WRITING IS READING IS WRITING: TWO APPLICATIONS OF THE PAROL EVIDENCE RULE TO COLLECTIVE BARGAINING AGREEMENTS

Gerald M. Moody, Jr.*

I. INTRODUCTION

Collective bargaining agreements are contracts that resist application of traditional contract law.[1] This creates an

* J.D. Candidate 2009, Columbia University School of Law; B.A. Literature, Bard College. The author wishes to thank Professor Carol

obvious analytical problem.[2] On the one hand, collective bargaining agreements seem like ordinary contracts. The collective bargaining agreement is a written document that creates enforceable rights and duties between management and the union. Yet collective bargaining agreements have special qualities that make certain contract principles inapplicable. First, there are many heterogeneous parties on both sides of the agreement.[3] Second, unlike ordinary contracts, collective bargaining agreements are often intentionally silent on significant matters.[4] In order to be of a readable length, collective agreements must be written in generalized language that is capable of capturing the myriad relationships between management and labor.[5] Third, bargaining over both the present and future agreements continues after the parties have signed.[6] These differences, *inter alia*, have generated debate in the federal circuit courts and among commentators about whether to apply traditional rules of contract interpretation to collective bargaining

---

Sanger for her guidance and the staff of the *Columbia Business Law Review* for its editorial assistance.

[1] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960) ("[T]he . . . source of law [for a collective bargaining agreement] is not confined to the express provisions of the contract, as the industrial common law-the practice of the industry and the shop-is equally a part of the collective bargaining agreement although not expressed in it."); *see also* Clyde Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 529 (1969).

[2] *See* SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 55:23 (4th ed. 2007) (noting that there is "a diversity of views regarding exactly what rules of contract interpretation apply to discern the parties' intention with respect to collective bargaining agreements").

[3] *See* James B. Zimarowski, *Interpreting Collective Bargaining Agreements: Silence, Ambiguity, and NLRA Section 8(d)*, 10 INDUS. REL. L. J. 465, 478 (1989) (describing the differences between standard contracts and collective bargaining agreements, which "by definition . . . encompass multiple parties and multiple tiers of parties on each side of the bargaining relationship").

[4] *Id.*

[5] *Id.*

[6] *Id.*

agreements or to create a specialized set of rules.[7] One important question is whether, and to what extent, collective bargaining agreement analysis should extend beyond the four corners of the document in order to determine the mutual intent of the parties.[8] It is critical that judges and arbitrators, each with a unique kind of authority over collective bargaining agreements, use the interpretative method best suited to their distinct interpretive projects.

The Supreme Court has held that, according to national labor policy, arbitration is the preferred method of dispute resolution for collective bargaining agreements.[9] Arbitration is an alternative dispute resolution forum that is contractually chosen by the parties to resolve disputes outside of the court system.[10] If a collective bargaining agreement contains an arbitration clause—as nearly all do—labor and management have agreed that "arbitrators [will] act as their designated 'contract readers.'"[11] With permission

---

[7] *See* WILLISTON & LORD, *supra* note 2, § 55:23; *see also* Carlton J. Snow, *Contract Interpretation: The Plain Meaning Rule in Labor Arbitration*, 55 FORDHAM L. REV. 681, 693 (1987).

[8] *See* Zimarowski, *supra* note 3, at 479; United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960) (discussing how gaps should be filled); *see also* James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 Mo. L. Rev. 283, 284-85 (1995) (explaining that arbitrators disagree about whether to use a plain meaning approach to collective bargaining agreements or to consider extrinsic evidence).

[9] *See* Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability: David L. Threkeld & Co. v. Metallgesesellschaft Ltd.*, 58 BROOK. L. REV. 279, 286-88 (1992) (describing the importance of arbitration for national labor policy); *see also Warrior*, 363 U.S. at 582 (noting the "congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . . ").

[10] *See, e.g.*, Note, *The Arbitrator's Approach to Labor Contract Interpretation*, 64 HARV. L. REV. 1338 (1951).

[11] Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 575-76 (1990). *See also* United Steelworkers v. Enter. Wheel, 363 U.S. 593, 596 (1960) ("[Arbitrators] are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a

of the parties, arbitrators can act simultaneously as adjudicators and mediators who take an active role in negotiating settlements.[12] Most importantly, arbitrators must be familiar with the labor environment in which the collective bargaining agreement was created.[13] In order to interpret the open-ended language used in collective agreements, arbitrators should examine the context in which the document was written.[14] Therefore, arbitrators usually read collective bargaining agreements against the backdrop of bargaining history, past practices and other extrinsic evidence.[15]

Some arbitrators, however, do not consult evidence of bargaining history or past practices unless a term in the collective bargaining agreement is ambiguous on its face. These arbitrators use a tool of contract interpretation, which, for the purposes of this Note, will be called the "strong" parol evidence rule.[16] Conversely, the "weak" parol evidence rule allows the introduction of extrinsic evidence such as bargaining history to determine if contractual terms are

---

particular factory or a particular industry as reflected in particular agreements.").

[12] *See* Craver, *supra* note 11, at 627-28 ("Arbitrators should recognize that they also constitute participants in the continuing collective bargaining process. The arbitrators should not view themselves as stoical participants who can only listen to the evidence presented by the parties .... With the permission of both sides, they might even endeavor to function as a mediator.").

[13] *See Warrior*, 363 U.S. at 581-82 ("The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.").

[14] *See* Summers, *supra* note 1, at 529 (explaining the need for understanding the context in which collective bargaining agreements were created).

[15] *See* Westbrook, *supra* note 8, at 316 (arguing that an arbitrator interpreting a collective bargaining agreement "should consider other contract provisions, bargaining history, and past practices"); *see also* Zimarowski, *supra* note 3, at 479.

[16] *See* Westbrook, *supra* note 8, at 316.

ambiguous.[17] Both rules have been developed and embraced by judges in the process of resolving disputes about ordinary contracts in a judicial forum.[18] There is, of course, in the courts and among commentators, a healthy debate about whether efficiency and fairness concerns weigh in favor of barring or admitting extrinsic evidence before interpreting ordinary contracts.[19] However, the arguments in favor of barring extrinsic evidence are much less persuasive in the context of substantive disputes about collective bargaining agreements.[20]

Judges must also choose whether to employ the strong or weak parol evidence rule when settling procedural disputes over collective bargaining agreements, such as questions of arbitrability. Labor and management occasionally disagree about whether they agreed to submit a particular grievance to arbitration.[21] This is a question of jurisdiction, and the Supreme Court has held that only federal or state courts applying substantive federal law may decide such disputes.[22] The Court, however, has limited judicial review of collective bargaining agreements with arbitration clauses to two questions: (1) whether the parties agreed to arbitrate an issue[23] and (2) whether the arbitration award is

[17] *See* WILLISTON & LORD, *supra* note 2, § 55:23.

[18] *Id.*

[19] *See* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 555-57 (1998) (explaining how the costs and benefits of excluding extrinsic evidence differ depending on the type of contract).

[20] *See infra* Part IV.A; *see also* Westbrook, *supra* note 8, at 319-20.

[21] *See* Craver, *supra* note 11, at 578.

[22] *See* AT&T Techs., Inc. v. Commc'n Workers, 475 U.S. 643, 649 (1986) (holding that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator"); William B. Gould IV, *Judicial Review of Labor Arbitration Awards-Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464, 476 (1989).

[23] *See AT&T*, 475 U.S. at 649.

appropriate.[24] These limitations were constructed out of the fear that federal district court judges, unfamiliar with labor agreements, would rob parties of their arbitration bargain if they were permitted to review the substantive merits of disputes.[25] The Court therefore created a strong presumption in favor of arbitrability to ensure that judges interfere as little as possible with the arbitration process.[26]

This Note argues that judges deciding procedural arbitrability questions should use a strong parol evidence rule, while arbitrators resolving substantive disputes about collective bargaining agreements should use a weak parol evidence rule. If judges do not use a strong parol evidence rule, they threaten to undermine the benefits of arbitration. If arbitrators do not use a weak parol evidence rule, they risk the same result. The Supreme Court should therefore resolve the split in the federal circuit courts over the appropriate parol evidence standard in order to ensure the success of national labor policy.[27] Part II of this Note describes the current constitutional and statutory regime of collective bargaining agreements and the relationship between arbitral and judicial enforcement. Part III discusses two competing approaches to the parol evidence rule used by arbitrators and judges who interpret and enforce collective bargaining agreements. Part IV concludes by suggesting why judges and arbitrators should use the approach to the parol evidence rule best suited to their distinct interpretive roles.

---

[24] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[25] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 463 (1957) (arguing that "judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes"); *see also AT&T*, 475 U.S. at 650.

[26] *See AT&T*, 475 U.S. at 650.

[27] *See* Nelson, *supra* note 9, at 286-88; *see also Warrior*, 363 U.S. at 582 (describing the importance of arbitration in national labor policy).

II. ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS

Almost forty years ago, in its landmark *Steelworkers Trilogy* decisions, the Supreme Court announced its preference that disputes concerning collective bargaining agreements be resolved in labor arbitration.[28] The following sections describe the complex process of resolving disputes over collective bargaining agreements. Part II.A briefly explains the collective bargaining process. Part II.B explores the substantial limitation on judicial oversight of collective agreements. Part II.C explicates arbitration's primary role in resolving substantive disputes about collective bargaining agreements. Part II.D explains the presumption that all disputes about collective bargaining agreements with arbitration clauses are subject to arbitration. Part II.E describes the federal courts' role in deciding procedural questions of whether labor and management agreed to submit a particular dispute to arbitration.

A. Collective Bargaining Agreements

Collective bargaining agreements were uncommon in the United States before Congress passed the National Labor Relations Act ("NLRA") of 1935.[29] The NLRA was enacted as a response to industrial strife caused by unfair distributions of power between management and labor during the early part of the twentieth century.[30] Among other things, the NLRA guarantees employees the right to organize labor unions, choose bargaining representatives, and secure collective bargaining agreements.[31] A collective bargaining agreement is a contract between an employer and one or more employee representatives that controls the terms and

---

[28] *See Warrior*, 363 U.S. at 581.

[29] Rosetta E. Ellis, *Mandatory Arbitration Provisions in Collective Bargaining Agreements: The Case Against Barring Statutory Discrimination Claims From Federal Court Jurisdiction*, 86 VA. L. REV. 307, 313 (2000).

[30] *See* Zimarowski, *supra* note 3, at 473-74.

[31] *See* Craver, *supra* note 11, at 571.

conditions for wages, hours, workplace conditions, and the procedure for resolving disputes.[32] The employer has a duty under the statute to bargain in good faith with the union representative.[33] By joining together, workers increase their bargaining power with respect to the employer.[34] If a majority of the employees vote for the union, all employees are thereafter subject to the collective bargaining agreement, whether or not they so voted.[35]

Although they share many similarities with contracts, collective bargaining agreements are in some ways fundamentally different; for instance, they are often written purposely in ambiguous language to accommodate the rights and duties of many parties.[36] In *United Steelworkers v. Warrior & Gulf Navigation Co.*,[37] the Supreme Court

---

[32] 29 U.S.C. § 158(d) (1994) ("For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .").

[33] *Id.*

[34] *See* Zimarowski, *supra* note 3, at 475.

[35] *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 336 (1944) (upholding the collective bargaining provision of the NLRA).

[36] *See* Summers, *supra* note 1, at 529; *see also* Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 32 (1958) ("There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.").

[37] The Supreme Court, in its landmark *Steelworkers Trilogy* decisions, interpreted section 301 of the NLRA to create a framework for collective bargaining agreements and arbitration. The case holdings remain largely intact, and the colorful language of the opinions have been described as "holy writ" to commentators. *See* Clyde W. Summers, *The Trilogy and Its*

explained that collective bargaining agreements could not achieve the level of specificity seen in commercial contracts.[38] The Court also noted that the collective bargaining process is crucial to "industrial self governance" and that "[a]rbitration [was] the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."[39] Unlike ordinary contracts, collective bargaining agreements are never completely written. The Supreme Court and some commentators agree that the outcome of disputes in arbitration is just another stage in the writing process.[40]

A collective bargaining agreement derives much of its usefulness from incompleteness, a quality that promotes flexibility in the relationship between labor and management.[41] After interpreting the document in context,[42] an arbitrator must find and apply the basic principles of agreement between labor and management. This is no easy task. Because labor and management often rely in part on past practice and oral agreements instead of the language

Offspring Revisited: It's a Contract, Stupid, 71 WASH. U. L.Q. 1021, 1021-22 (1993).

[38] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-80 (1960) ("The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . 'Some [provisions in collective bargaining agreements] do little more than leave problems to future consideration with an expression of hope and good faith.'" (quoting Dean Shulman)).

[39] *Id.* at 581.

[40] *See id.* at 578 ("For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."); *see also* Craver, *supra* note 11, at 571.

[41] *See* Summers, *supra* note 1, at 529. As collective bargaining agreements must create the rights and duties for so many parties with myriad relationships, they must be written in partly generalized terms.

[42] Arbitrators often do and should make healthy use of evidence of bargaining history, past practices and various other indicia of the side agreements that accompany a collective bargaining agreement. *See* Westbrook, *supra* note 8, at 316.

written in the collective agreement, the likelihood of disagreement is high. Moreover, parties to a collective bargaining agreement do not choose to bargain; both management and labor are brought to the table by economic necessity, as well as by statutory authority.[43] The incentives of both parties are also simultaneously aligned and adverse: both parties benefit more by continuing the employment relationship than by ending it, and yet each sacrifices to the extent it accommodates the interest of the other. In addition, renegotiation of collective bargaining agreements is an ongoing process in which modifications are made both to the prospective and current agreements.[44] Finally, the alternative to concession and mutual agreement—a strike—is economically inefficient and bad for morale. Considering this potentially explosive relationship, the Court hoped that neutral arbitrators would ensure that the bargaining process moves forward by interpreting and reshaping the meaning of the collective bargaining agreement.[45] Unlike a judge, an arbitrator's primary mission in the collective bargaining context is to facilitate a cooperative solution rather than to decide the rights of the parties against a body of law.[46]

B. A Limited Role for the Courts

The decision to limit the judiciary's role in interpreting collective bargaining agreements has roots in a history of failed attempts by the federal courts to resolve labor

---

[43] *See* Zimarowski, *supra* note 3, at 478. Both employer and employee are motivated, at least in part, by economic self-preservation. Moreover, management is required by the NLRA to bargain in good faith with a union representative, if not reach an agreement.

[44] *See* Summers, *supra* note 1, at 533-34.

[45] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) ("The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to collective bargaining agreements.").

[46] *See* Craver, *supra* note 11, at 627-28 (suggesting that arbitrators should see themselves as participants in the collective bargaining process rather than "stoical adjudicators").

disputes.[47] Before 1960, when one party brought a suit to compel arbitration, courts had frequently overreached and decided the merits of the dispute.[48] This, of course, undercut both the "congressional policy in favor of settlement of disputes by parties through the machinery of arbitration,"[49] as well as the bargaining parties' own preference for arbitration.[50] To rein in those judges who were resolving disputes meant for arbitration, the Supreme Court expressly limited judicial review over collective bargaining agreements with arbitration clauses.[51] According to the Supreme Court, "the judicial inquiry under section 301 must be *strictly confined* to the question whether the reluctant party did agree to arbitrate the grievance."[52] Accordingly, judicial oversight of labor disputes is quite minimal.[53] In fact, arbitration decisions are reviewed with greater deference than those of federal district court judges.[54] The American

[47] *See* Gould, *supra* note 22, at 464.

[48] *See* Craver, *supra* note 11, at 578-79 (describing a phenomenon known as the *Cutler-Hammer* doctrine, under which courts prior to the *Steelworker Trilogy* cases of 1960 usurped the arbitral function and decided the substantive merits of a claim on procedural grounds); *see also* Int'l Ass'n of Machinist v. Cutler-Hammer, Inc., 271 A.D. 917, 918 (1947) (per curiam), *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947) (per curiam) ("If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.").

[49] *See Warrior*, 363 U.S. at 582.

[50] *Id.* at 567-68 ("[T]he courts have no proper concern with the 'merits' of claims which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators.").

[51] *Id.* at 582-85 (1960).

[52] *Id.* at 574, 582 (emphasis added). *See also* United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Ent. Wheel & Car Corp., 363 U.S. 593 (1960); Bernard D. Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961).

[53] *See* Gould, *supra* note 22, at 472 (describing the Supreme Court's reason for limiting the court's role in the arbitration process).

[54] *Id.* at 465-66. *See also Am. Mfg.*, 363 U.S. at 568 (holding that "the courts, therefore, have no business weighing the merits of the grievance, considering whether there is equality in a particular claim, or determining whether there is particular language in the particular written instrument which will support the claim"); *Warrior*, 363 U.S. at 568 (holding that the

collective bargaining process, which includes arbitration, has a greater independence from the branches of government than any in the world.[55]

C. The Role of Arbitration Under Collective Bargaining Agreements

Nearly all collective bargaining agreements today provide that disputes will be resolved through arbitration.[56] The arguments in favor of utilizing arbitration as a dispute resolution mechanism are generally the following: increased speed, reduced costs, easier access, and the specialized knowledge of arbitrators.[57] The benefits of faster resolution in comparison to litigation for labor disputes include minimizing time and money costs, as well as decreasing the probability that the employment relationship will end.[58] The costs of arbitration are almost always lower than those of litigation because arbitration places significant limits on discovery and motion practice.[59] Lower arbitration costs reduce barriers to entry for many prospective employee-plaintiffs, making it easier for them to proceed pro se

"court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provision of a labor organization"); *Enterprise*, 363 U.S. at 596-99 (holding that courts may refuse to enforce an arbitrator's award only if it does not "draw its essence from the collective bargaining agreement").

[55] *See* Gould, *supra* note 22, at 467; *see also* NLRB v. Ins. Agents Int'l Union, 361 U.S. 477, 488 (1960) ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate substantive solution of their differences.").

[56] *See* Laura J. Cooper, *Discovery in Labor Arbitration*, 72 MINN. L. REV. 1281, 1284 (1988).

[57] *See* Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 353-59 (2006).

[58] *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001).

[59] *See* Bales, *supra* note 57, at 353-54 (discussing the debate over whether management of employees benefit from arbitration's total reduction in costs).

without the procedural hurdles of litigation.[60] Finally, arbitrators bring expertise in industrial relations to their role in resolving labor disputes.[61] For these reasons, the Supreme Court has endorsed the "congressional policy in favor of the settlement of disputes by the parties [to collective bargaining agreements] through the machinery of arbitration . . . ."[62] The ubiquitous presence of arbitration clauses in collective bargaining agreements demonstrates that the private companies and labor unions share Congress's preference for arbitration.[63]

D. The Presumption of Arbitrability

In any contract, arbitration may be compelled only if both parties agree to bring their disputes before an arbitrator.[64] The Federal Arbitration Act ("FAA"), enacted in 1925, requires courts to enforce arbitration agreements concerning "commerce" and "maritime transactions."[65] The agreement to accept an arbitrator's jurisdiction over a particular grievance is normally achieved through the insertion of a general arbitration clause in a contract. In *Litton Financial Planning*, the Supreme Court reaffirmed its holding that arbitration clauses in collective bargaining agreements

---

[60] *See* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1575 (2005).

[61] *See* Edgar A. Jones, Jr., *"His Own Brand of Industrial Justice": The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. REV. 881, 883-84 (1983); *see also* Craver, *supra* note 11, at 576-77.

[62] United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 575, 582.

[63] *See* Craver, *supra* note 11, at 573-74 ("Almost all contemporary bargaining agreements provide for the resolution of disputes concerning the interpretation and application of contractual provisions through grievance-arbitration machinery.").

[64] *See* AT&T Techs. Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986) ("The duty to arbitrate being contractual in origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.").

[65] *See* United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (current version at 9 U.S.C. §§1-16 (2007)).

should be broadly interpreted in favor of arbitration.[66] Concerning suits brought under section 301 of the Labor-Management Relations Act, the Court held that "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute . . . . Doubts should be resolved in favor of coverage.'"[67] The Court has distinguished labor arbitration from the arbitration of general commercial disputes, for which arbitration clauses are not construed so broadly, by holding that arbitration is necessary to further the national industrial policy of harmonious labor relations.[68]

In *Warrior & Gulf*, the Court laid down the standard for procedural questions of whether the parties agreed to submit a particular grievance to arbitration:

> In the absence of any *express provision* excluding a particular grievance from arbitration, we think *only the most forceful evidence* of a purpose to exclude the claim from arbitration can prevail . . . [s]ince any attempt by a court to infer such purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.[69]

Thus, the Court created a presumption in favor of arbitrability that can be rebutted only by (1) an "express provision" or (2) the "most forceful evidence" that a particular grievance would not be subject to arbitration. The Supreme Court intended to halt the common law approach to

---

[66] Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 209 (1991) (quoting *Warrior*, 363 U.S. at 582-83).

[67] *Id.*

[68] *See* Nelson, *supra* note 9, at 286-88.

[69] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960) (emphases added).

arbitration agreements, which allowed judges to look at the substantive question of the claim to decide whether the grieving party could prevail.[70] Before the *Steelworkers Trilogy*, the Supreme Court of New York had ruled in *International Association of Machinists, Dist. No. 15, Local No. 402 v. Cutler-Hammer* that, if a court decided that the grieving party could not win on the merits, it should refuse to order arbitration.[71] This practice—known as the *Cutler-Hammer* doctrine—allowed courts to usurp the arbitral function and decide the substantive merits of a claim on procedural grounds.[72] This, of course, undercut Congress's preference for arbitration to serve as the primary machinery of dispute resolution as part of its national labor policy.[73] The strong presumption of arbitrability effectively ended this practice under *Cutler-Hammer*.[74] This has helped to keep substantive questions involving collective bargaining agreements away from judges and in the hands of arbitrators, where the Supreme Court has ruled they belong.[75]

E. Who Decides Questions of Arbitrability?

The federal district courts, however, retain authority over an important procedural question concerning collective bargaining agreements. In *AT&T Technologies, Inc. v.*

---

[70] *See supra* Part II.B; *see also* Int'l Ass'n of Machinist v. Cutler-Hammer, Inc., 67 N.Y.S.2d 317 (1947) (per curiam), *aff'd*, 297 N.Y. 519 (1947) (per curiam) ("If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.").

[71] *Id.*

[72] *See* Craver, *supra* note 11, at 578-79.

[73] *See Warrior*, 363 U.S. at 567-68, 592 (Whittaker, J., dissenting, but agreeing with the majority on this point) ("[T]he courts have no proper concern with the 'merits' of claims which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators.").

[74] *See* Craver, *supra* note 11, at 578-79.

[75] *See Warrior*, 363 U.S. at 582 (describing the "congressional policy in favor of settlement of disputes by parties through the machinery of arbitration . . . ").

Communications Workers, the Supreme Court held that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court not the arbitrator."[76] The Court was concerned that arbitrators, in hopes of financial gain, would expand their jurisdiction to all claims involving collective bargaining agreements with arbitration clauses, causing a reduction in the number of parties willing to use arbitration.[77] The empirical and normative bases for this assumption have been challenged, but the rule remains firmly established.[78] Now, federal district courts decide the procedural issue of whether a particular grievance was covered by the collective bargaining agreement and, subsequently, whether to compel arbitration.

This rule, however, flies in the face of the Supreme Court's intention to keep the judiciary from interfering in labor disputes. There is always a looming possibility that judges will be tempted to overreach and, in the process of deciding procedural arbitrability disputes, rule on the substantive merits of the dispute.[79] Judges had, of course, been guilty of this under the *Cuttler-Hammer* doctrine concerning actions to enforce arbitration clauses.[80] Procedural challenges to arbitrability present the same opportunity to judges wishing to decide substantive disputes that should be decided by arbitrators. While attempting to assess arbitrability, judges may be tempted to hear evidence of bargaining history or past practices, which would potentially undercut the usefulness of arbitration.[81]

---

[76] AT&T Techs. Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986).

[77] *See* Gould, *supra* note 22, at 482 ("It relates to an even more perplexing and vexatious aspect of *AT&T*, that is, the Court's assumption that the parties would not enter into collective bargaining agreements with arbitration clauses if the issue of arbitrability was in the hands of arbitrators rather than courts.").

[78] *See* Gould, *supra* note 22, at 482 (arguing that industrial relations experience in this country has shown that arbitrators may determine their own jurisdiction without adverse effects).

[79] *See* Craver, *supra* note 11, at 585.

[80] *See supra* Part II.D.

[81] See Craver, *supra* note 11, at 582.

Arbitrators are often chosen for the amount of expertise they bring to the matter under dispute.[82] This expertise most importantly includes familiarity with industrial organization. Judges, however, rarely have expertise in industrial organization. And, unlike arbitrators, judges are not chosen for their understanding of a particular industry; instead, judges are assigned to cases more or less randomly. Therefore, litigation concerning preliminary questions of arbitrability may prevent parties from receiving the benefits offered by arbitration.[83] Resolving the dispute might be more expensive, more time consuming, and the ultimate decision may rest with an inexpert judge. The strong presumption in favor of arbitrability represents one way of avoiding these problems. Another way to ensure that labor and management get the benefit of their arbitration bargain is for judges to use a strong parol evidence rule when deciding whether the parties agreed to submit a grievance to arbitration.[84] The answer to nearly all arbitrability questions would be simple: either there is an express provision in the contract excluding an issue from arbitration, or that issue is subject to arbitration. Judges would only consult extrinsic evidence when a term in the agreement is ambiguous on its face—something close to an express provision. Critically, neither party would be permitted to demonstrate ambiguity in a provision by introducing extrinsic evidence *ex ante*.

---

[82] *See* Mark Berger, *Arbitration and Arbitrability: Toward and Expectation Model*, 56 BAYLOR L. REV. 753, 754 n.2 (2004) ("The American Arbitration Association maintains separate panels of arbitrators for specific types of disputes to assist the parties in selecting subject matter experts."); *see also* United Steelworks v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (explaining the parties' reliance on the expertise arbitrators bring to disputes).

[83] *See* Morristown Daily Record, Inc. v. Graphic Commc'ns Union Local 8N, 832 F.2d 31, 34 (3d Cir. 1987) (acknowledging that "answering . . . [the] question [of arbitrability] may entail some probing of preliminary substantive issues").

[84] *See infra* Part IV.B.

III. CONTRACT INTERPRETATION AND COLLECTIVE BARGAINING AGREEMENTS

The Supreme Court has called a collective bargaining agreement "more than a contract,"[85] but many commentators agree that rules of contract interpretation still inform the process of determining the mutual intent of management and the labor union.[86] The following sections explore this dynamic. Part III.A describes the primary differences between collective bargaining agreements and traditional contracts. Part III.B explicates the two main approaches to the parol evidence rule, one of the most important tools for interpreting ordinary commercial contracts.

A. Collective Bargaining Agreements as Contracts

Legal commentators have long debated whether common law contract principles should be applied to collective bargaining agreements.[87] The debate is roughly between those who understand collective bargaining agreements as susceptible to traditional rules of interpretation and those who believe that collective bargaining agreements are not justly served by a strict application of contract principles.[88] In *Collective Agreements and the Law of Contracts*, Professor Clyde Summers analyzes collective bargaining agreements and the law of contracts.[89] Summers identifies four ways in which collective bargaining agreements resist a straightforward application of common law contract doctrine.[90] First, the bargaining relationship is compelled by

---

[85] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

[86] *See* Snow, *supra* note 7, at 692-93 ("The prevalent view seems to embrace the notion that the collective bargaining agreement is a special species of contract, and contract law has, at least, some application.").

[87] *See id.* (discussing the spectrum of views concerning the application of contract law to collective bargaining agreements); *see also* WILLISTON & LORD, *supra* note 2, § 55:23.

[88] *See* Cox, *supra* note 36, at 14.

[89] *See* Summers, *supra* note 1, at 528.

[90] *Id.*

the NLRA, which requires that management bargain in good faith with organized employees.[91] In a commercial setting, potential parties to a contract are generally not compelled to deal with one another.[92] Second, collective bargaining agreements are written in intentionally vague language because management and labor recognize that the agreement may have to be altered to meet unforeseen difficulties.[93] Third, collective bargaining agreements are negotiated such that modifications are made to both the prospective and current agreements.[94] Finally, collective bargaining agreements involve a large number of different types of parties on each side of the agreement.[95] The Supreme Court has taken the view that these differences make collective bargaining agreements "more than a contract," and analogous to "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[96] In light of the acknowledged differences between ordinary contracts and collective bargaining agreements, should longstanding contractual rules apply to collective bargaining agreements? The parol evidence rule provides an excellent case study.

B. The Parol Evidence Rule

There is, of course, disagreement among jurisdictions over methods for interpreting ordinary contracts. The parol evidence rule is a notable example.[97] Once the parties have finalized a written document that they agree represents their bargain, the parol evidence rule prevents admission of evidence to prove the existence of side agreements that

[91] *Id.* at 530.

[92] *Id.* at 531.

[93] *See id.* at 529.

[94] *See id.* at 533.

[95] *See id.* at 528.

[96] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

[97] *See generally* WILLISTON & LORD, *supra* note 2, § 33:1.

contradict the express terms of that writing.[98] Its utility has been debated vigorously since Professor Samuel Williston drafted the Restatement (First) of Contracts and the Uniform Sales Act.[99] Williston believed that no extrinsic evidence should instruct the judge's interpretation of an agreement unless a reasonable person would consider its language ambiguous or incomplete in some way.[100] According to this view, the intent of the parties could and should be found only in the language of the contract, which the judge must interpret strictly, reasonably, and objectively.[101] The judge looks to the four corners of the contract to decide whether any side bargain would naturally have been struck by reasonable parties similarly situated to the contracting parties.[102] If it appears reasonable to the judge that such an agreement would have been struck or that any term of the contract is ambiguous, she will admit extrinsic evidence pertaining to the matter.[103] Williston thus advocated use of the strong parol evidence rule.

Williston's approach was rejected by some legal commentators, including Professor Arthur Corbin, who encouraged using parol evidence to determine the intent of the contracting parties.[104] Corbin believed that language was susceptible to myriad interpretations and was only properly understood in context.[105] Professor Corbin famously wrote, "when a judge refuses to consider relevant evidence on the ground that the meaning of the written words is to him plain

---

[98] *See* Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CIN. L. REV. 269, 276 (2000). The evidence excluded includes both oral and written material.

[99] *See* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 199-201 (1998).

[100] *Id.*

[101] *Id.* at 202-03.

[102] *See* Cunningham, *supra* note 98, at 279.

[103] *Id.* at 199-200.

[104] *See* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965).

[105] Computer Sys. of Am., Inc. v. IBM Corp., 795 F.2d 1086, 1090 (1st Cir. 1986).

and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience."[106] According to Corbin, judges must learn as much as possible about the actual parties to the dispute before deciding whether they intended the writing to be fully integrated.[107] The Restatement (Second) of Contracts adopted Corbin's approach by calling for an increased emphasis on the context in which the contract was made.[108] In the Restatement (Second) of Contracts, the parol evidence rule discharges prior agreements only if the contract is a "binding integrated agreement," and extrinsic evidence of prior or contemporaneous agreements is admissible in order to show that the "writing is not a fully integrated agreement."[109] Therefore, the evidentiary bar is much lower and judges are not compelled to rely solely on their own judgment when deciding whether a written agreement is the final and complete representation of the contract. This is the weak parol evidence rule.

These "strong" and "weak" versions of the parol evidence rule are informed by familiar tradeoffs between efficiency and fairness. Under the strong parol evidence rule, judges enforce the contract as written and will only consider extrinsic evidence of past practices after a preliminary finding of ambiguity. This approach conserves judicial resources by placing the burden of clear drafting on the parties, who may not rely on filling potential gaps in litigation.[110] Under the "weak" parol evidence rule, judges admit all relevant evidence and then determine whether the contract is integrated. This approach expends judicial resources in the name of equity by ensuring that drafting mistakes are not abused by opportunistic parties.[111] There

---

[106] *See* Corbin, *supra* note 104, at 164.

[107] *See* Cunningham, *supra* note 98, at 280.

[108] *See* Robert Bracuher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13, 14 (1981).

[109] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 213-14 (1981).

[110] *See* Posner, *supra* note 19, at 555-57.

[111] *Id.*

are risks and costs to both approaches, including the possibilities of judicial bias and misleading evidence.[112]

IV. TWO RULES, TWO INTERPRETIVE PROJECTS

The interpretative problems that judges and arbitrators face when interpreting collective bargaining agreements are very different. These problems and their potential solutions will be discussed in the following sections. Part IV.A addresses the relatively simple question of whether arbitrators should utilize a strict or relaxed parol evidence rule to resolve substantive disputes about collective bargaining agreements. Part IV.B addresses the harder question—which form of the parol evidence rule should be used by judges deciding procedural arbitrability questions—by discussing a longstanding split in the federal circuit courts. Part IV.C presents the argument that judges should use a strong parol evidence rule, while arbitrators should use the weak form.

A. The Parol Evidence Rule and Arbitration

The traditional arguments for and against both approaches to the parol evidence rule are not well-suited to resolving substantive disputes about collective bargaining agreements in arbitration.[113] These arguments were developed in the judicial context, which differs greatly from arbitration. While arbitration in practice is often extremely adversarial, it is ideally a cooperative process.[114] Because labor and management have a symbiotic, ongoing relationship, the arbitrator must help them to balance their competing interests by finding cooperative solutions.[115]

---

[112] *See, e.g.*, Masterson v. Sine, 436 P.2d 561, 564 (Cal. 1968).

[113] The traditional arguments are that a strong parol evidence rule conserves judicial resources by placing the burden on the parties to draft carefully *ex ante*, rather than rely on a court to resolve poor drafting disputes *ex post*.

[114] *See generally* Craver, *supra* note 11.

[115] *See* United Steelworks v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) ("For arbitration of labor disputes under collective

Conversely, a judge will decide the rights of the parties to a commercial contract in what is often a win-lose scenario. Once the rights have been allocated to one party or the other, the relationship can often end.

The arbitrator, however, must assist labor and management to work together or else risk a result that benefits neither party.[116] Therefore, a strong parol evidence rule cannot incentivize the parties to draft carefully *ex ante* before a dispute occurs.[117] The collective bargaining agreement is not meant to explicitly provide for all the contingencies that may affect its administration.[118] As the Supreme Court has noted, collective bargaining agreements cannot achieve the same level of specificity as other contracts.[119] Moreover, a strong parol evidence rule is meant to deter litigation, while arbitration is a necessary and desired way to grease the wheels of the employment relationship.[120] If an arbitrator were to use a strong parol evidence rule and limit his interpretation to the plain language of the contract, he would be baffled by the ambiguous, functional language used in collective bargaining agreements. That arbitrator would not be able to familiarize himself fully with the bargaining practices of the particular company and would instead attempt to read contract language in a vacuum. Collective bargaining agreements, however, are "industrial constitutions" that must be

bargaining agreements is part and parcel of the collective bargaining process itself."); *see also* Craver, *supra* note 11, at 576 ("It is often less important whether or not the arbitrator reaches the 'correct' result, than it is that he or she achieve some solution. Such a denouement enables the parties to move on to other matters.").

[116] *See* Craver, *supra* note 11, at 624-25.

[117] This is one of the main arguments in favor of a strong parol evidence rule. Rather than waste resources on lititgation, a strong parol evidence rule is used to convince parties to spend those resources instead of drafting clear contracts. *See generally* Posner, *supra* note 19.

[118] *See* Summers, *supra* note 1, at 529.

[119] *See Warrior*, 363 U.S. at 580.

[120] *See id.* at 581 ("The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.").

interpreted with knowledge of the extensive, intimate relationship between the two parties.[121] Therefore, arbitrators should use a weak parol evidence rule, which permits the introduction of extrinsic evidence to act as an interpretative guide, so as to yield an interpretation of the collective agreement that is consistent with the parties' intentions.

B. The Parol Evidence Rule and Questions of Arbitrability: Two Approaches

Judges, however, should use the strong parol evidence rule when determining whether labor and management agreed to arbitrate a particular dispute. This ensures that judges do not rule on the substantive merits of disputes meant for arbitration.[122] There is a split in the federal circuit courts over this question, which the Supreme Court should finally resolve. The *Steelworkers Trilogy* cases were decided in 1960.[123] At the same time, there was a growing academic movement in favor of using of a weak parol evidence rule to interpret ordinary contracts.[124] Two years after the *Steelworker Trilogy* cases, and in the midst of this movement, the Ninth Circuit mandated the use of a weak parol evidence rule for deciding arbitrability questions without foreseeing the untoward effects.[125] Other federal circuit courts, such as the Fifth Circuit, wisely waited and determined that a relaxed parol evidence rule is not appropriate for questions of arbitrability.[126] This is the

---

[121] *See* Snow, *supra* note 7, at 693-94 (describing the need for arbitrators to look beyond the four corners of the document when reading collective bargaining agreements).

[122] *See supra* Part II.E.

[123] *See* Gould, *supra* note 22, at 464.

[124] *See* Braucher, *supra* note 108, at 14 (discussing the changes from the original RESTATEMENTS to RESTATEMENTS (SECOND)).

[125] *See* Pac. Nw. Bell Tel. Co. v. Commc'ns Workers, 310 F.2d 244, 249 (9th Cir. 1962).

[126] *See* Paper, Allied-Indus., Chemical and Energy Workers Int'l Union Local No. 4-2001 v. ExxonMobil Ref. & Supply Co., 449 F.3d 616 (5th Cir. 2006) (declaring bargaining history inadmissible). Most federal circuit

correct choice because it helps to ensure the success of the national labor policy, which requires that substantive disputes about collective bargaining agreements be decided in arbitration.[127] After all, the procedural question of whether an issue is subject to arbitration is a threshold matter and can be the subject of long and expensive fights in litigation. As the gatekeepers to arbitration, judges should use a strong parol evidence rule to ensure that they do not hold back the parties from getting the benefits of their arbitration bargain. Such use complements both the strong presumption in favor of arbitration and Congress's clear intention that the resolution of disputes between labor and management occur in arbitration rather than the federal courts.[128] The following two cases demonstrate the opposing responses to these considerations.

---

courts agree with the Fifth Circuit; *Pacific Northwest Bell* is discussed as a representative example of the minority approach. *See, e.g.*, Air Line Pilots Ass'n, Intern. v. Midwest Exp. Airlines, Inc., 279 F.3d 553, 557-58 (7th Cir. 2002) (explaining that "negotiating history is just what the parol evidence rule does *not* allow to be used to vary the terms of a written contract intended to be the final, integrated expression of the parties' deal" (emphasis added)); *see also* Brown-Graves Co. v. Cent. States, Se. & Sw. Areas Pension Fund, 206 F.3d 680, 683-84 (6th Cir. 2000) (adopting the strong parol evidence rule by holding "the parties to a collective bargaining agreement are bound by the terms of their agreement, regardless of their undisclosed intent"); Excel Corp. v. United Food & Commercial Workers Int'l Union, Local 431, 102 F.3d 1464, 1468 (8th Cir. 1996) (explaining that and "arbitrator's reliance on parole [sic] evidence was erroneous because the plain language in the applicable portions of the CBA is clear and unambiguous"); Clark v. Ryan, 818 F.2d 1102, 1105 (4th Cir. 1987) (stating that "[b]ecause the disputed language is neither ambiguous nor uncertain, the district court's decision to admit parol evidence was error"). The Second Circuit arguably adopts a compromise approach by admitting extrinsic evidence where differing interpretations of whether the parties agreed to arbitrate particular grievances are neither "frivolous [n]or unreasonable." Strauss v. Silvercup Bakers, Inc., 353 F.2d 555, 558 (2d Cir. 1965).

[127] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (describing the "congressional policy in favor of settlement of disputes by parties through the machinery or arbitration . . . ").

[128] *See* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 209 (1991).

1. *Pacific Northwest Bell*

In the 1962 case of *Pacific Northwest Bell Telephone Company v. Communications Workers of America*, the Ninth Circuit held that the parol evidence rule did not bar the admission of bargaining history to assist an arbitrator in determining whether a collective bargaining agreement provided for arbitration of a particular grievance.[129] The company sought a declaration that disputes involving the disciplinary suspension of employees were not covered by the collective bargaining agreement's arbitration clause.[130] The collective bargaining agreement did not expressly mention disciplinary suspension of employees.[131] The company introduced evidence of bargaining history purportedly showing that the union had unsuccessfully sought an express provision to send disputes about suspensions to arbitration.[132] The trial court held that such evidence was barred by the parol evidence rule, which prohibits the introduction of evidence contradicting or altering the express terms of the agreement.[133] However, the Ninth Circuit noted that the express terms of such agreements do not capture the parties' entire commitment.[134] In order to resolve the question of arbitrability, the court found that evidence of bargaining history was not barred by the parol evidence rule if it was offered to show that the company had not agreed to arbitrate employee suspension.[135] The court then held that the district court erred in excluding evidence of bargaining history as part of the "most forceful evidence of a purpose to exclude a claim," and remanded the case for a new trial on that issue.[136] The Ninth Circuit has, in effect, mandated the

---

[129] *See* Pac. Nw. Bell Tel. Co., 310 F.2d at 249.

[130] *Id.* at 245-46.

[131] *Id.* at 246.

[132] *Id.* at 247.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 249.

[136] *Id.* (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 547, 584 (1960)).

use of a weak parol evidence rule for procedural questions of arbitrability involving collective bargaining agreements.

2. *Paper, Allied Industrial*

In the 2006 case of *Paper, Allied Industrial, Chemical and Energy Workers International v. Exxonmobil Refining & Supply Co.*, the Fifth Circuit rejected the reasoning of *Pacific Northwest Bell.*[137] Instead, the Fifth Circuit instituted the use of a strong parol evidence rule for all procedural arbitrability questions. In *Paper*, an employee was terminated after being transferred to a temporary position as a result of a medical disability.[138] The union filed a grievance alleging that the employee was terminated without just cause and asked to have the issue sent to arbitration.[139] But the company rejected arbitration, claiming that the employee was not discharged but rather "received a disability separation necessary to receive long-term disability benefits."[140] The District Court compelled arbitration after deciding that grievances for unjust termination were arbitrable under the collective bargaining agreement.[141] The company appealed, arguing that the District Court ignored evidence of bargaining history as part of the "most forceful evidence of a purpose to exclude a claim," and that such evidence shows the parties did not intend to send disability determinations to mandatory arbitration.[142] The Fifth Circuit held that extrinsic evidence of bargaining history is only properly admitted to show an issue is not arbitrable when the collective bargaining agreement contains language ambiguous on its face.[143] Because the collective bargaining

---

[137] *See* Paper, Allied-Indus., Chemical & Energy Workers Int'l Union Local No. 4-2001 v. ExxonMobil Ref. & Supply Co., 449 F.3d 616, 620 (5th Cir. 2006).

[138] *Id.* at 618.

[139] *Id.* at 619.

[140] *Id.*

[141] *Id.* at 618.

[142] *Id.* (internal quotations omitted).

[143] *Id.* at 621.

agreement contained no ambiguous language, the Court reasoned, a strong parol evidence rule barred its introduction and the District Court had properly ordered arbitration.[144]

C. Who Should Choose Which Rule?

These two cases were decided more than forty years apart. Despite the recent trend toward mandating the use of a strong parol evidence rule for procedural arbitrability questions, the federal circuit courts remain in disagreement. This jeopardizes federal labor policy.[145] Judges deciding arbitrability questions should not probe extrinsic evidence such as bargaining history to determine the actual intent of the parties. Indeed, the Supreme Court announced the strong presumption in favor of arbitrability as a way to circumscribe the judicial role in interpreting collective bargaining agreements.[146] This presumption puts the parties on notice that they should expressly include in the collective bargaining agreement any issue they wish to exclude from arbitration. In other words, the presumption of arbitrability should function as a merger clause for questions of arbitrability. Then parties seeking to exclude a grievance from arbitration would know that, unless they expressly exclude it from arbitration, the grievance will be subject to arbitration.

The "most forceful evidence" prong should not be an invitation to introduce evidence of bargaining history and

---

[144] *Id.* at 627.

[145] *See* Nelson, *supra* note 9, at 286-88; *see also* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (describing the "congressional policy in favor of settlement of disputes by parties through the machinery of arbitration . . . ").

[146] *See* Gould, *supra* note 22, at 465-66; *see also* Strauss v. Silvercup Bakers, Inc., 353 F.2d 555, 558 (2d Cir. 1965) (explaining that, in the context of mandating use of the strong parol evidence rule for arbitrability questions, the Second Circuit is "aware of the danger that courts will become 'entangled in the construction of the substantive provisions of a labor agreement . . . through the back door of interpreting the arbitration clause . . . '" (quoting *Warrior*, 363 U.S. at 585)).

past practice.[147] If the prong functions as a backdoor to the court system, those parties relying on the low costs of arbitration could be abused by financially powerful parties hoping to tie a case up in litigation. Judges, too, if given access to bargaining history, might be tempted to usurp arbitral authority and decide the merits of the claim.[148] Both of these problems threaten to deprive parties of the benefits of arbitration, which is a crucial part of the machinery of national labor policy.[149] Indeed, the reasoning behind the presumption in favor of arbitrability essentially mandates judges to use a strong parol evidence rule to avoid these scenarios.

If a collective bargaining agreement unambiguously supports a finding of arbitrability, the intention of the parties is clear. A weak parol evidence rule permitting the introduction of bargaining history to decide arbitrability questions is contrary to the point of arbitration. The parties bargained for an expert to resolve their dispute in an inexpensive and expeditious manner. If all collective bargaining agreements may be challenged by introducing bargaining history to a trial judge, those benefits will be lost. The judges will, in effect, threaten the autonomy of the collective bargaining process, which is promoted by federal labor policy.[150] Then, either the union or management will necessarily be deprived of the advantages of arbitration.

Empirical research shows that the employees are more often the losers when courts employ a weak parol evidence rule to settle procedural arbitrability questions. One of the benefits of arbitration is, of course, its low cost: discovery and motion practice are expensive and allow employers with

---

[147] *See Warrior*, 363 U.S. at 584-85.

[148] *See* Craver, *supra* note 11, at 582 ("Under the AT&T Technologies approach, one has reason to believe that district court judges may become more enmeshed in the validity of the underlying controversies. While endeavoring to assess arbitrability, the judges may be tempted to examine contractual language, bargaining history, and even past practice. Such conduct would be entirely inappropriate.").

[149] *See* Nelson, *supra* note 9, at 286-88.

[150] *See* Gould, *supra* note 22, at 495.

large amounts of capital to intimidate employees who do not have the resources to fight a long legal battle. The *AT&T* decision, which seemed to expand the reach of courts to interpret collective bargaining agreements, has led to an opportunistic tactic on the part of management.[151] Employers have begun to submit a dispute to an arbitrator and, at the same time, challenge the arbitrator's jurisdiction over the grievance on arbitrability grounds.[152] If the employer loses both on the merits and the issue of arbitrability, the employer challenges the arbitrator's award on the ground that the arbitrator did not have the authority to decide her own jurisdiction.[153] This opportunistic practice flies in the face of the longstanding mission of arbitration—to provide for a mechanism for stabilizing inequities in bargaining power in order to promote industrial self-governance. If the courts allow employers to tie up the arbitration process in litigation, the benefits of arbitration will be lost. To combat this trend, courts should utilize a strong parol evidence rule in order to keep collective bargaining agreements out of court. If the strong presumption of arbitrability is married to a strong parol evidence rule, employers will be dissuaded from using the courts as a mechanism to wield bargaining power.

V. CONCLUSION

Almost fifty years ago, the Supreme Court placed the judiciary at the margins of industrial disputes. The Court decided that arbitrators were better qualified to hear disputes about collective bargaining agreements. Their most important qualification was their intimate knowledge of the labor setting. As workplace technology and practice continue to become more complex, arbitrators will need to rely even

---

[151] *See* AT&T Tech., Inc. v. Commc'n Workers, 475 U.S. 643, 649 (1986).

[152] *See* Gould, *supra* note 22, at 470.

[153] *Id. See also* George Day Constr. Co., Inc. v. United Bhd. of Carpenters & Joiners Local 354, 722 F.2d 1471 (9th Cir. 1984) (upholding district court confirmation of arbitral award).

more on a weak parol evidence rule to decide substantive questions involving collective bargaining agreements. Evidence of bargaining history and past practices is necessary to understand the complex employment relationship of a particular company. At the same time, judges should recognize that Congress and the Supreme Court have announced a preference for arbitral oversight of the collective bargaining process as part of national labor policy.[154] Ideally, the collective bargaining process (including arbitration) helps to create an autonomous form of industrial self-government where the arbitrator works as a mediator to ensure a harmonious labor environment. To ensure that the parties know how to draft agreements appropriately, the Supreme Court should require judges to use a strong parol evidence rule when deciding procedural questions of arbitrability. If either party wishes to exclude an issue from arbitration, it will have to so expressly provide for it in the agreement.

[154] *See* Nelson, *supra* note 9, at 286-88; *see also* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (describing the "congressional policy in favor of settlement of disputes by parties through the machinery of arbitration . . . ").