degree of deference is necessary to avert large-scale industrial consequences

First, as manifest in *Cole’s*¹⁵⁸ interpretation of *Steelworkers I*,¹⁵⁹ the prevailing judicial attitude toward CBA-based arbitration awards is that they deserve extra deference in order to prevent industry-stopping strikes. This is a poorly supported argument because it

156. HANSON ET AL., *supra* note 134, at 172.

157. *Id.*

158. *Cole v. Burns*, 105 F.3d 1465, 1473–79 (D.C. Cir. 1998).

159. 363 U.S. 574, 576 (1960).

presumably rests on two implicit, unsupported premises. First, arbitration (as opposed to litigation in court) prevents labor strikes; second, arbitration will not be effective in preventing labor strikes unless arbitration awards are given substantial deference. *Cole*'s later invocation of the in-the-trenches labor arbitrator¹⁶⁰ may be relevant to the first premise; one with inside knowledge of the industry and shop norms may be able to pacify opposing parties better than a judge, and thereby avert a strike. Aside from the removed reference to the specialized labor arbitrator, however, *Cole* leaves as an exercise to the reader the derivation of the arbitrate-or-strike dichotomy.

a. Best-case scenario: arbitrate-or-strike is less accurate in a closed shop. This Comment argues that in a best-case scenario, if arbitration does prevent unions from striking, then it is less true, axiomatically, in situations where there is tension between the employee and the union—as is more likely in a closed-shop setting. Assuming that a strike occurs when employees are unhappy, and that labor arbitration keeps unions happy (or willing to work—a key idea behind *Cole*'s arbitrate-or-strike dichotomy),¹⁶¹ this Comment argues that the union would probably *not* choose to strike to protest poor treatment directed at an unpopular employee. For example, in the event that such an employee's grievances were relegated to the judicial system for ordinary litigation, a union at odds with the employee would have little incentive to strike upon an unfavorable outcome of the litigation. Similar factual circumstances surrounded the black plaintiffs in *Goodman v. Lukens Steel Co.*¹⁶² In *Lukens*, the plaintiffs' union (as well as employer) was found guilty of discriminatory practices because it both failed to assert the plaintiffs' original claims of discrimination and because it tacitly encouraged more discrimination.¹⁶³ While *Lukens* did not involve a reluctantly unionized employee (there is no statement that the plaintiffs in *Lukens* would have chosen not to unionize), it incontrovertibly demonstrates that unions may prefer (however illegally) not to take a stand for the employee.

Issues of who has standing to bring an arbitration case may limit the data available of how many other cases there are like *Lukens*—in

160. *Cole*, 105 F.3d at 1480.

161. *Id.*

162. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *see supra* note 5.

163. *Id.*

the context of closed shops and open shops. In *Humphrey v. Moore*, the Supreme Court ruled that an employee may not challenge a perceived unfavorable decision of a union unless the employee can demonstrate that the union acted with fraud or breached its duty of representation under the CBA.¹⁶⁴ The strict hurdles that an employee must clear in order to attack an arbitration decision may prevent a judicial record of tension and opposition between the union and the employee. This Comment makes no statement on the prevalence of the kind of overt enmity between union and employee that was present in *Lukens*. It does argue, however, that the *possibility* of this employer-union opposition is exacerbated in a closed-shop environment, and that procedural standing issues may prevent such conflicts from coming to light, since union bylaws permit a union to object to the employment of any worker whose presence “adversely affects employer and employee relations.”¹⁶⁵

If it is not true that a union would strike rather than arbitrate the claim of an unpopular employee, such an employee might be in better hands litigating his claim in court.¹⁶⁶

b. Worst case scenario: arbitrate-or-strike is right for the wrong reason. This Comment argues that at worst, the arbitrate-or-strike dichotomy in *Steelworkers I* and *Cole* is right for the wrong reason. Because tension between employer and union is more likely in a closed shop, and because labor arbitrators, by *Cole*'s admission, “can account for other considerations affecting shop morale and attitude,”¹⁶⁷ a union arbitrator may not represent the best interests of the individual employee at odds with the union.¹⁶⁸ Several cases demonstrate that unions may pursue a course of legal action (or inaction) that is contrary to the best interests of the employee,¹⁶⁹ and

164. 375 U.S. 335, 349–51 (1964); *see also* *Harvey Bell v. IML Freight*, 589 F.2d 502, 506 (10th Cir. 1979); *Andrus v. Convoy Co.*, 480 F.2d 604, 606 (9th Cir. 1973).

165. HANSON ET AL., *supra* note 134, at 172.

166. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974).

167. *Cole v. Burns*, 105 F.3d 1465, 1476 (D.C. Cir. 1998).

168. *Gardner-Denver*, 415 U.S. at 58 n.19. The Supreme Court has retreated from its broader anti-arbitration dicta in *Gardner-Denver*. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1469 (2009). Because this Comment looks at judicial scrutiny of arbitration awards from a normative perspective, *Gardner-Denver* is significant as a historical example of recognizing tension between the union and the worker that the judiciary *ought* to apply to the context of arbitration awards. *See supra* note 10.

169. *E.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *Humphrey v. Moore*, 375 U.S. 335, 342, 348–51 (1964); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Steele v.*

this Comment argues that this is more likely because of the increased possibility for tension in a closed shop. Moreover, an unpopular worker is protected only by the very things that arbitrators are *not* famous for providing, especially under the current standard of high deference given labor arbitration awards, namely, strict implementation of the employment contract and the pertinent legal statutes.¹⁷⁰ Because labor arbitrators may preserve the continuity and normalcy of the workplace at the expense of unbiased defense of the individual worker, the arbitrate-or-strike dichotomy may be true in a closed shop only because arbitrators can practice triage with the company interests.

c. The second premise. There is another reason why closed-shop settings blunt the force of *Cole's* first reason that giving arbitration awards deference is necessary to prevent an industry-stopping strike. Even if arbitration were necessary to stop a strike, it does not follow that a higher degree of judicial scrutiny would enervate the incentive to arbitrate. Courts, for example, could still give substantial deference to labor arbitrators' findings of fact, while reviewing their findings for conformity with the law. Thus, in a closed-shop setting, the assertion that giving arbitration awards a high degree of deference is necessary to prevent labor strikes is both presumptuous and harmful to the unpopular employee.

2. Giving arbitration awards a high degree of deference honors the mini-social contract of labor unions

Second, *Cole* and *Steelworkers III* both promulgate the paradigm that the arbitration agreement is a *bargained for* part of the collective bargaining agreement, and therefore the parties have given value to receive the arbitration award.¹⁷¹ *Cole* goes so far as to say that a "gross error" on the part of the arbitrator is an oxymoron, insofar as the parties have bargained for the arbitrator's interpretation.¹⁷² This paradigm is simply contradicted in a closed shop with employees who would rather not be represented by the union. Donald R.

Louisville & N.R. Co., 323 U.S. 192 (1944); *Tunstall v. Bhd. of Locomotive Firemen*, 323 U.S. 210 (1944).

170. The basic story in the cases in note 169, *supra*, involve a court stepping in to make sure that a union plays fair.

171. *Cole*, 105 F.3d at 1473-79; *Steelworkers III*, 363 U.S. 593, 599 (1960).

172. *Cole*, 105 F.3d at 1476.

Richberg, Chairman of the National Recovery Administration during the Roosevelt administration, noted:

The entire value of labor organization to the workers lies in this power of the workers to control their representatives. The basis of that control and the only assurance that it will continue, is found in the right and freedom of the individual worker to refuse to support an organization or a representative whose judgment or good will he does not trust.¹⁷³

This Comment submits that failure to represent dissident employees is a natural outgrowth of the closed-shop system, in which employees are forced to belong to an organization with which they would rather not affiliate.

3. Giving arbitration awards a high degree of deference leads to a more satisfactory outcome

Third, *Cole* summarized various reasons why CBA arbitration may lead to a more satisfactory result than either a judicial judgment or even arbitration of a dispute by the individual worker.¹⁷⁴ Foremost among these was the observation that an arbitrator has specialized knowledge of the law of the shop that qualifies him beyond even the “ablest judge,” because she can take into account “such factors as the effect upon productivity . . . [and] the morale of the shop.”¹⁷⁵ It is precisely these reasons that make arbitration *unfit* for a closed-shop setting: if the arbitrator can indeed take into account factors such as productivity and morale of the shop, then the unhappy-to-join-the-union employee is an easy target for letting go. As noted before, union bylaws under closed-shop CBAs may allow “the union to object to any employee who adversely affects employer and employee relations.”¹⁷⁶ As demonstrated above, it is likely that in at least some instances, a former scab or employee who otherwise opposed union certification and authorization would continue to be the object of resentment and enmity by fellow employees. This Comment argues that it is self-evident that finding against such a person in arbitration may boost the morale of the workplace.

173. EDWARD A. KELLER, THE CASE FOR RIGHT-TO-WORK LAWS: A DEFENSE OF VOLUNTARY UNIONISM 32–33 (1956).

174. *Cole*, 105 F.3d. at 1473–79.

175. *Id.* at 1474 (quoting *Steelworkers I*, 363 U.S. 574, 582 (1960)).

176. HANSON ET AL., *supra* note 134, at 172.

The *Cole* court also found it noteworthy that CBA arbitration awards were preferable because a union actually negotiated for the agreement to arbitrate and could return to the bargaining table later in a continuing relationship with the employer to iron out any difficulties.¹⁷⁷ An individual employee, the *Cole* reasoning continued, is presented with an arbitration clause “on a take-it-or-leave-it basis” and therefore, in such a contract of adhesion, has no choice but to accept the obligation to arbitrate or cease working.¹⁷⁸ In a closed-shop setting, however, those reasons may be reversed: the unpopular employee may perceive no choice but to accept the union-negotiated arbitration award or not work at all; he cannot revisit the question without the union’s sanction.¹⁷⁹ If an unpopular and dissatisfied employee receives an unfavorable arbitration award, then it is unlikely that she will return or even be represented vicariously at a future bargaining table with the employer. Therefore, in a closed-shop setting it is less safe to assume that the agreement to arbitrate represents the will of the employee and that the employee will participate in a positive, ongoing relationship with the employer. For this reason and the above reasons, closed-shop arrangements vitiate the reasons for affording arbitral decisions made under a CBA a high degree of deference.

IV. A MODEST SUGGESTION

Given the foregoing observation that a closed-shop arrangement nullifies the reasons for awarding super deference to an arbitration award, this Comment proposes a paradigm that is parallel to the Supreme Court’s developed view on enforcing arbitration *agreements*. As discussed in Section I above, the Supreme Court has come to hold that in order for an arbitration agreement under a CBA to be enforceable, it must be “clear and unmistakable.”¹⁸⁰ The Court has voiced concerns—analogueous to some of those mentioned in Section II above—that unless the agreement to arbitrate is clear

177. *Cole*, 105 F.3d at 1477.

178. *Id.*

179. “[T]he vast majority (probably 99% or more) of collective bargaining agreements that contain binding arbitration provisions reserve to the union the right to decide whether to submit a particular grievance to that forum. Individual employees do not have the right to arbitrate their grievances absent the union’s imprimatur.” Peter Lareau, *Peter Lareau on 14 Penn Plaza LLC v. Pyett*, 2009 EMERGING ISSUES 3509, at 14.

180. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78 (1998).

and unmistakable, the individual employee will not have knowingly consented to the arbitration.¹⁸¹ As a rough analog of this, closed-shop arbitration awards could be subjected to a “manifest disregard of law” level of scrutiny that includes examining whether the law was correctly applied. Because there may be tension between the reluctantly-unionized employee and the union, courts should regard arbitration decisions made in such a context with a high level of scrutiny that includes making sure the law was correctly applied.

This need not include forcing judicial-like process and results on the arbitrator; arbitrators may still render an award that is uniquely tailored to the workplace. However, since a reluctantly unionized employee has *not* bargained for an arbitrator’s interpretation of the contract or her reading of the statute, federal and state courts should determine if the law (both statutory and principles of contract construction) was correctly applied by the arbitrator.

V. CONCLUSION

Holding closed-shop arbitration decisions to a higher level of scrutiny would ultimately *conform with* the Supreme Court’s reasoning in *Steelworkers III* that an arbitration agreement is a bargained-for element of a CBA.¹⁸² If the bargained-for nature of the arbitration agreement truly *does* lead to increased enforceability, then when the employee has *not* bargained for the arbitration agreement, the arbitration award should not be treated with such high deference. Courts’ continued application of the *Cole* court’s reasoning to closed-shop settings diminishes the persuasive value and credibility of those reasons; specifically, it weakens the relationship between the bargained-for nature of the arbitration agreement and the level of deference that courts give to the arbitration award. Therefore, courts should apply a strict “manifest disregard of law” standard of review to closed-shop arbitration awards.

Currently, the arbitration awards made in a CBA enjoy a high level of deference from courts,¹⁸³ while arbitration agreements made as part of a CBA receive much less deference from the courts.¹⁸⁴ The compulsory unionization that goes hand-in-hand with a closed-shop

181. *Id.*

182. *Steelworkers III*, 363 U.S. 593, 599 (1960).

183. *See supra* Part II.A.

184. *See supra* Part II.B.

arrangement vitiates and even reverses most of the reasons for affording CBAs such a high level of deference.¹⁸⁵ Parallel to the same way that the Supreme Court has adopted stricter standards and greater scrutiny for the enforcement of arbitration agreements under a CBA, courts should subject arbitration awards to a high level of scrutiny—strict “manifest disregard of the law”—when there is a high probability of reluctant unionization. Using such a high level of scrutiny to review closed-shop arbitration awards would be the most faithful application of the Supreme Court’s inherent rationale in its most seminal union decisions.

*Nephi Hardman**

185. *See supra* Part III.

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