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Richard A. Bales
Salmon P. Chase College of Law, Northern Kentucky University

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*Richard A. Bales**

I. INTRODUCTION

The United States Supreme Court has long championed arbitration as the preferred method of resolving labor disputes. In the 1960 *Steelworkers* Trilogy, the Court held that arbitrators, and not the courts, are to decide the arbitrability of grievances,[1] that courts should not refuse to order arbitration unless the parties' arbitration clause "is not susceptible of an interpretation that covers the asserted dispute"[2]; and that so long as an arbitrator's award "draws its essence" from the collective bargaining agreement, courts should not review the merits of the award.[3] Labor and management responded by writing arbitration agree-

* Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. Special thanks to Edward C. Brewer III, Emily M.S. Houh, and Rachel LeJeune.

1 United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 567-68 (1960).

2 United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

3 United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

ments into virtually all collective bargaining agreements.[4] Throughout the nearly half century that has elapsed since *Steelworkers*, the Court has continually reaffirmed the centrality of arbitration to the resolution of labor disputes,[5] and indeed has expanded the favor for arbitration into other contexts.[6]

Collective bargaining agreements, however, seldom resolve all sources of conflict between labor and management, so the parties to a collective bargaining agreement frequently sign side or settlement agreements to deal with these unanticipated issues. If a dispute arises concerning the interpretation of a side or settlement agreement, it often is unclear whether that dispute must be resolved through the courts or through arbitration. The federal circuit courts are split concerning the circumstances under which disputes regarding these side and settlement agreements are covered by the arbitration clause contained in the underlying bargaining agreement. Two circuits – the Second[7] and Fourth[8] – have held that a dispute over the terms of the side or settlement agreement is arbitrable only if the subject matter of the side or settlement agreement is similar to that of the collective bargaining agreement. Three circuits – the Third,[9] Seventh,[10] and Ninth[11] – have created a rebuttable presumption[12] that disputes in-

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4 *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 411 n.11 (1988) (noting that 99% of sampled collective bargaining agreements contained arbitration clauses); Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir. 1997) ("[A]rbitration . . . becomes an issue in a section 301 case only when a collective bargaining agreement happens to contain (as most such agreements do) an arbitration clause."); Martin v. Shaw's Supermarkets, Inc., 105 F.3d 40, 42 (1st Cir. 1997) (noting that arbitration clauses are "almost always a feature of labor contracts"); Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 688, 691 & n.19 (noting that "[n]early every collective bargaining agreement contains an arbitration clause").

5 *See, e.g.*, Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991); Paperworkers v. Misco, Inc., 484 U.S. 29 (1987); AT & T Techs., Inc. v. Communications Workers, 475 U.S. 643, 650 (1986).

6 *See* Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 593 (1995) (noting the expansion of the Court's arbitration doctrines into the employment context); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 (noting the expansion of the Court's arbitration doctrines into the consumer context).

7 Cornell Univ. v. UAW Local 2300, 942 F.2d 138, 140 (2d Cir. 1991).

8 Adkins v. Times-World Corp., 771 F.2d 829, 830-31 (4th Cir. 1985).

9 L.O. Koven & Brother, Inc. v. Local Union No. 5767, United Steelworkers, 381 F.2d 196, 204-05 (3d Cir. 1967).

10 Niro v. Fearn Int'l, Inc., 827 F.2d 173, 175 (7th Cir. 1987).

11 Inlandboatmens Union v. Dutra Group, 279 F.3d 1075, 1080 (9th Cir. 2002).

12 For an extensive discussion of presumptions and inferences, see Anna Laurie Bryant & Richard A. Bales, *Using the Same Actor "Inference" in Employment Discrimination Cases*, 1999 UTAH L. REV. 255, 281-83.

volving a side or settlement agreement are arbitrable if the subject matter of the side or settlement agreement is within the scope of the arbitration clause of the collective bargaining agreement and if the parties have not otherwise excluded the subject from arbitration.

This article argues that courts should adopt the "scope of the arbitration clause" approach to determining the arbitrability of side or settlement agreements. Part II describes the historical evolution of the Supreme Court's arbitration doctrines. Part III presents the circuit split on the issue of the arbitrability of disputes involving side or settlement agreements. Part IV analyzes the arguments on both sides of the issue. It argues that the "scope of the arbitration clause" approach is the better approach because, compared to the alternative approach, it is more determinate, more consistent with Supreme Court precedent, more likely to reflect the intent of the parties, and more consistent with the Court's ideological view of labor relations. Part V concludes.

II. BACKGROUND: ARBITRATION UNDER SECTION 301

A. *Section 301*

Section 301(a) of the Labor Management Relations Act ("LMRA") provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[13]

Notably absent from this statutory language is any mention of arbitration.[14] Nonetheless, this provision has become the centerpiece of the Supreme Court's labor arbitration doctrines.

The first major litigated issue with respect to § 301 was whether the section was simply jurisdictional or whether it authorized federal courts to create federal substantive law.[15] In the 1955 case of *Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,[16] the Court held that § 301 was purely juris-

[13] 29 U.S.C. § 185 (1998).

[14] Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919, 922 (1998); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 583 (1983).

[15] PATRICK HARDIN & JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW 1300 (4th ed. 2001).

[16] 348 U.S. 437 (1955).

dictional.[17] Two years later, however, in *Textile Workers Union v. Lincoln Mills of Alabama*,[18] the Court reversed course.[19] The union had sued under § 301 for specific performance of an arbitration agreement.[20] The Court, stating that arbitration agreements are a "quid pro quo" for no-strike agreements,[21] interpreted § 301 as expressing "a federal policy that federal courts should enforce [arbitration] agreements . . . and that industrial peace can be best obtained only in that way."[22] The Court held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."[23] The Court then explained that while some of this substantive law could be found in the LMRA,

> [o]ther problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanctions but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem . . . . Federal interpretation of the federal law will govern, not state law.[24]

Thus, because federal law governed, the unenforceability of arbitration agreements at common law did not preclude the enforceability of such agreements under § 301, and the Court held that the employer should be ordered to arbitrate the union's claims.[25]

B. The Steelworkers *Trilogy*

Lincoln Mills heralded grievance arbitration as the *raison d'etre* for the new federal common law that the Court created out of § 301. The special status of arbitration in the resolution of labor grievances was ensconced in the three simultaneously-issued 1960 cases known collectively as the *Steelworkers* Tril-

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17 *Id.* at 449, 459.

18 353 U.S. 448 (1957).

19 Although *Lincoln Mills* undermined the rationale of *Westinghouse*, *Westinghouse* was not formally overruled until *Smith v. Evening News Ass'n*, 371 U.S. 194 (1962).

20 *Lincoln Mills*, 353 U.S. at 455.

21 *Id.*

22 *Id.*

23 *Id.* at 456.

24 *Id.* at 457.

25 *Id.*

ogy. In *United Steelworkers v. American Manufacturing Corp.*,[26] an employee injured on the job filed a workers' compensation claim and produced evidence that he was 25% permanently disabled.[27] The employer and employee settled this claim, but two weeks later the union filed a grievance arguing that the employee should be permitted to return to work.[28] The employer refused to arbitrate, arguing that the employee's admission of permanent disability in the workers' compensation claim precluded the union from arguing in the grievance that the employee was able to return to work.[29] The lower courts refused to compel arbitration.[30]

The Supreme Court reversed. Recognizing that the arbitration of even frivolous claims may have "therapeutic values" conducive to the collective bargaining context,[31] the Court stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.[32]

In *United Steelworkers v. Warrior & Gulf Navigation Co.*,[33] the second case of the *Steelworkers* Trilogy, the union sought to compel arbitration of the employer's contracting-out of maintenance work.[34] The employer refused to arbitrate, relying on a provision in the collective bargaining agreement that exempted from arbitration matters "which are strictly a function of management."[35] The lower courts had refused to order arbitration.[36]

Again, the Supreme Court reversed. Distinguishing commercial arbitration of statutory claims,[37] in which case precedent precluded the enforcement of

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26 363 U.S. 564 (1960).

27 *Id.* at 566.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* at 568.

32 *Id.* at 567-68.

33 363 U.S. 574 (1960).

34 *Id.* at 575-76.

35 *Id.* at 577.

36 *Id.*

37 At both English and American common law, an arbitration agreement was revocable by either party at any time before an award was rendered. *See, e.g.*, Vynior's Case, 77 Eng. Rep. 597

pre-dispute arbitration agreements,[38] the Court stated that while commercial arbitration may be an inadequate substitute for litigation, labor arbitration "is the substitute for industrial strife."[39] While issues of substantive arbitrability were to be determined by courts, such issues must be reached with due regard for a strong presumption of arbitrability: "An 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."[40] This decision, like *American Manufacturing*, was very favorable toward labor arbitration.

Finally, in the third case of the Trilogy, *United Steelworkers v. Enterprise Wheel & Car Corp.*,[41] the Court established an extraordinarily deferential standard for the judicial review of labor arbitration awards. A company fired a group of employees after they walked off the job to protest a fellow employee's discharge.[42] The arbitrator found that although the walk-out was improper, the penalty was inconsistent with the collective bargaining agreement, and ordered reinstatement with back pay less a ten-day suspension.[43] The employer refused

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(K.B. 1610); Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746); Or. & W. Mortgage Sav. Bank v. Am. Mortgage Co., 35 F. 22, 23 (C.C.D. Or. 1888). This changed with the enactment of the 1925 United States Arbitration Act, 43 Stat. 883 (1925), re-enacted in 1947 as the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994). The FAA provides for the specific enforcement of arbitration agreements. *Id.* § 2. It also contains a clause excluding "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1.

Prior to 1953, circuit courts were divided over whether courts could compel arbitration of a dispute arising under a collective bargaining agreement, and if so, whether the FAA or § 301 of the LMRA was the proper statutory authority for doing so. *See* RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 38-44 (1997). The Supreme Court resolved this issue in *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), by holding that § 301 grants federal courts the authority to order specific performance of an arbitration agreement contained in a collective bargaining agreement.

38 *See* Wilko v. Swann, 346 U.S. 427 (1953) (voiding pre-dispute arbitration agreement with respect to claim arising under section 12(2) of the Securities Act of 1933). *See generally* BALES, *supra* note 37, at 18-19, 23-26 (discussing the public policy defense to the enforcement of arbitration agreements). *Wilko* has since been overruled, and the public policy defense is dead. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (overruling *Wilko*); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (creating a presumption of arbitrability in favor of arbitrating statutory claims).

39 *Warrior & Gulf Navigation*, 363 U.S. at 578; *cf.* Corrada, *supra* note 14, at 926 ("Today, as the strike threat has generally diminished, if employers view arbitration favorably, they would likely see it as a substitution for litigation.").

40 *Warrior & Gulf Navigation*, 363 U.S. at 582-83.

41 363 U.S. 593 (1960).

42 *Id.* at 595.

43 *Id.*

to comply with the award, and the union sued for enforcement.[44] The district court agreed with the union and ordered compliance, but the court of appeals refused to enforce the arbitral award.[45]

The Supreme Court, as in the previous two Trilogy cases, reversed. The Court held that a labor arbitrator's award is "final"[46] so long as it "draws its essence from the collective bargaining agreement."[47] Any doubt must be resolved in favor of enforcement; "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award."[48] Arbitration, reasoned the Court, is a creature of contract, and the parties should receive the arbitral (not judicial) decision for which they bargained.[49]

The *Steelworkers* Trilogy collectively established a virtually irrebuttable presumption of arbitrability and a sharply limited role for the courts before, during, and after arbitration.[50] In some senses, however, the importance of the Trilogy exceeds the sum of its holdings, because it was in the Trilogy cases that the Supreme Court first articulated clearly the ideological view of collective bargaining and arbitration that still governs modern labor relations law. This ideological view is discussed in the next section.

C. *The Ideology of Arbitration*[51]

Industrial pluralism is a model of labor relations that eschews outside interference and instead deems workers, with a little help from the law, as sufficiently empowered to look after themselves.[52] This model underlies the Na-

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44 *Id.*

45 *Id.* at 595-96.

46 *Id.* at 599.

47 *Id.* at 597.

48 *Id.* at 598.

49 *Id.* at 599.

50 *See* BALES, *supra* note 37, at 20.

51 *See* Richard A. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1867-71 (1994).

52 *See, e.g.*, Richard A. Bales, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL. J.L. & PUB. POL'Y 161, 162-64 (1992) (describing the industrial pluralism model and how it is embodied in the NLRA); Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955) (arguing that the collective bargaining process and the grievance procedures created therein constitute an "autonomous rule of law"); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 622-24 (1992) (discussing the industrial pluralist understanding of constructing an autonomous workplace).

tional Labor Relations Act ("NLRA"),[53] was articulated at length by scholars/labor arbitrators Harry Shulman[54] and Archibald Cox,[55] and was adopted by the Supreme Court in the *Steelworkers* Trilogy. According to this model, the NLRA establishes a legal framework through which employees can organize[56] to acquire the bargaining power they need to influence wages, working conditions, and other terms and conditions of employment.[57] Through this legal empowerment, workplace relations become analogous to miniature political democracies[58] in which employers and employees, roughly coequal,[59] jointly negotiate and enforce[60] an agreement that establishes the terms and conditions of employment.[61] The process of collective bargaining thus gives employees a

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53 29 U.S.C. §§ 151-66 (1988).

54 Shulman, *supra* note 52.

55 Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 275-76 (1948).

56 For a discussion of the tensions between individualism and collectivism, see Clyde W. Summers, *Individualism, Collectivism, and Autonomy in American Labor Law*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 453 (2001).

57 *See, e.g.*, Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423 (1993) (stating that "[w]hile the diminished bargaining power of individual workers vitiated the normative force of their voluntary choice to submit to the authority of the large-scale enterprise, collective bargaining would empower workers sufficiently to cleanse that choice of duress"); Shulman, *supra* note 52, at 1000 (explaining that the NLRA established a "bare legal framework [that] is hardly an encroachment on the premise that wages and other conditions of employment be left to autonomous determination by employers and labor"); *see also* 29 U.S.C. § 151 (1988) (citing the "inequality of bargaining power" between centralized employers and employees "who do not possess full freedom of association or actual liberty of contract" as a reason that the NLRA was needed); 78 CONG. REC. 3678 (1934) (statement of Sen. Wagner), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 20 (1985) (arguing that there must be equality of bargaining power which is accomplished through the employees' right to participate in collective bargaining).

58 *See, e.g.*, Cox, *supra* note 55, at 275-76 (comparing collective bargaining agreements with administrative and judicial processes); Stone, *supra* note 52, at 622-24 (stating that labor and management are like political parties in a democracy, each with its own constituency and agenda); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 9 (1988) (noting that collective bargaining provides a measure of industrial democracy).

59 JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 43 (4th rev. ed. 1936) (stating that employees are empowered by collective bargaining and minimum wage laws that create equal bargaining power between employees and their employer).

60 David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 742 (1973) (noting that "[t]he enforcement mechanism . . . is the essence of the industrial collective bargaining agreement" assuming that both labor and management comply with the jointly agreed rules).

61 *See* CLINTON S. GOLDEN & HAROLD J. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 30 (1942) (noting the role of labor and management in collective bargaining).

voice in decisions that significantly influence their lives,[62] freeing them from unilateral employer dictates.[63]

Thus, the NLRA shifted workplace sovereignty from employers and the courts (which had been issuing labor injunctions) to employers and employees, creating a framework for the joint determination of workplace rights through collective bargaining.[64] Establishing an internal mechanism for resolving disputes between employers and employees was critical to maintaining this shift in sovereignty.[65] Arbitration quickly became this mechanism.[66] In the metaphor of industrial democracy, the workplace "legislature" promulgated the law of the shop through collective bargaining negotiations.[67] Arbitration, analogous to the judiciary,[68] interpreted that private law. Not only did arbitration provide a prac-

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62 Summers, *supra* note 58, at 9 (noting the entry of democratic ideology into the workplace).

63 United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-81 (1960) (noting that collective bargaining agreements allow labor and management to govern the workplace with input from both parties); *see, e.g.*, GOLDEN & RUTTENBERG, *supra* note 61, at 23-47 (noting the role of labor and management in collective bargaining); Barenberg, *supra* note 57, at 1424 (recognizing the goal of collective bargaining as "freedom for self direction, self control and cooperation") (citing Robert Wagner, *Industrial Democracy and Cooperations* (Radio Address at the National Democratic Club 4 (May 8, 1937)); William M. Leiserson, *Constitutional Government in American Industries*, 12 AM. ECON. REV. 56, 66 (1922) (arguing that labor gained strength by organizing and thus weakened managements' absolute power).

64 *See Warrior & Gulf Navigation*, 363 U.S. at 580 (noting that "[a] collective bargaining agreement is an effort to erect a system of industrial self-government"). An exception to this shift in sovereignty is the doctrine of reserved management rights, which permits unilateral employer decision making over issues "at the core of entrepreneurial control." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *accord* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 666 (1981) (concluding that an employer has no duty to bargain over a decision to close part of its operations); Otis Elevator Co., 269 N.L.R.B. 891 (1984) (holding that an employer has no duty to bargain over a decision to transfer work from one facility to another).

65 *See* GOLDEN & RUTTENBERG, *supra* note 61, at 37 (noting that in the early 1940s the role of the NLRB shifted from an enforcer of collective bargaining agreements to a supervisor of elections, and that this event marked the end of an era during which unions and management looked to government for the solution of their problems); Leiserson, *supra* note 63, at 75 (noting the shift in sovereignty from the hands of owners and managers into a democratic system).

66 *See* United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 594-96 (1960) (noting that a collective bargaining agreement will often provide for the use of arbitration to settle disputes); *Warrior & Gulf Navigation*, 363 U.S. at 582 (noting that an arbitrator brings experience and competence in the subject matter to the grievance process that a judge might not possess); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 568-69 (1960) (noting that arbitration will be used for all grievances involving interpretation of the collective bargaining agreement).

67 *See Warrior & Gulf Navigation*, 363 U.S. at 581 (stating that arbitration of collective bargaining agreement provisions creates a "system of private law"); Leiserson, *supra* note 63, at 75 (stating that trade agreements result in a predictable, constitutional-like form of business government); Stone, *supra* note 52, at 623 (stating that workplace legislation is enacted and contained in the collective bargaining agreement).

68 *See* Leiserson, *supra* note 63, at 63 (noting how arbitration can be used to settle a grievance,

tical mechanism for resolving disputes arising under the collective bargaining system, it also fit the theoretical model of an autonomous system.[69] Arbitration was purely a product of contract:[70] the arbitrator was chosen by, and served at the whim of, the two parties, and the arbitrator's authority was derived exclusively from the terms of the collective bargaining agreement that the parties had negotiated.[71] Arbitration thus completed the metaphor of industrial organization

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much like a court's judicial power); Stone, *supra* note 52, at 623 (stating that arbitration is supposed to supply a neutral vantage point for enforcing workplace rules).

[69] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (noting that the integral role of the arbitrator in the industrial pluralist system helps establish "industrial self-government"); *Warrior & Gulf Navigation*, 363 U.S. at 581 (recognizing that "the grievance machinery under a collective bargaining agreement is at the very heart of industrial self-government" and that "[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise"); Shulman, *supra* note 52, at 1007 (noting that collective bargaining agreements force the parties to handle their disputes guided by contract terms).

[70] The themes of autonomy and judicial non-interference also resonate with contemporary theoretical discourse on freedom of contract in the commercial sphere. *See* Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith and Fair Dealing in Contract Law*, 88 CORNELL L. REV. ___ (forthcoming 2003) (manuscript on file with author) ("conventional economic analysis to contract law suggests that in a perfect contracting world, judicial intervention would be necessary to refuse to enforce contracts only in the most egregious of circumstances created by the non-complaining party, such as when the complaining [party] has been fraudulently induced or induced by duress to enter into the agreement"); *see also* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 261-64, 275-77 (3d ed. 2000); ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 32 (1990) ("[T]he market does not care about fairness . . . . As long as there are no artificial barriers to success, no one should be offended by the functioning of the market . . . .").

[71] *See Gardner-Denver Co.*, 415 U.S. at 53 (stating that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties"); *Enter. Wheel & Car*, 363 U.S. at 597 (upholding an arbitral award "so long as it draws its essence from the collective bargaining agreement[,]" and stating that an arbitration award that relies on external law instead of the collective bargaining agreement fails this test); *Warrior & Gulf Navigation*, 363 U.S. at 582 (noting that the arbitrator's authority is only limited by the collective bargaining agreement's terms); Harry T. Edwards, *Labor Arbitration at the Crossroads: The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65, 90-91 (1977) (stating that arbitrators should be reluctant to decide public law issues because they may be wrong and, if followed by a court out of deference to the arbitrator, they may distort the development of precedent); Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 557-59 (1967) (stating that "parties typically call on an arbitrator to construe and not to destroy their agreement"); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 75 MICH. L. REV. 1137, 1140-43 (1977) (stating that an award must "draw its essence" from the collective bargaining agreement in order to be valid and enforceable) (quoting *Enter. Wheel & Car*, 363 U.S. at 597). The late Dean Shulman stated that

> [a] proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather a part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.

as a self-contained mini-democracy – "an island of self-rule whose self-regulating mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders."[72]

D. *Post*-Steelworkers *Developments*

Following the *Steelworkers* Trilogy, the Supreme Court continued to emphasize the strength of the presumption of arbitrability. In the 1986 case of *AT & T Technologies, Inc. v. Communications Workers*,[73] a union demanded to arbitrate a dispute involving layoffs. The employer refused, arguing that its decision that a dearth of work justified layoffs was not arbitrable. The Seventh Circuit directed the parties to submit the arbitrability issue to the arbitrator.

Re-affirming the presumption of arbitrability articulated in the *Steelworkers* Trilogy, the Court found the presumption particularly applicable where the arbitration clause is broad.[74] The Court vacated and remanded, however, ruling that the district court, not the arbitrator, should make the initial determination of arbitrability.[75]

A year after *AT & T Technologies*, the Court decided *Paperworkers v. Misco, Inc.*,[76] in which the Court re-affirmed the narrow scope of judicial review of arbitration awards that was established in *Enterprise Wheel*. The Court again re-affirmed the limited scope of judicial review in the 2000 case of *Eastern Associated Coal Corp. v. United Mine Workers, District 17*,[77] in which the Court held that an arbitral award itself, and not merely the conduct leading to an employee's discharge, must conflict with public policy to justify the vacation of an arbitral award.

In the 1991 case of *Litton Financial Printing Division v. NLRB*,[78] the Court delineated a limit to the scope of the presumption of arbitrability even while it re-affirmed the presumption itself. The National Labor Relations Board ("NLRB") had read into an expired collective bargaining agreement a continuing duty to arbitrate grievances that arose after expiration of the agreement.[79] The Court disagreed, stating that "arbitration is a matter of consent, and . . . will

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Shulman, *supra* note 52, at 1016.

72 Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1515 (1981).

73 475 U.S. 643, 650 (1986).

74 *Id.*

75 *Id.*

76 484 U.S. 29 (1987).

77 531 U.S. 57 (2000).

78 501 U.S. 190 (1991).

79 *Id.* at 195-96.

not be imposed upon parties beyond the scope of their agreement."[80] The issue, the Court noted, was a contractual one: "whether the parties agreed to arbitrate this dispute."[81]

Thus, in the forty-plus years following the *Steelworkers* Trilogy, the Court has continued to emphasize the primacy of arbitration and the strong presumption of arbitrability. At the same time, however, the Court also has established that arbitration is a creature of contract, and that arbitrability extends only so far as its organic clause.

E. Scope of the Collective Bargaining Agreement

The Supreme Court's *Steelworkers* Trilogy, in addition to establishing the presumption of arbitrability and the limited judicial review of arbitral awards, also created a broad definition of what is meant by a collective bargaining agreement. For example, in *Warrior & Gulf*, the Court stated that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it."[82] Again in *Warrior & Gulf*, the Court said: "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. The collective agreement covers the whole employment relationship."[83] Consistent with this expansive view of the collective bargaining agreement, courts and arbitrators have found that custom, past practice, and oral understandings all may, under appropriate circumstances, constitute an enforceable part of the collective bargaining agreement itself.[84]

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80 *Id.* at 201.

81 *Id.* at 209.

82 United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

83 *Id.* at 578.

84 ELKOURI & ELKOURI, HOW ARBITRATION WORKS 630 (Marlin M. Volz & Edward P. Goggin, eds., 5th ed. 1997) (hereinafter "ELKOURI & ELKOURI"); *cf.* U.C.C. § 2-202(a) (2002) (providing that a commercial contract "may be explained or supplemented . . . by course of dealing or usage of trade . . . or by course of performance); *id.* § 1-205 (defining "course of dealing or usage of trade"); *id.* § 2-208 (discussing "course of performance"). U.C.C. section 2-202, comment (2) explains:

> Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the words used.

Another such source of material enforceable as part of the collective bargaining agreement is the side agreement. Parties to a collective bargaining agreement often amend or supplement[85] that agreement by entering into a subsequent (often a settlement) agreement. One labor arbitrator has explained:

> Although the [collective bargaining] Agreement is the chief instrument that guides the parties in their relationships there frequently arises an occasion when it is thought necessary or desirable to clarify, add to, or change the Agreement in some manner. This is what a side agreement does. They [sic] are very commonly used because the parties find them useful in some instances and necessary in other cases.[86]

Thus, a side agreement becomes a part of the original collective bargaining agreement.

Most side agreements, however, do not contain an arbitration clause; disputes arising under side agreements are arbitrable only if the arbitration clause contained in the collective bargaining agreement will extend to the subject of the side agreement. The circuit split on this issue is the subject of the next Part of this article.

III. THE PROBLEM OF SIDE AND SETTLEMENT AGREEMENTS

To date, five[87] federal circuit courts have addressed the issue of the circumstances under which disputes regarding side and settlement agreements are

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85 *Cf.* U.C.C. § 2-209 (providing for the modification, recission, and waiver of commercial contracts).

86 Fox Mfg. Co., 47 Lab. Arb. Rep. (BNA) 97, 101 (1966) (Marshall, Arb.), *cited in* ELKOURI & ELKOURI, *supra* note 84, at 599.

87 The Sixth Circuit considered an analogous issue in *Bakers Union Factory No. 326 v. ITT Continental Baking Co.*, 749 F.2d 350 (6th Cir. 1984). In *Bakers Union*, an employee was repeatedly disciplined for on-the-job intoxication. *Id.* at 351. After a third incident, the company, the employee, and the union all agreed that the employee would return to work under a "last chance" agreement which provided, among other things, for automatic discharge if the employee failed to complete treatment for alcoholism. *Id.*

The employee failed to complete the treatment, and the company fired him. *Id.* at 351-52. The union grieved the discharge to arbitration, and the arbitrator, though finding "just and proper cause for discipline in this case," ordered that the employee be given another chance. *Id.* at 352. The company refused to reinstate the employee, and the union sued for enforcement. *Id.* The primary issue in the case was whether the arbitrator had exceeded his authority by disregarding the last chance agreement. *Id.* at 353. This issue turned on whether the last chance agreement should be considered an extension of the collective bargaining agreement, such that (a) the arbitration clause of the collective bargaining agreement would apply to the last chance agreement, and (b) the arbitrator would not be free to disregard the terms of the last chance agreement. *See id.* at 353-55. Regarding (a), the court seemed to adopt a presumption that parties to a settlement agreement do *not* intend for the arbitration clause of an underlying collective bargaining agreement to apply

covered by the arbitration clause contained in the underlying collective bargaining agreement. The Second[88] and Fourth[89] Circuits have held that a dispute over the terms of the side or settlement agreement is arbitrable only if the subject matter of the side or settlement agreement is similar to that of the collective bargaining agreement. This approach takes into account the overall similarity of the subject matter of the side or settlement agreement to that of the collective bargaining agreement, without focusing on the strictures of the arbitration clause of the collective bargaining agreement. Conversely, the Third,[90] Seventh,[91] and Ninth[92] Circuits have created a rebuttable presumption that disputes involving a side or settlement agreement are arbitrable if the subject matter of the side or settlement agreement is within the scope of the arbitration clause of the collective bargaining agreement, and the parties have not otherwise excluded the subject from arbitration. This approach emphasizes the importance of the arbitration clause of the underlying collective bargaining agreement.

A. Circuits Comparing the Subjects of the Two Agreements

The Second and Fourth Circuits have adopted an approach that compares the subject of the side or settlement agreement to the subject of the collective bargaining agreement. This may be called the "collateral contract"[93] approach. In the Fourth Circuit case of *Adkins v. Times-World Corp.*,[94] the Roanoke Typographical Union Local No. 60 ("Local No. 60") had negotiated a collective bargaining agreement with newspaper publisher Times-World Corporation ("Times-World").[95] This agreement contained a clause providing that "[t]his Agreement alone shall govern relations between the parties on all subjects concerning which any provision is made in this Agreement, and any dispute involving any such subjects shall be determined" pursuant to a grievance

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to the settlement agreement. *Id.* at 354 ("Although the parties may by contract provide that the settlement agreements are subject to subsequent arbitration, we conclude that the parties in this case did not so provide."). Regarding (b), the court held that the last chance agreement was binding on the arbitrator, and that the arbitrator had exceeded his authority by disregarding it. *Id.* at 356. Accordingly, the court reversed and remanded with instructions that the arbitration award be vacated. *Id.*

88 Cornell Univ. v. UAW Local 2300, 942 F.2d 138, 140 (2d Cir. 1991).

89 Adkins v. Times-World Corp., 771 F.2d 829, 830-31 (4th Cir. 1985).

90 L.O. Koven & Brother, Inc. v. Local Union No. 5767, United Steelworkers, 381 F.2d 196, 204-05 (3d Cir. 1967).

91 Niro v. Fearn Int'l, Inc., 827 F.2d 173, 175 (7th Cir. 1987).

92 Inlandboatmens Union v. Dutra Group, 279 F.3d 1075, 1080 (9th Cir. 2002).

93 *See Cornell Univ.*, 942 F.2d at 140.

94 771 F.2d 829 (4th Cir. 1985).

95 *Id.* at 830.

procedure culminating in binding arbitration.[96] Local No. 60 and Times-World also negotiated an addendum agreement which guaranteed job security until retirement to certain printers employed in Times-World's composing room.[97] Both the collective bargaining agreement and the addendum were renewed several times over a period of ten years.[98]

During negotiations attendant to one of the renewals, Local No. 60 and Times-World agreed to a reduction-in-force program, under which Times-World offered to pay a lump-sum severance to any of five printers who voluntarily retired early.[99] An insufficient number of these printers took the early retirement option, however, and Times-World laid three of them off.[100] Local No. 60 grieved the layoffs, and both the union and the company agreed to submit the dispute to arbitration.[101] The printers, however, filed suit in federal district court against both the union and the company, seeking a stay of arbitration.[102] The district court granted the stay, and both Times-World and Local No. 60 appealed.[103]

On appeal, the Fourth Circuit framed the issue as "whether the addendum [wa]s part of the collective bargaining agreement."[104] In determining that it was, the court focused on three things: the language of the addendum, the negotiation history of the addendum, and the conduct of the parties.[105] Regarding the language of the addendum, the court noted that the title "addendum" "suggested an inseparable link to another instrument, specifically the collective bargaining agreement."[106] The court then compared the subject matter of the addendum to that of the collective bargaining agreement, and determined that "[t]he addendum relate[d] to a major concern of the principal agreement, namely employment and layoff procedures for specific employees."[107]

Regarding the negotiation history of the addendum, the court noted that the addendum had no existence separate from the collective bargaining agreement, and that the addendum and collective bargaining agreement were thrice

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96 Adkins v. Times-World Corp., 771 F.2d 829, 831 (4th Cir. 1985).

97 *Id.* at 830.

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.* at 830-31.

103 *Id.* at 831.

104 *Id.*

105 *See id.* at 831-32.

106 *Id.* at 832.

107 *Id.*

renewed simultaneously.[108] Finally, regarding the conduct of the parties, the court noted that both Local No. 60 and one of the printers had filed a grievance concerning the layoffs and requested arbitration.[109] For all these reasons, the court determined that collective bargaining agreement and the addendum were "part of the same contract" and therefore both subject to the arbitration clause contained in the bargaining agreement.[110] The court therefore reversed and remanded with instructions that the stay of arbitration be vacated.[111]

For purposes of categorizing this case, the specific outcome (requiring arbitration of a side agreement) is less important than the process by which the court reached that outcome. The salient consideration is the fact that the court relied in large part on a comparison between the subject of the addendum and the subject of the collective bargaining agreement. As the next case illustrates, courts that follow this same approach do not necessarily reach the same outcome.

Like the Fourth Circuit, the Second Circuit also has adopted an approach by which it compares the subject of the addendum and the subject of the collective bargaining agreement. In *Cornell University v. UAW Local 2300*,[112] Local 2300 of the United Automobile Aerospace and Agricultural Implement Workers of America ("Local 2300") and Cornell University negotiated a collective bargaining agreement that, among other things, referred to a Cornell Health Care Plan ("Health Care Plan" or "Plan") and required Cornell to notify Local 2300 prior to changing the Plan.[113] The agreement also contained a clause providing that an arbitrable grievance included "any matter involving the interpretation or application of this Agreement which alleges a violation of the rights of an employee or the Union under the terms of this Agreement."[114]

During negotiations over the collective bargaining agreement, Local 2300 made several proposals that Cornell rejected.[115] The parties later incorporated these proposals into a letter of understanding.[116] This letter contained a clause agreeing that the parties would jointly form a health insurance committee for the purpose of cost containment and review of health insurance plan information.[117]

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108 *Id.*

109 *Id.*

110 *Id.* at 831.

111 *Id.* at 832-33.

112 942 F.2d 138 (2d Cir. 1991).

113 *Id.* at 139.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

A year later, Cornell announced changes to the Health Care Plan and, consistent with the notice provision in the collective bargaining agreement, notified Local 2300.[118] Local 2300 grieved, arguing that Cornell had circumvented the letter of understanding by failing to present the changes first to the health insurance committee.[119] Local 2300 filed a request for arbitration, arguing that the grievance was arbitrable because the letter of understanding was part of the collective bargaining agreement and therefore subject to the bargaining agreement's arbitration clause.[120] Cornell sued for a stay of arbitration, arguing that the letter of understanding was not part of the collective bargaining agreement and that it therefore was not subject to the arbitration clause.[121] Local 2300 counterclaimed, seeking arbitration and damages.[122] On cross motions for summary judgment, the district court ruled for Cornell, and Local 2300 appealed.[123]

Like the Fourth Circuit in *Adkins*, the Second Circuit framed the issue as whether the letter of understanding "may be read as part and parcel of the Collective Bargaining Agreement or whether it is collateral to it."[124] If the letter of understanding "supplements [the collective bargaining agreement] and does not stand alone as a side agreement," then the arbitration agreement would apply to the letter agreement.[125] If, however, the letter of understanding is "dissimilar and . . . a contract set apart and distinct from" the collective bargaining agreement, then the arbitration agreement would not apply to the letter agreement.[126] Again, as in *Adkins*, the issue turned on the similarity in subject matter between the side agreement and the collective bargaining agreement.

The Second Circuit concluded that on these facts, the letter of understanding created "an entirely distinct and different obligation from" the collective bargaining agreement, and that the arbitration clause therefore did not apply.[127] The court based its conclusion on the fact that the health insurance committee created by the letter of understanding was not mentioned in the col-

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118 Cornell Univ. v. UAW Local 2300, 942 F.2d 138, 139 (2d Cir. 1991).

119 *Id.*

120 *Id.* at 139-40.

121 *Id.*

122 *Id.* at 140.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* This is consistent with U.C.C. § 2-202 (2002), which provides that a commercial contract "may be explained or supplemented . . . (b) by evidence of consistent additional terms *unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.*") (emphasis added).

lective bargaining agreement.[128] The court expressly rejected the "self-serving" affidavit of a union official that it was his understanding that the letter agreement was a part of the collective bargaining agreement, and relied instead on evidence that the university had sought to keep the letter of understanding out of the collective bargaining agreement.[129] Therefore, the court affirmed the decision of the district court to grant Cornell's motion for summary judgment and to refuse to compel arbitration.[130]

Thus, both the Fourth and Second Circuits have adopted a similar test for determining under what circumstances a side agreement will be subject to an arbitration clause in an underlying collective bargaining agreement: both circuits have held that the side agreement will be subject to arbitration if the subject of the side agreement is similar in subject matter to the bargaining agreement. Nonetheless, the outcome of the two cases was different: the Fourth Circuit required arbitration and the Second Circuit did not. Different outcomes would not be particularly surprising if the facts of the cases were significantly different.

These cases, however, are factually similar on the key issue of the subject matter similarity. The Second Circuit was correct to point out that the collective bargaining agreement in *Cornell* made no mention of a health insurance committee, but the general subject of health insurance *was* a subject of the collective bargaining agreement. Similarly, while the Fourth Circuit correctly pointed out that the collective bargaining agreement in *Adkins* contained employment and layoff procedures for employees, the agreement did *not* specifically guarantee the job security of the printers who were the subject of the addendum. In both cases, then, the side agreement at issue contained specific provisions that related to items covered only generally in the collective bargaining agreements. To be sure, the *Cornell* case may have been a weaker case for the union since the letter of understanding apparently did not explicitly require the university to submit proposed changes in the Health Care Plan to the health insurance committee, but that involves the merits of the case and not the issue of arbitrability. Thus, the different outcomes of the two cases tend to indicate that there is a fuzzy line between arbitrable similarity and non-arbitrable dissimilarity. The test has yielded arguably unpredictable outcomes.

B. Circuits Focusing on the Scope of the Arbitration Clause

The indeterminacy of the approach adopted by the Second and Fourth Circuits is one reason several circuits have rejected that approach and instead adopted an approach that focuses on the scope of the arbitration clause in the

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128 *See Cornell Univ.*, 942 F.2d at 140.

129 *See id.* at 140-41.

130 *See id.* at 141.

underlying collective bargaining agreement.[131] For example, in *L.O. Koven & Brother, Inc. v. Local Union No. 5767, United Steelworkers*,[132] L.O. Koven & Brother, Inc. ("Koven") had a collective bargaining agreement with United Steelworkers of America, AFL-CIO, Local No. 5767 ("Local 5767").[133] This bargaining agreement contained an arbitration clause in which the parties agreed to arbitrate "any difference . . . as to the meaning, compliance with, or application of the provisions of this agreement."[134]

Koven filed for bankruptcy.[135] Local 5767 filed several claims with the bankruptcy court for back-owed wages it claimed its members were due under the collective bargaining agreement.[136] The parties, through the bankruptcy court, settled these claims: Koven paid Local 5767 $7,000, and in return Local 5767 released Koven from all claims arising prior to the date of the release.[137] Local 5767 then filed a grievance for back vacation pay that it claimed Koven owed its members prior to the date of the release.[138] Koven refused to pay, arguing that the release had discharged the grievance.[139] Local 5767 requested arbitration.[140] Koven responded by suing in federal court for a declaratory judgment that the grievance had been discharged.[141] Local 5767 counterclaimed for an arbitration order.[142] The district court agreed with Koven, and Local 5767 appealed.[143]

The Third Circuit reversed, holding that the effect of the release should be arbitrated pursuant to the arbitration clause of the collective bargaining agreement.[144] The court stated that "unless a release explicitly discharges the

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131 *See, e.g.*, Inlandboatmens Union v. Dutra Group, 279 F.3d 1075, 1081 (9th Cir. 2002).

132 381 F.2d 196 (3d Cir. 1967).

133 *Id.* at 198.

134 *Id.* at 199.

135 *Id.* at 198.

136 *See id.*

137 *See id.* at 198-99.

138 *See id.* at 199.

139 *Id.*

140 *Id.*

141 *Id.* at 200.

142 *Id.*

143 *Id.*

144 *Id.* at 204-05. However, the court held that the claim for vacation benefits during the dates that Koven was being administered under Chapter XI of the Bankruptcy Act was not arbitrable pursuant to the Bankruptcy Act. *Id.* at 208. For a thorough discussion of the circumstances under which an employer is permitted to discharge in bankruptcy its contractual obligations under a collective bargaining agreement, see Donald B. Smith & Richard A. Bales, *Reconciling Labor and Bankruptcy Law: The Application of 11 U.S.C. § 1113*, 2001 L. REV. MICH. ST. U. DET. C.L.

parties from the collective bargaining agreement itself, or from the arbitration provisions thereof, . . . its effect should be determined by an arbitral forum."[145] Thus, the court created a rebuttable presumption that an arbitration clause in a collective bargaining agreement would extend to disputes arising under side or settlement agreements.

Similarly, in the Seventh Circuit case of *Niro v. Fearn International, Inc.*,[146] Dominic Niro was employed by Fearn International ("Fearn") and represented by Local 744 of the International Brotherhood of Teamsters ("Local 744").[147] Fearn fired Niro for reporting to work under the influence of drugs or alcohol, and Local 744 grieved the discharge.[148] The collective bargaining agreement contained an arbitration clause that applied to "any dispute or difference of opinion between the Company and the Union or between the Company and any of its employees covered by this [collective bargaining] Agreement, involving the meaning, interpretation or application of the provisions of this Agreement."[149] Prior to arbitration the parties reached a settlement agreement pursuant to which Fearn reinstated Niro contingent on his successful completion of a substance abuse program.[150] Before completing this program, however, Niro was hospitalized for an overdose of PCP.[151] Fearn concluded that Niro's use of PCP violated the settlement agreement, and again fired him.[152] Local 744 did not grieve the second discharge.[153]

Niro sued Fearn for wrongful discharge in violation of the collective bargaining agreement, and Local 744 for breach of the duty of fair representation.[154] Local 744 cross-claimed against Fearn to compel arbitration over the alleged breach of the settlement agreement and over the original discharge.[155] The district court concluded that the original discharge was no longer arbitrable,

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145 *L.O. Koven*, 381 F.2d at 205.

146 827 F.2d 173 (7th Cir. 1987).

147 *Id.* at 174.

148 *Id.*

149 *Id.* at 175 n.1.

150 *Id.* at 174.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.* For thorough discussions of a union's duty of fair representation to its employees, see Connye Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 LAB. LAW. 183 (1996); Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127 (1992).

155 *Niro*, 827 F.2d at 174.

but ordered the claim for breach of the settlement agreement (i.e., the second discharge) to arbitration.[156]

Fearn appealed the order compelling arbitration of the second discharge, arguing, among other things, that the settlement agreement was not subject to the arbitration clause found in the collective bargaining agreement and therefore was not arbitrable.[157] The Seventh Circuit affirmed. The rule adopted by the court was substantially different from the test announced by the Second and Fourth Circuits in *Cornell* and *Adkins*. The *Niro* court stated that "a settlement agreement is an arbitrable subject when the underlying dispute is arbitrable, except in circumstances where the parties expressly exclude the settlement agreement from being arbitrated."[158] Thus, instead of focusing on the relationship between the side or settlement agreement and the collective bargaining agreement, the *Niro* court focused on whether the subject of the side or settlement agreement is within the scope of the arbitration clause of the collective bargaining agreement. If the subject of the side or settlement agreement is within the scope of the arbitration clause, then a dispute concerning the side or settlement agreement is presumed arbitrable absent an indication that the parties intended otherwise.[159] The court concluded that Niro's second discharge was "a subject the parties intended to be a matter of arbitration," and therefore affirmed the district court's order to arbitrate.[160]

The Ninth Circuit adopted a similar approach in *Inlandboatmens Union v. Dutra Group*.[161] Dutra Group ("Dutra") was a marine construction, towing, and dredging company. Its deck hands were represented by the Inlandboatmens' Union of the Pacific ("IBU").[162] IBU filed a grievance against Dutra regarding a subcontracting arrangement in which Dutra allegedly leased one of its barges to another company, Master's Tug & Tow ("Master's"), and subcontracted with Master's to have Master's employees do work for Dutra.[163] The collective bargaining agreement between Dutra and IBU required Dutra to use only IBU members to perform Dutra's work; Masters' employees were not members of IBU.[164] IBU claimed that three of its members were laid off as a result of this arrangement.[165]

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156 *Id.*

157 *Id.*

158 *Id.* at 175.

159 *Id.*

160 *Id.* at 176.

161 279 F.3d 1075 (9th Cir. 2002).

162 *Id.* at 1077.

163 *Id.*

164 *Id.*

165 *Id.*

The collective bargaining agreement between IBU and Dutra contained an arbitration clause governing "[a]ny dispute concerning . . . wages, working conditions, or any other matters referred to in this" bargaining agreement.[166] Prior to arbitrating the dispute, the parties successfully mediated it, resulting in a settlement agreement.[167] This settlement agreement provided, among other things, that Dutra would subcontract work to Master's only if Master's agreed to employ IBU members for labor to be performed for Dutra.[168]

Shortly after the settlement agreement was signed, IBU claimed that Dutra breached the settlement agreement by once again subcontracting with Master's even though Master's continued to employ non-IBU members to perform work for Dutra.[169] IBU sued Dutra in federal court, seeking enforcement of the settlement agreement and damages.[170] Dutra moved to dismiss on the ground that the issue was within the scope of the arbitration clause in the underlying collective bargaining agreement.[171] The district court agreed, and IBU appealed.[172]

Like the Seventh Circuit in *Niro*, the Ninth Circuit in *Inlandboatmens* focused on the scope of the arbitration clause in the underlying collective bargaining agreement, stating:

> We hold that disputes arising under a side agreement must be arbitrated if the dispute relates to a subject that is within the scope of the [collective bargaining agreement]'s arbitration clause. For example, if the arbitration clause in a [bargaining agreement] were even broader than the one at issue here, and covered "all disputes that may arise" between the parties, then any dispute over any matter, whether or not it relates to a side agreement, would unquestionably be arbitrable. In contrast, if the arbitration clause were far narrower and covered only, for example, disputes over discipline and discharge, then a dispute arising under a side agreement concerning the assignment of vacation days would not be arbitrable.[173]

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166 Inlandboatmens Union v. Dutra Group, 279 F.3d 1075, 1077 (9th Cir. 2002).

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.* at 1077-78.

171 *Id.* at 1078.

172 *Id.*

173 *Id.* at 1080.

This approach, noted the court, avoids the indeterminacy of the Second and Fourth Circuit's "collateral contract" approach, and gives the parties to a side agreement more predictability concerning whether the subject of such an agreement will be arbitrable.[174] The parties are free to specify whether they want the subject of the side agreement to be arbitrable.[175] If they do not specify arbitrability, then they merely need to "examine the arbitration clause of the [collective bargaining agreement] . . . and determine whether it applies to the subject matter of the [side] agreement . . . . The general arbitration clause will apply to a dispute over a side agreement to the same extent that it would govern any other disagreement between the parties."[176]

In this case, the court noted that the subject of the side agreement – subcontracting – was an explicit part of the collective bargaining agreement.[177] Moreover, the arbitration clause in the bargaining agreement was reasonably broad and extended to subcontracting issues.[178] Finally, the court noted that, although the parties could have excluded the side agreement from arbitration by placing an exclusionary clause in either the collective bargaining agreement or the side agreement, the parties had not done so here.[179] The court therefore concluded that, since the subject of the dispute over the side agreement was arbitrable under the collective bargaining agreement, the dispute belonged in arbitration and not in court.[180]

IV. ANALYSIS AND PROPOSAL

As discussed in Part II.C. above, although the Supreme Court has announced a broad presumption of arbitrability, the scope of an arbitration clause is not infinite and may be contractually narrowed by the parties. The "collateral contract" analysis of the Second and Fourth Circuits seeks to further this goal by focusing on the presumed intent of the parties. The underlying assumption is that if the subject of the side or settlement agreement is closely related to the subject of the underlying collective bargaining agreement, then the parties must have intended disputes arising under the side or settlement agreement to be arbitrable (e.g., *Adkins*). If, on the other hand, the subject of the side or settlement agreement is dissimilar to the subject of the underlying collective bargaining agreement, then this group of courts assumes that the parties must have intended to create a wholly new and self-contained set of contractual obligations. Be-

174 Inlandboatmens Union v. Dutra Group, 279 F.3d 1075, 1081 (9th Cir. 2002).

175 *Id.*

176 *Id.*

177 *Id.* at 1080.

178 *Id.*

179 *Id.* at 1080 n.6.

180 *Id.* at 1080, 1084.

cause this new contract is presumed to be self-contained, if it does not contain an arbitration clause, then the parties must not have intended for the contents of the side or settlement agreement to be arbitrable (e.g., *Cornell*). Thus, this approach takes into account the overall similarity of the subject matter of the side/settlement agreement to that of the collective bargaining agreement, without focusing on the strictures of the arbitration clause of the collective bargaining agreement.

There are two problems with this approach. First, the underlying presumptions may be incorrect. The issue of arbitrability may never have occurred to the parties when they were drafting the side or settlement agreement; the purpose of such agreements is to resolve a dispute, not to create new ones. Conversely, the parties may have disagreed over whether the side/settlement agreement would be arbitrable, and thus omitted any reference to arbitrability because they could not agree. Another problem with the underlying presumptions is that there is little reason to believe that parties agreeing to a side/settlement agreement that is dissimilar to the underlying collective bargaining agreement have any less reason to think that an arbitration clause will apply to their side/settlement agreement than parties agreeing to a side/settlement agreement that is similar to the underlying bargaining agreement. The presumption is not particularly intuitive, and therefore is unlikely to be an accurate gauge of the intent of the parties.

The second problem with the "collateral contract" approach is that it is relatively indeterminate. As the *Adkins* and *Cornell* cases indicate,[181] it often is difficult to categorize a side or settlement agreement as similar or dissimilar to the underlying collective bargaining agreement. For example, courts may differ, as the *Adkins* and *Cornell* courts did, on how to classify a side/settlement agreement that discusses in great detail a matter that is only peripherally discussed in the bargaining agreement. The cases, rather than presenting a dichotomous choice between black and white, instead yield various shades of gray. The resulting indeterminacy in turn undermines the "intent of the parties" rationale of the collateral contract approach: the parties cannot be presumed to have intended a particular outcome if the parties cannot predict *ab initio* what the outcome will be.

The approach of the other circuits is to presumptively extend the arbitration clause in the underlying collective bargaining agreement to the side or settlement agreement. This approach, which emphasizes the importance of the arbitration clause in the underlying collective bargaining agreement, has four advantages. The first is that it is much more determinate. It avoids the false similar/dissimilar dichotomy and therefore the categorization problem. Moreover, it can draw upon an extensive body of case law that has developed over

[181] *See supra* Part III.A.

the last forty-plus years for determining arbitrability under collective bargaining agreements.[182]

Second, the scope of the arbitration clause approach is more consistent with the Supreme Court's arbitration doctrine than the "collateral contract" approach. The scope of the arbitration clause approach borrows the general presumption of arbitrability which the Court announced in the *Steelworkers* Trilogy and applies it to side and settlement agreements. No new doctrine is created – the old doctrine is simply applied in a slightly different (but conceptually similar) context. Moreover, the contractarian focus on the scope of the arbitration clause in the underlying collective bargaining agreement is consistent with the Court's pronouncement in *Litton*[183] and other cases that labor arbitration is a product of contract and that arbitration clauses should be enforced as far as – but no farther than – the language of the arbitration agreements permit. The parties should get what they bargained for, no more and no less.

The third advantage of the scope of the arbitration clause approach is that it preserves the intent of the parties. It does so in two ways. First, any exclusions or limitations on arbitrability are found in the underlying collective bargaining agreement. As the Ninth Circuit explained in *Inlandboatmens*, an arbitration clause that extends only to discipline and discharge will not cover a side agreement concerning vacation pay.[184] Second, this approach preserves party autonomy insofar as it permits the parties to either expand or constrict the application of the arbitration agreement with respect to the side or settlement agreement. If the side or settlement agreement provides that its contents are not arbitrable, then the court will respect that agreement notwithstanding a broad arbitration clause in the collective bargaining agreement.

Fourth, the scope of the arbitration clause approach is more consistent with the theoretical underpinnings of the Supreme Court's view of labor relations. Its determinacy helps keep labor disputes out of court – there is little incentive to litigate if the parties know who the victor will be. Moreover, its consistency with the intent of the parties preserves party autonomy and protects the contractualist vision of collective bargaining.

V. CONCLUSION

Collective bargaining agreements seldom provide an answer for every conceivable issue that may arise between a company and a union. For this reason, companies and unions frequently decide to supplement their bargaining agreements through the use of side or settlement agreements. Often, however, the side or settlement agreements fail to resolve the issue completely, and fur-

182 *See, e.g.*, ELKOURI & ELKOURI, *supra* note 84, at 34-35, 300-05.

183 *See supra* notes 78-81 and accompanying text.

184 *See supra* note 173 and accompanying text.

ther fail to specify whether the subject of the side or settlement agreement is arbitrable.

The federal circuits are split on the proper test for ascertaining the arbitrability of side or settlement agreements. One group of circuits has held that courts should focus on the relationship between the subject of the settlement agreement and the subject of the collective bargaining agreement; if the subjects are different, then these courts presume that the parties intended not to extend the arbitration agreement in the underlying collective bargaining agreement to the side or settlement agreement. Another group of circuits has held that courts should focus on the scope of the arbitration agreement in the underlying collective bargaining agreement, and should order arbitration if the subject of the side or settlement agreement is within the scope of the arbitration clause in the bargaining agreement and if the parties have not explicitly provided in the side or settlement agreement that its contents are not arbitrable.

This article argues that the "scope of the arbitration clause" approach is the better approach, for four reasons. First, it yields more predictable outcomes than the "collateral contract" approach because it avoids the necessity of pigeonholing the cases into ill-defined categories. Second, it is more consistent with Supreme Court doctrine concerning labor arbitration, insofar as it merely extends the long-established presumption of arbitrability into a slightly different context. Third, it preserves the intent of the parties with respect to the scope of arbitrability. Fourth, it is more consistent with the Court's industrial pluralist view of labor relations.