Boston College Law Review

Volume 26
Issue 1 *Number 1*

Article 1

12-1-1984

The Steelworkers Trilogy as Rules of Decision Applicable by Analogy to Public Sector Collective Bargaining Agreements: The Tennessee Valley Authority Paradigm

William R. Casto

BOSTON COLLEGE LAW REVIEW

VOLUME XXVI DECEMBER 1984 NUMBER 1

THE *STEELWORKERS TRILOGY* AS RULES OF DECISION APPLICABLE BY ANALOGY TO PUBLIC SECTOR COLLECTIVE BARGAINING AGREEMENTS: THE TENNESSEE VALLEY AUTHORITY PARADIGM†

WILLIAM R. CASTO*

* B.A., J.D., University of Tennessee; J.S.D., Columbia University; Associate Professor of Law, Texas Tech University School of Law. The author formerly served as an attorney in the Office of the General Counsel of the Tennessee Valley Authority. The views expressed in this Article are solely those of the author and do not necessarily represent those of the Tennessee Valley Authority.

INTRODUCTION

Virtually all private sector collective bargaining agreements contain grievance provisions culminating in binding arbitration.[1] This permits labor disputes to be resolved quickly, informally, and finally by experienced neutral third parties selected by labor and management. In the private sector, general agreement exists that most disputes are better resolved through arbitration than by resort to strikes and other forms of labor strife.[2] The Supreme Court's 1960 *Steelworkers Trilogy* assures the primacy of private arbitration for the resolution of private sector labor disputes. In the first case of the *Trilogy*, *United Steelworkers of America v. American Manufacturing Co.*,[3] the Court held that if the parties agree to arbitration (which they do in 95% of all collective bargaining agreements), even a "frivolous, patently baseless"[4] claim must be referred to arbitration. Then the Court held in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*[5] that arbitration clauses should be construed to require arbitration of all grievances unless an objecting party can present "the most forceful evidence of a purpose to exclude the claim from arbitration."[6] Finally, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,[7] the Court drastically limited the scope of judicial review of arbitration awards. The propriety of extending the *Steelworkers* principles to public sector collective bargaining agreements will be considered in this article.[8]

---

[1] *See* Bartlett, *Employment Discrimination and Labor Arbitrators: A Question of Competence*, 85 W. VA. L. REV. 873, 874-76 (1983). The *Steelworkers* Court, of course, was aware of this fact. *See, e.g.*, Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 452 n.3 (1957) ("Most agreements provide procedures for settling grievances, generally including some form of arbitration as the last step.") (quoting H.R. REP. No. 245, 80th Cong., 1st Sess. 21 (1947)). Labor arbitration first became a matter of national importance during World War II when industrial stability was crucial to the war effort. *But see* Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373, 411 (1983)(In 1920, 55% of labor agreements contained arbitration provisions; by 1934, 66% contained arbitration provisions; and by 1942, 76% contained arbitration provisions.). By the mid-1950's over 90 percent of American collective bargaining agreements had arbitration provisions. Davey, *Labor Arbitration: A Current Appraisal*, 9 INDUS. & LAB. REL. REV. 85 (1955-56). By 1966, the portion of agreements containing arbitration provisions was over 94 percent. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURES, BULL. NO. 1425-26, at 5 (1966).

[2] *See generally* FLEMING, THE LABOR ARBITRATION PROCESS (1965); ELKOURI & ELKOURI, HOW ARBITRATION WORKS (3d ed. 1973); FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION (1974). *See also* Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983).

[3] 363 U.S. 564 (1960).

[4] *Id.* at 566 (quoting the lower court). The Court was speaking to the merits of the grievance rather than the issue of whether the grievance was required by the collective bargaining agreement to be submitted to arbitration.

[5] 363 U.S. 574 (1960).

[6] *Id.* at 585.

[7] 363 U.S. 593 (1960).

[8] The *Warrior & Gulf* Court also held that the threshhold issue of whether a particular matter is subject to arbitration is an issue to be resolved by the courts unless the parties clearly have contracted to the contrary. United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 n.7 (1960). *See* Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329, 334 (1980). This narrow issue will not be considered in this article.

The separate subject of interest arbitration also will not be considered in this article. Interest arbitration arises out of the actual negotiation of the terms of an agreement. To resolve public sector collective bargaining impasses, many states authorize or require arbitration of particular bargaining disputes. *See generally* Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C. L.

The unifying purpose of the three *Steelworkers* cases was to promote industrial stability and to avoid labor strife by assuring the resolution of grievances through arbitration rather than costly labor strikes.[9] These three opinions have had a far-reaching impact upon the judicial system. Hundreds of thousands of disputes that otherwise would have been subject to judicial resolution[10] were funneled away from the courts into private hands. This renunciation of judicial authority drastically stunted the growth of a newborn federal common law[11] and virtually precluded the courts from having any significant substantive impact upon the enforcement of private sector collective bargaining agreements. As the *Steelworkers* Court explained, however, "[i]t is the arbitrator's construction which was bargained for,"[12] and neither employers nor organized labor appear to be unduly dissatisfied with the resulting system of private justice.[13]

The *Steelworkers Trilogy* established principles of private sector labor law. These cases arose under the Labor Management Relations Act,[14] and that Act expressly excludes "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof"[15] from the definition of covered employer. In addition, when the *Trilogy* was decided, public sector collective bargaining had yet to emerge as a significant aspect of labor law and labor-management relations.[16] The *Steelworkers* Court almost certainly gave no thought whatsoever to public sector considerations when it remanded the private sector to arbitration.

More recently collective bargaining has become a significant aspect of governmental employer-employee relations. At the federal level, a general system of labor-management relations applicable to federal employees was established in 1962 by a presidential execu-

---

REV. 557 (1980). In contrast, grievance arbitration arises out of disputes regarding the provisions or effect of an existing collective bargaining agreement.

[9] *See* United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 577-78 (1960); United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 567 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

[10] Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1982), vested the federal courts with jurisdiction to enforce collective bargaining agreements. *See* Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957). This jurisdiction includes authority to enjoin strikes that are contrary to a collective bargaining agreement. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 237-38 (1970), *overruling*, Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

[11] *See infra* notes 29-34 and accompanying text.

[12] United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

[13] *See, e.g.*, Jones & Smith, *Management Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 115 (1964).

[14] 29 U.S.C. §§ 141-97 (1982). In this article the phrase "Wagner Act" will be used to refer to the original National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449 (1935). The phrase "Taft-Hartley Act" will be used to refer to the Labor Management Relations Act of 1947, Pub. L. No. 101, 61 Stat. 136 (1947). The phrase "Labor Management Relations Act" will be used to refer generally to the codification of these two acts in the United States Code.

[15] 29 U.S.C. § 152(2) (1982). Section 152 defines words for the purposes of 29 U.S.C. §§ 151-69 which is a codification of the National Labor Relations Act, as amended. Another portion of the code, 29 U.S.C. § 142(3), adopts the Section 152(2) definition of employer for the entire Labor Management Relations Act.

[16] Binding grievance arbitration did not emerge as a generally significant factor in the public sector until the 1970's. *See Project: Collective Bargaining and Politics in Public Employment*, 19 UCLA L. REV. 887, 893-96 (1972). There were some notable exceptions. For example, the Tennessee Valley Authority has been bargaining collectively with its employees since the 1930's. *See infra* notes 122-49 and accompanying text. Another early example of collective bargaining with federal employees involved the Bonneville Power Administration. *See* M. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 307 (1976).

tive order.[17] This executive system, after frequent amendments,[18] eventually was replaced in 1978 by the Federal Service Labor Management Relations Act[19] modeled after the private sector Labor Management Relations Act and the executive orders. During the same period, collective bargaining at the state and local level was booming, and many states enacted public sector employee relations acts also modeled after the Labor Management Relations Act. With the widespread advent of public sector collective bargaining, the question naturally arises whether the principles of the *Steelworkers Trilogy* should be extended to the resolution of grievances under public sector collective bargaining agreements.[20]

The thesis of this article is that the *Warrior & Gulf* presumption of arbitrability is based upon private sector legislative policy and that, in the absence of pertinent legislation, the courts should be reluctant to impose this policy on the public sector. In contrast, the other two *Steelworkers* principles essentially implement the parties' prior agreement and therefore are readily adaptable to public sector agreements. Grievance arbitration clearly is desirable and has enhanced industrial stability and peace in the private sector. Similarly, there is no doubt that grievance arbitration has played and will continue to play an important role in public sector labor relations.[21] But the extent to which public sector grievance arbitration is to be adopted should be left to the process of collective bargaining or to legislation. The courts should not impose their independent judgment upon the public sector.

Instead of writing in a vacuum, the Tennessee Valley Authority ("TVA"),[22] a government corporation wholly owned by the federal government, will be used as a general proxy for the public sector. TVA has a long and healthy history of collective bargaining with its employees,[23] including litigation concerning the arbitration of disputes covered by collective bargaining agreements.[24] Like state and local governments, TVA also is ex-

---

[17] Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962).

[18] The history of the various executive orders is presented in M. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 109 (1976).

[19] Chapter VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-35 (1982).

[20] *See* Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329 (1980); *Developments in the Law — Public Employment*, 97 HARV. L. REV. 1611, 1718-24 (1984). *See also* Toole, *Judicial Activism in Public Sector Grievance Arbitration: A Study of Recent Developments*, 33 ARB. J. 6 (Sept. 1978). For an admirable survey of public sector grievance arbitration awards and a cogent discussion of the capacity and appropriate authority of public sector arbitrators, see Abrams, *The Power Issue in Public Sector Grievance Arbitration*, 67 MINN. L. REV. 261 (1982). *See also* M. LIEBERMAN, PUBLIC SECTOR BARGAINING ch. 5 (1980) (able critical analysis by an experienced public sector arbitrator).

[21] By 1975, over 70% of all public sector collective bargaining agreements provided for some form of grievance arbitration. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 1833, GRIEVANCE AND ARBITRATION PROCEDURES IN STATE AND LOCAL GOVERNMENTS 18, 40 (1975).

[22] TVA was created by enactment of the Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831-31dd (1982). Although TVA is in some ways a unique organization, the analysis developed in this article is generally applicable to the entire public sector. To be sure, particular government entities may be subject to specific legislative policies or rules of decision in respect to grievance arbitration. In this event, the legislative rule or policy should prevail.

[23] *See infra* notes 122-49 and accompanying text.

[24] *See* Salary Policy Employee Panel v. Tennessee Valley Authority, 731 F.2d 325 (6th Cir. 1984); Tennessee Valley Trades and Labor Council v. Tennessee Valley Authority, 488 F. Supp. 146 (E.D. Tenn. 1980), *app. dismissed as moot*, 672 F.2d 918 (6th Cir. 1981); Salary Policy Employee Panel v. Tennessee Valley Authority, 439 F. Supp. 1134 (E.D. Tenn. 1977).

cluded from the Labor Management Relations Act[25] and the Federal Service Labor Management Relations Act.[26] The applicability of the *Steelworkers* principles to TVA collective bargaining agreements, therefore, is a matter of common law and is not answered directly by statute.

1. *Lincoln Mills* and the *Steelworkers Trilogy*

In a sense, the *Steelworkers Trilogy* should be considered a quartet that includes the earlier decision of *Textile Workers Union of America v. Lincoln Mills*.[27] In *Lincoln Mills*, the Court held that executory agreements to arbitrate labor grievances are judicially enforceable.[28] Then in the *Trilogy*, the Court established the primary legal principles governing private sector grievance arbitration.

A. Lincoln Mills

Lincoln Mills involved a suit under section 301 of the Taft-Hartley Act[29] to enforce a collective bargaining agreement containing a no-strike provision and a grievance provision culminating in arbitration. When the employer refused to arbitrate several grievances related to work loads and assignments, the union sought a court order compelling arbitration.[30]

Before reaching the merits, the Court had to determine whether suits under section 301 were governed by state law or federal law. The lower court unanimously agreed that executory agreements to arbitrate were unenforceable under the relevant state's law[31] but split on the issue of whether arbitration clauses in collective bargaining agreements are enforceable under federal law.[32] Although section 301 appeared to be little more than a simple grant of subject matter jurisdiction,[33] the *Lincoln Mills* Court held that the substantive law to be applied in suits under section 301 is federal law, "which the courts must fashion from the policy of our national labor laws."[34]

Having determined the choice of law issue, the Court turned to the question of whether executory agreements to arbitrate disputes under collective bargaining agree-

---

[25] *See supra* note 15 and accompanying text.

[26] The Act applies to agencies which are defined to mean "Executive agenc[ies]." 5 U.S.C. § 7103(a)(3) (1982). Since state and local governments are not a part of the Executive branch of the federal government, they are excluded. The same definitional subsection of the Act excludes TVA by name. *Id.* § 7103(a)(3)(E) (1982).

[27] 353 U.S. 448 (1957).

[28] *Id.* at 457-59.

[29] 29 U.S.C. § 185 (1982). Section 301(a) vests the United States District Courts with jurisdiction over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter."

[30] 353 U.S. 448, 449 (1957).

[31] Lincoln Mills v. Textile Workers Union, 230 F.2d 81, 84 & 88 (5th Cir. 1956); *id.* at 90 (Brown, J., dissenting).

[32] *Compare* 230 F.2d at 84-89 (majority opinion) *with id.* at 90-96 (dissenting opinion).

[33] *See* 353 U.S. 448, 460-546 (1957) (Frankfurter, J., dissenting).

[34] 353 U.S. at 456. This aspect of *Lincoln Mills* sparked an academic tempest in a teapot. *See* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). In particular, there was a very real concern regarding the federal court's competence to fashion a federal common law of collective bargaining agreements. *Id.* at 22-30. In any event, the *Steelworkers Trilogy* preempted the federal courts' lawmaking responsibilities, and the courts' competence in this area was not tested.

ments are enforceable. In answering this question, the Court was confronted by the established common-law doctrine that this type of executory agreement is not judicially enforceable.[35] The United States Arbitration Act[36] abrogated this doctrine by providing for specific performance of executory agreements to arbitrate.[37] That Act, however, specifically excepted "contracts of employment."[38] The court of appeals in *Lincoln Mills* relied upon this legislation and the common-law doctrine to hold that under federal law the agreements were not enforceable.[39]

The Supreme Court did not purport to determine generally whether executory agreements to arbitrate are enforceable under federal common law.[40] Instead, the Court found in the legislative history of the Taft-Hartley Act an implicit congressional policy favoring the enforcement of executory collective bargaining agreements to arbitrate.[41] Referring to the legislative history of the Labor Management Relations Act, the Court noted that Congress sought to encourage employers and their employees to enter into collective bargaining agreements with no-strike clauses.[42] The Court recognized, however, that a union could not be expected to agree to a no-strike clause unless some protection was provided against management violations of the collective bargaining agreement — what the *Lincoln Mills* Court called "*quid pro quo*."[43] Initially the House and Senate versions of Taft-Hartley made violation of an arbitration agreement an unfair labor practice.[44] The Committee of Conference dropped this approach, stating, "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations

---

[35] *See, e.g.*, RESTATEMENT OF CONTRACTS § 550 (1932). *See generally* C. UPDEGRAFF, ARBITRATION AND LABOR RELATIONS 140-50 (3d ed. 1970). The *Lincoln Mills* Court recognized the doctrine, citing Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924). 353 U.S. at 456 n.7.

[36] 9 U.S.C. §§ 1-14 (1982).

[37] 9 U.S.C. § 2 (1982).

[38] 9 U.S.C. § 1 (1982). At the time *Lincoln Mills* was decided, there was a difference of opinion among the lower federal courts as to whether the Arbitration Act applied to collective bargaining agreements. *See* Lincoln Mills v. Textile Workers Union, 230 F.2d 81, 84-86 (5th Cir. 1956). *See also* Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373, 416-17 (1983). After the Supreme Court's decision in *Lincoln Mills*, the issue was moot.

[39] Lincoln Mills v. Textile Workers Union, 230 F.2d 81, 84-88 (5th Cir. 1956).

[40] This question was not addressed. 353 U.S. at 456 n.7.

[41] 353 U.S. at 453-56. In a concurring opinion Justices Burton and Harlan agreed that the Taft-Hartley Act established "a congressional policy to encourage and enforce labor arbitration in industries affecting commerce." *Id.* at 460 (citing Lincoln Mills v. Textile Workers Union, 230 F.2d 81, 89 (5th Cir. 1956) (Brown, J., dissenting)). Only Justice Frankfurter objected to the Court's analysis of the legislative history. 353 U.S. at 462 (Frankfurter, J., dissenting).

[42] *See* S. REP. No. 105, 80th Cong., 1st Sess. 17-18 (1947), *quoted in* 353 U.S. at 453 n.4 ("private industrial peace . . . [can] result in the stability of industrial relations").

[43] 353 U.S. at 455. Section 301 of the Taft-Hartley Act appeared to give federal courts jurisdiction (that these courts previously had been denied under the Norris-LaGuardia Act, 29 U.S.C. § 104 (1982)) to enforce no-strike agreements by injunction. This point was made in a staged colloquy between Representatives Hartley and Barden. 93 CONG. REC. 3656-57 (1947), *quoted in* 353 U.S. at 455-56. When this issue first was considered, the Court held that the Norris-LaGuardia Act still precluded a labor injunction in this situation. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 209-10 (1962). But the Court eventually overruled *Sinclair Refining* and held that Section 301 empowered the federal courts to enforce collective bargaining agreements by enjoining strikes. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 237-38 (1970).

[44] S. REP. No. 105, 80th Cong., 1st Sess. 20-21 & 23 (1947); H.R. REP. No. 245, 80th Cong., 1st Sess. 21 (1947). *See* 353 U.S. at 452 n.3.

Board."[45] The Court read this language as indicating an implicit congressional understanding that judicial enforcement of arbitration provisions is a prerequisite to a binding no-strike provision. Labor would not surrender its right to strike, unless the agreement included such a judicially enforceable arbitration provision to protect employees during the term of the collective bargaining agreement.[46] To assure industrial stability and peace, the old rule against the specific performance of arbitration agreements had to give way to this legislative policy favoring the enforcement of arbitration provisions in collective bargaining agreements.

B. *The* Steelworkers Trilogy

Three years after *Lincoln Mills*, the Court decided the *Steelworkers Trilogy*. The effect of these three opinions was to send virtually all grievances to arbitration and to bar most judicial review of arbitration awards.

1. Frivolous Grievances

In *United Steelworkers of America v. American Manufacturing Co.*,[47] the Court reversed a lower court's decision that a "frivolous, patently baseless"[48] grievance was not subject to arbitration under the parties' collective bargaining agreement. The case involved an employee who had obtained a worker's compensation settlement from the defendant company on the basis of a permanent 25 percent disability. After the settlement, the union filed a grievance claiming that under the collective bargaining agreement the disabled employee was entitled to be reinstated to his job.[49] In deciding the question of arbitrability, the Supreme Court accepted the lower court's characterization of the grievance as "frivolous, patently baseless."[50] Justice Douglas wrote the majority opinion in all three of the *Steelworkers Trilogy* cases, and in *American Manufacturing* he wrote as a common-law judge interpreting an agreement using ordinary principles of contract interpretation.[51] The relevant clauses of the agreement were recited: "Any disputes,

---

[45] H.R. REP. NO. 510, 80th Cong., 1st Sess. 42 (1947), *quoted in* 353 U.S. at 452. In a dissenting opinion, Justice Frankfurter suggested that in providing for judicial enforcement of collective bargaining agreements, the Congress assumed that the courts would be guided by conventional equitable concepts including the traditional doctrine excluding the specific performance of arbitration clauses. 353 U.S. at 468-69.

[46] The Court explained:

> [T]he legislation . . . expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way . . . . [T]o repeat, the entire tenor of the history indicates that the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement.

353 U.S. at 455.

[47] 363 U.S. 564 (1960).

[48] United Steelworkers of Am. v. American Mfg. Co., 264 F.2d 624, 628 (6th Cir. 1959).

[49] *Id.* at 625. Although the employee had obtained a settlement from the company of $3,548.04 because he was permanently partially disabled, his position for purposes of the grievance proceedings was that he was "able to return to his former duties without danger to himself or to others." *Id.* at 625 (quoting the employee's physician's report).

[50] *See* 363 U.S. at 568.

[51] This ordinary contract interpretation approach is the thesis of Justice Brennan's concurring opinion filed with both *American Mfg.*, 363 U.S. at 569, and *Warrior & Gulf*, 363 U.S. at 585. Justice

misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of the agreement . . . may be submitted to [arbitration]."[52] Thus, "the agreement [was] to submit all grievances to arbitration, not merely those that a court may deem to be meritorious."[53] This result is quite consistent with accepted concepts of contract interpretation. The Court gave "special heed . . . to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."[54] But the interpretation of contracts in context is an important tenet of contract interpretation.[55]

The *American Manufacturing* collective bargaining agreement contained a no-strike clause that did not have any exceptions. Therefore Justice Douglas refused to read an exception into the arbitration clause because "one is the *quid pro quo* for the other."[56] This of course is traditional contract interpretation. As the *Lincoln Mills* Court previously had explained in more detail, a union likely would not agree to a no-strike clause without some sort of effective protection against employer abuses. Binding arbitration supplies that protection.[57] Given this quid pro quo, a determination that the scope of the *American Manufacturing* arbitration was narrower than the no-strike clause would have been inconsistent with a fundamental aspect of the parties' bargain.[58]

American Manufacturing is consistent with common principles of contract interpretation. The rationale is little more than the application of the plain meaning doctrine to a collective bargaining agreement. In a nutshell, the Court simply held that when the parties agree to private arbitration as the proper method for resolving grievances, a frivolous grievance should be dismissed on the merits by an arbitrator rather than by a court. The Court's only explicit reference to public policy was to note that the parties' agreement as interpreted by the Court was consistent with public policy.[59] Thus, *American*

Douglas' opinion for the Court in *American Mfg.* is consistent with and essentially adopts the Brennan thesis. In contrast, we will see that the *Warrior & Gulf* decision is not so easily justified in terms of ordinary contract interpretation. *But see* 363 U.S. at 572-73 (Brennan, J., concurring). Justice Douglas relied upon public policy as the essential justification for his majority opinion in *Warrior & Gulf*. *See infra* notes 79-98 and accompanying text.

[52] 363 U.S. at 565 n.1 (quoting arbitration provision).

[53] *Id.* at 567. *See also id.* at 568.

[54] *Id.* at 567.

[55] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981). At one point, Justice Douglas implicitly criticized the lower courts for their "preoccupation with ordinary contract law." 363 U.S. at 567. This statement should be read as an allusion to the lower courts' failure to give proper consideration to the full context of the collective bargaining agreement.

[56] 363 U.S. at 567. The concept of quid pro quo also appears in Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 407 (1976); William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12, 19 (1974); Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974); Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 382 (1974); Boys Markets v. Clerks Union, 398 U.S. 235, 248 (1970); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 n.4 (1960); and Textile Workers v. Lincoln Mills, 353 U.S. 448, 455 (1957).

[57] *See supra* notes 41-46 and accompanying text.

[58] One might question whether excluding frivolous claims from arbitration does meaningful damage to the bilateral symmetry of the no-strike and arbitration clauses, but Justice Douglas had an answer. "[T]he moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." 363 U.S. at 568. The arbitration of even frivolous claims may have therapeutic value. *Id. See also id.* at 568 n.6 (quoting, Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. MIN. L. INST. 247, 261 (1958)).

[59] The Court quoted a portion of the Labor Management Relations Act: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance

Manufacturing is a simple case of judicial enforcement of the plain and reasonable meaning of the parties' agreement. Public policy played no significant part, except — following the *Lincoln Mills* rationale — to validate the parties' agreement.

2. Limited Judicial Review

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,[60] the Court reversed a lower court's refusal to enforce an arbitrator's decision. The defendant company had fired a group of employees for leaving their jobs, and the union filed a grievance that led to arbitration.[61] The collective bargaining agreement expired after the employees' discharge but before the arbitrator's decision.[62] Nevertheless, the arbitrator ordered reinstatement of the employees with backpay.[63] In enforcement proceedings, the court of appeals partially overturned the arbitrator's award on the grounds that after the expiration of the collective bargaining agreement, the arbitrator lacked authority to order reinstatement and could not award backpay for the period after the expiration.[64]

The Supreme Court began its opinion with a brief allusion to public policy: "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."[65] But the remainder of *Enterprise Wheel* is similar to *American Manufacturing* in that the Court presented its analysis as a matter of contract interpretation rather than as the judicial imposition of public policy. As in *American Manufacturing*, the Court concluded: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[66]

The Court emphasized the special qualifications of arbitrators in settling labor disputes. With their special knowledge of the workplace — a knowledge judges were presumed not to have[67] — arbitrators can supply remedies and fill gaps in collective

disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d) (1982).

[60] 363 U.S. 593 (1960).

[61] *Id.* at 595.

[62] *Id.*

[63] *Id.* The arbitrator thought that only a 10-day suspension without pay was warranted and ordered that the amount of backpay due should be reduced to reflect a 10-day suspension and any pay received from other employment. *Id.* The district court in *Enterprise Wheel* ordered the company to comply with the award. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 168 F. Supp. 308, 313 (S.D. W. Va. 1958). The court of appeals indicated that the matter of adjustments to the backpay award should be remanded to the arbitrator to establish the exact amount of the adjustments. Enterprise Wheel & Car Corp. v. United Steelworkers of Am., 269 F.2d 327, 331-32 (4th Cir. 1959). This aspect of the decision in the court of appeals was affirmed by the Supreme Court. 363 U.S. at 599.

[64] 269 F.2d 327, 331 (4th Cir. 1959).

[65] 363 U.S. at 596.

[66] 363 U.S. at 599.

[67] This notion of arbitrators' special competence runs throughout the *Steelworkers Trilogy*. *See, e.g.*, United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. at 581-82; United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. at 596. Whether arbitrators in fact have this special expertise has been disputed. Bartlett, *Employment Discrimination and Labor Arbitrators: A Question of Competence*, 85 W. VA. L. REV. 873 (1983); Davey, *The Supreme Court and Arbitration: The Musings of an Arbitrator*, 36 NOTRE DAME LAW. 138 (1960); Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 930 (1979)("It is difficult to explain how arbitrators generally can lay claim to special knowledge about industrial relations.").

bargaining agreements that the drafters of the agreement may not have anticipated. As long as the arbitrator's award "draws its essence from the collective bargaining agreement," the award should be enforced.[68] Therefore the Court directed that the arbitrator's decision be enforced.[69]

Enterprise Wheel, like *American Manufacturing*, is a simple case of contract interpretation. The parties had agreed upon arbitration as the appropriate method for settling disputes, and this agreement necessarily implied that there would be only limited judicial review of any resulting awards.[70] Limited judicial review is inherent in the concept of arbitration. Thus, *Enterprise Wheel* merely involves the specific application of the general rule of contract interpretation that, "unless a different intention is manifested . . . technical terms and words of art are given their technical meaning when used in a transaction within their technical field."[71]

3. Presumption of Arbitrability

United Steelworkers of America v. Warrior & Gulf Navigation Co.[72] is the third opinion in the *Trilogy*. In *Warrior & Gulf*, the defendant company had laid off a number of employees while continuing a long-established policy of contracting out a portion of its work.[73] The resulting grievance proceedings culminated in the company's refusal to submit the matter to arbitration.[74] The *Warrior & Gulf* collective bargaining agreement, like the *American Manufacturing* agreement, had a no-strike clause and an arbitration provision.[75] Nevertheless, *American Manufacturing* was not controlling because the *Warrior & Gulf* agreement expressly provided that "matters which are strictly a function of management shall not be subject to arbitration."[76] In contrast, the *American Manufacturing* agreement was applicable to all disputes under the agreement.[77] The lower courts interpreted the *Warrior & Gulf* management exclusion to encompass the issue of contracting out and accordingly held that the matter was not subject to arbitration,[78] but the Supreme Court reversed.

Portions of the Supreme Court's *Warrior & Gulf* opinion suggest the possibility that the Court was merely seeking the meaning of the parties' agreement so that the agreement could be enforced. Other portions of the opinion, however, indicate that the Court sought to impose public policy upon the parties. In fact, the Court's rationale is based primarily upon public policy that virtually disregards the parties' agreement. The

---

[68] 363 U.S. at 597.

[69] *Id.* at 599.

[70] *See* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, reprinted in* NAT'L ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 30TH ANNUAL MEETING 29, at 33-34 (1978); Jones, *"His Own Brand of Industrial Justice": The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. Rev. 881 (1983).

[71] RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981). *See also* 3 CORBIN, CONTRACTS §§ 557-58 (1960); E. FARNSWORTH, CONTRACTS § 7.10 (1982); 4 WILLISTON, CONTRACTS § 618 (3d ed. 1961).

[72] 363 U.S. 574 (1960).

[73] *Id.* at 575.

[74] *Id.* at 577.

[75] *Id.* at 576-77.

[76] *Id.* at 576 (quoting the collective bargaining agreement).

[77] *See* 363 U.S. 564, 565 (1960).

[78] 168 F. Supp. 702, 705-06 (S.D. Ala. 1958), *aff'd*, 269 F.2d 633, 636-37 (5th Cir. 1959) (2-1 decision).

triumph of public policy over the parties' agreement is expressed in the cardinal paragraph of the opinion:

> [A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . . [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.[79]

In theory, parties could avoid arbitration by not including arbitration provisions in their agreements. In practice, however, 95 percent of all collective bargaining agreements include an arbitration provision.[80] This background of private sector practice makes the *Warrior & Gulf* Court's almost irrebutable presumption of arbitrability applicable to virtually all collective bargaining agreements.

In *Warrior & Gulf*, the Court relied upon the legislative policy of promoting industrial stability and peace by fostering labor arbitration.[81] The Court initially used this public policy to preserve the parties' agreement. In some previous cases involving commercial arbitration, the Court had voided arbitration agreements as against public policy.[82] The Court proceeded to explain important functional differences between commercial arbitration and labor arbitration. Parties to a commercial transaction do not assume that their commercial relationship will result in litigation. If they did, they probably would not contract with each other. Commercial disputes almost always are resolved through negotiation, with litigation being reserved for irreconcilable differences. In a commercial setting, resort to litigation is the exception, and arbitration in a commercial setting is viewed as a direct substitute for judicial proceedings.[83] In contrast, the Court pointed out, the "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."[84] Since the alternative to arbitration of labor disputes is industrial strife that has far reaching public impacts, labor arbitration serves a more valuable function than commercial arbitration.[85] Consequently, the Court concluded that in view of the policy favoring labor arbitration, the rationale of the commercial cases was not applicable.[86] This aspect of *Warrior & Gulf* is similar to the *Lincoln Mills* decision and is consistent with the parties' agreement.

The Court went on to note that all the potential problems inherent in the employment relationship simply cannot be anticipated and expressly resolved in a collective bargaining agreement.[87] Therefore, the drafters of collective bargaining agreements

---

[79] 363 U.S. at 582-83 (footnote omitted). *See also* Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467, 479-90 (1964).

[80] *See supra* note 1.

[81] 363 U.S. at 578.

[82] The Court cited Wilko v. Swan, 346 U.S. 427 (1953). 363 U.S. at 578.

[83] 363 U.S. at 578 & 580-81.

[84] *Id.* at 578.

[85] *Id.*

[86] *Id.*

[87] Of course, commercial relationships also are complex, and major commercial agreements are fully as detailed as a mature collective bargaining agreement. But typically there are only two important issues in a commercial agreement: What is to be provided and what is the price? These two

resort to arbitration as a device for dealing with the impossibility of resolving all problems in advance. The parties to a collective bargaining agreement understand that many grievances may raise issues with no clear resolution under the language of the agreement, and the parties expect these grievances to be settled by arbitration.[88]

The labor arbitration process described by the *Warrior & Gulf* Court is quite different from commercial arbitration. The labor arbitrator is expected to be familiar with and to resort to what the Court called "industrial common law," by which the Court meant industry and shop customs and traditions.[89] Under this scheme, the arbitrator is "part of a system of self-government created by and confined to the parties."[90] Furthermore, the Court suggested that the arbitrator might go beyond ordinary contract interpretation and consider "such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished."[91] The role of a labor arbitrator described by the Court is not entirely judicial, and parties to a collective bargaining agreement might not want to vest such authority in a judge.[92]

The special qualities and functions of labor arbitration may provide ample support for distinguishing "the hostility evinced by the courts toward arbitration of commercial agreements,"[93] but the question in *Warrior & Gulf* remained whether the employer's policy of contracting out was subject to arbitration. The Court decided to beg the question by establishing a presumption of arbitrability: "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, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."[94]

Having stated the presumption of arbitrability, the Court rejected the lower courts' analysis because it was not clear that "contracting-out grievances were *necessarily* excepted from the grievance procedure."[95] Furthermore, the Court feared that if the courts adopted anything other than a restrictive construction of the management function exception, "the arbitration clause would be swallowed up by the exception."[96] Of course, this construction, in effect, swallowed up the management function exclusion insofar as that exclusion was intended to prevent arbitration at the outset.[97] The Court concluded its opinion by returning to public policy: "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict."[98]

---

questions can be answered with a good deal of specificity over the course of a few hundred pages, and such specificity is the norm for multi-million dollar agreements.

[88] 363 U.S. at 580-81.

[89] *Id.* at 581-82.

[90] *Id.* at 581 (quoting Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955)).

[91] 363 U.S. at 582.

[92] "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." 363 U.S. at 582.

[93] *Id.* at 578.

[94] *Id.* at 584-85.

[95] *Id.* at 583 (emphasis added). Later in the opinion, the Court noted that the parties could have included in the agreement a provision expressly excluding contracting out but that the parties had not included such a clause. *Id.* at 584-85.

[96] *Id.* at 584.

[97] The arbitrator presumably would give some substantive effect to the management function exclusion.

[98] 363 U.S. at 585.

C. *Reprise*

The *Lincoln Mills* and the three *Trilogy* opinions are not founded upon a single, unifying rationale. *Lincoln Mills*, *American Manufacturing*, and *Enterprise Wheel* can easily be justified as the simple judicial enforcement of an agreement in which the Court merely sought to ascertain the meaning of the parties' agreement. In contrast, the *Warrior & Gulf* opinion deals more with public policy than the agreement between the parties, and the *Warrior & Gulf* Court imposed a rule of construction upon the parties that implemented public policy without regard to the parties' agreement.

In *Lincoln Mills*, *American Manufacturing*, and *Enterprise Wheel*, the Court concentrated on ascertaining the meaning of the parties' agreement. This task is an ordinary matter of contract interpretation, and the agreement — assuming it is not contrary to public policy — is enforced as a matter of course. To be sure, the Court discussed public policy in these cases, but the purpose of that discussion was simply to validate the parties' agreement.[99] The public policy favoring labor arbitration justified the Court's rejection of the longstanding common-law principle making executory agreements to arbitrate unenforceable.[100] In view of the strong congressional policy favoring the arbitration of labor grievances, the Court held that the rationale of these prior cases was inapplicable. Therefore, the parties' agreement to arbitrate could be enforced.

In *Warrior & Gulf*, the Court took a significantly different approach. Public policy played a leading rather than a supporting role. In giving effect to agreements, courts traditionally have distinguished between interpretation and construction. Interpretation describes a court's quest for an agreement's meaning.[101] Judicial construction of an agreement is fundamentally different from a quest for meaning. A judge who construes an agreement decides the legal effect of the agreement, and that legal effect may be quite different from the agreement's intended or even reasonable meaning.[102]

The *Warrior & Gulf* Court did not really purport to give effect to the collective bargaining agreement's meaning.[103] Instead, the case was decided on the basis of a presumption based upon the congressional policy favoring arbitration.[104] The Court's construction of the *Warrior & Gulf* contract was consistent with the general principle of contract law that a meaning favoring the public interest is ordinarily preferred.[105] But this "is a rule of legal effect as well as interpretation, and rests more on considerations of public policy than on the probable intention of the parties."[106] Although some presump-

---

[99] *See supra* notes 35-46 and accompanying text.

[100] *See supra* notes 35, 81-82 and accompanying text. In addition, the Court had on one occasion voided an executory agreement to arbitrate a dispute over matters that were the subject of extensive federal regulation. *See supra* note 82 and accompanying text.

[101] *See* RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981).

[102] *Id.* comment c.

[103] *See* 363 U.S. at 569-73 (Brennan, J., concurring). In contrast, Justice Brennan's concurring opinion in *Warrior & Gulf* was based upon his assessment of the collective bargaining agreement's meaning. *Id.*

[104] "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 disputes." 363 U.S. at 582-83. *See supra* note 79 and accompanying text.

[105] RESTATEMENT (SECOND) OF CONTRACTS § 207 (1981). *See also* 3 CORBIN, CONTRACTS § 550 (1960); E. FARNSWORTH, CONTRACTS § 7.11 (1982); 4 WILLISTON, CONTRACTS § 626 (3d ed. 1961).

[106] RESTATEMENT (SECOND) CONTRACTS § 207 (1981).

tions are interpretive in the sense that they reflect the probable meaning of the parties,[107] the Court stated the presumption as a rule of construction rather than interpretation.[108] The source of the presumption is public policy — not the parties' probable intention.

The public policy behind the *Steelworkers Trilogy* and specifically behind the *Warrior & Gulf* decision is clear. The United States has a long and troubled history of polarized labor relations, and this sad tradition of intense industrial strife frequently has involved outright violence — intentional injury to person and property. Given the polarization of labor and management interests, the right to strike is vital to labor's ability to establish credible positions in negotiations with management.[109] At the same time, however, the actual occurrence of a strike causes extensive damage to the struck employer in terms of diminished production and to the striking employees in terms of lost wages. Nor is a strike simply a two-edged sword that injures only the participants in a labor-management dispute. Strikes also cause extensive damage to the general public.[110] The problem for formulators of national policy is to devise a system that guarantees the right to strike and yet minimizes the actual occurrence of strikes.

The *Warrior & Gulf* Court explained that the policy behind the national labor legislation is "to promote industrial stabilization through the collective bargaining agreement."[111] Stabilizing labor-management relations and avoiding industrial strife wards off untold damage. The Court continued: "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."[112] This use of the arbitral process has been fully endorsed by the Congress as "the desirable method for settlement of grievance disputes,"[113] and the *Warrior & Gulf* presumption was created "to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration."[114]

---

[107] *See, e.g.*, RESTATEMENT (SECOND) CONTRACTS § 202(3)(b) (1981) ("technical terms and words of art are given their technical meaning when used in a transaction within their technical field."); § 202(3)(a) ("where language has a generally prevailing meaning, it is interpreted in accordance with that meaning."); § 202(4) ("any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."). *See also* 3 CORBIN, CONTRACTS §§ 557-58 (1960); 4 WILLISTON, CONTRACTS § 618 (3d ed. 1961). Although these rules are not presumptions in the evidentiary sense, the use of technical terms and the course of performance suggest the presumed intent of the parties.

[108] Arguably, the *Warrior & Gulf* presumption reflects the probable meaning of the parties. If the arbitration clause is ambiguous, the presumption of arbitrability requires the party asserting nonarbitrability to adduce "the most forceful evidence of a purpose to exclude the claim from arbitration." 363 U.S. at 584-85. If this presumption reasonably reflected the intent of the parties at the inception of the agreement, the presumption would be acceptable. Justice Brennan, in his concurring opinion in *Warrior & Gulf*, suggested that the Court's decision could be based upon intent. 363 U.S. at 572. He wrote: "The very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction." *Id.* at 572. *See also* Schnieder Moving & Storage Co. v. Robbins, 104 S. Ct. 1844, 1849 (1984). Suffice it to say that Justice Brennan was not writing for a majority of the Court, and the *Warrior & Gulf* majority opinion did not rely upon Justice Brennan's attenuated analysis.

[109] One of the central provisions of the Labor Management Relations Act expressly guarantees employees the right to strike. 29 U.S.C. § 163 (1982).

[110] *See, e.g., infra* notes 224-26 and accompanying text.

[111] 363 U.S. at 578 (citing Textile Workers v. Lincoln Mills, 353 U.S. 448, 453-54 (1957)).

[112] 363 U.S. at 578.

[113] 29 U.S.C. § 173(d), *quoted in* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 566 (1960).

[114] United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

The source of the *Warrior & Gulf* presumption of arbitrability is quite clear. The rule is based expressly upon congressional policy. Under *Lincoln Mills*, "the courts must fashion [Section 301 law] from the policy of our national labor laws."[115] The *Warrior & Gulf* Court did not purport to make an independent assessment of the desirability of fostering the arbitration of labor disputes.[116] Nor did the Court attempt to ascertain the meaning of the parties' agreement. Instead, the Court merely implemented the "congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration."[117] Arbitration is not inherently desirable. The policy favoring arbitration is simply a means to effect more fundamental policy judgments, and the Supreme Court explained it as such. The fundamental "federal policy is to promote industrial stabilization . . . [and a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."[118] In cases decided since the *Steelworkers Trilogy*, the Court has consistently stated that the *Warrior & Gulf* presumption is a creature of congressionally established policy.[119]

Stated another way, the rationale of *Lincoln Mills*, *American Manufacturing*, and *Enterprise Wheel* is one of simple contract interpretation. Under this rationale, public policy plays only a supporting role. While prior common-law precedent indicated that executory agreements to arbitrate were not enforceable,[120] the strong public policy favoring arbitration was held to render the theory of the older decisions inappropriate. Beyond providing a rationale for judicial enforcement, however, public policy played no role whatsoever in interpreting or construing the agreement. In contrast, under the reasoning of *Warrior & Gulf*, the public policy of favoring arbitration becomes a source of legal obligation. The presumption of arbitrability is used to construe the actual scope of the arbitration agreement.

The difference between the two rationales found in the *Steelworkers Trilogy* suggests that the *Trilogy* should not be adopted in toto when public sector collective bargaining agreements are involved. *American Manufacturing* is easily justified as a simple case of judicial enforcement of the plain and reasonable meaning of the parties' agreement. The arbitration provision encompassed even frivolous claims. There can be little objection to adopting the *American Manufacturing* holding as a rule of decision for the interpretation of public sector agreements. If the parties to a public sector agreement have authority to place an arbitration clause in their agreement, the courts should give effect to the plain

---

[115] 353 U.S. at 456.

[116] Of course, a federal court must exercise independent judgment in shaping Section 301 law when there is no pertinent congressional guidance. Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 457 (1957) ("The range of judicial inventiveness will be determined by the nature of the problem."). Nevertheless, "*Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this Federal common law must be fashion[ed] from the policy of our national labor laws." Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, 417 U.S. 249, 255 (1974).

[117] 363 U.S. at 582.

[118] *Id.* at 578 (footnotes and citation omitted).

[119] *See* Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 213 (1962). The *Sinclair* Court explained: "[W]e think that [*Warrior & Gulf*] was founded not upon the policy predilections of this Court but upon what Congress said and did when it enacted § 301." *Id. Accord* Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 377 (1974) ("The Federal policy favoring arbitration of labor disputes is firmly grounded in congressional command."). *See also* Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 255 (1974) (quoted *supra* note 116).

[120] *See supra* note 35 and accompanying text.

and reasonable meaning of the parties' agreement. Similarly, since limited judicial review is inherent in the concept of arbitration, the *Enterprise Wheel* rule of limited review also simply reflects the parties' agreement. When the parties agree to arbitration, they agree to limited judicial review. Therefore *Enterprise Wheel* seems to be an appropriate rule of interpretation for public sector agreements.

The *Warrior & Gulf* decision — based as it is upon public policy rather than the agreement of the parties — is not as properly transferable to the public sector. A court that mechanically applies the presumption of arbitrability to the public sector is in effect imposing upon federal, state, or local governments its own independent judicial judgment regarding the desirability of arbitration.

II. THE *STEELWORKERS TRILOGY* AND TVA

The federal courts have relied upon the *Steelworkers Trilogy* in deciding cases involving TVA collective bargaining agreements.[121] Before considering these decisions, the historical context of TVA collective bargaining should be reviewed, and the source of law applicable to TVA collective bargaining agreements should be considered.

A. *The Historical and Legal Context of TVA Collective Bargaining*

In 1933 President Roosevelt requested legislation to create the Tennessee Valley Authority to develop the natural resources of the Tennessee River drainage basin and adjoining territory.[122] The President recognized that the proposed agency would require more flexibility and independence than usually is granted to federal agencies and therefore urged that TVA be created as "a corporation clothed with the power of government but possessed of the flexibility and initiative of private enterprise."[123] In a little over a month, the Congress responded by enacting the Tennessee Valley Authority Act of 1933.[124] Echoing the President's request, the Managers for the House of the TVA legislation explained in a statement added to the conference report: "[W]e intend that the corporation shall have much of the essential freedom and elasticity of a private business corporation."[125]

---

[121] Salary Policy Panel v. Tennessee Valley Authority, 731 F.2d 325, 331-32, (6th Cir. 1984); Tennessee Valley Trades and Labor Council v. Tennessee Valley Authority, 488 F. Supp. 146 (E.D. Tenn. 1980), *app. dismissed as moot*, 672 F.2d 918 (6th Cir. 1982); Salary Policy Employee Panel v. Tennessee Valley Authority, 439 F. Supp. 1134 (E.D. Tenn. 1977).

[122] A number of books have been written about TVA. *See* G. CLAPP, THE TVA: AN APPROACH TO THE DEVELOPMENT OF A REGION (1955); H. FINER, THE T.V.A. LESSONS FOR INTERNATIONAL APPLICATION (1944); C. HODGE, THE TENNESSEE VALLEY AUTHORITY: A NATIONAL EXPERIMENT IN REGIONALISM (1938); M. OWEN, THE TENNESSEE VALLEY AUTHORITY (1973) (The author was TVA's Washington, D.C. representative for a number of years.); C. PRITCHETT, THE TENNESSEE VALLEY AUTHORITY: A STUDY IN PUBLIC ADMINISTRATION (1943). For a study of TVA collective bargaining, see H. CASE, PERSONNEL POLICY IN A PUBLIC AGENCY: THE TVA EXPERIENCE (1955); Kampelman, *TVA Labor Relations: A Laboratory in Democratic Human Relations*, 30 Minn. L. Rev. 332 (1946) [hereinafter cited as Kampelman].

During the two Republican Administrations preceeding President Roosevelt, two attempts to create the TVA were vetoed. The story of these earlier bills is recounted in J. KING, THE CONSERVATION FIGHT chs. 16, 17 & 21 (1959) [hereinafter cited as THE CONSERVATION FIGHT].

[123] Message from President Roosevelt to the Congress, 77 CONG. REC. 1423 (1933). *See also* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591, 2599 (1983).

[124] 16 U.S.C. §§ 831-31dd (1982).

[125] H.R. REP. No. 130, 73d Cong., 1st Sess. 19 (1933).

The TVA Act, as originally enacted, expressly authorized the construction of the "Cove Creek Dam" in Tennessee.[126] The Cove Creek Dam became Norris Dam, TVA's first major construction project.[127] In a period of twenty years TVA built a system of twenty dams on the Tennessee River and its tributaries. These dams harnessed the river for flood control, navigation, and the production of electricity.[128]

The construction of Norris Dam has influenced TVA collective bargaining more than any other factor.[129] Ordinarily a government agency would have used private contractors to build Norris Dam, but instead the Corporation's Board of Directors decided to build the dam using a TVA construction force.[130] TVA almost immediately began hiring substantial numbers of laborers.[131] Thus from TVA's inception the Corporation employed large numbers of laborers whose work traditionally has been associated with private enterprise and who were the natural object of organized labor's attentions. It would have been strange indeed if TVA, which was one of the showpieces of President Roosevelt's New Deal, had taken an anti-union position and refused to bargain collectively with its construction employees.[132] TVA immediately opened communications with or-

---

[126] Act of May 18, ch. 32, § 17, 48 Stat. 67, *repealed by* Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8(a), 80 Stat. 648. A month after the TVA Act's passage, President Roosevelt placed construction of the dam "in the hands of Arthur E. Morgan [who was the Chairman of TVA's Board of Directors]". Exec. Order No. 6162 (June 8, 1933). This peculiar action was dictated by Section 17 of the TVA Act (*see supra*) which authorized the Secretary of War or the Secretary of the Interior to construct the dam. A proviso within this section authorized the President as an alternative to place control of the dam's construction in the hands of an engineer selected by the President. This proviso had been added to the Act at A.E. Morgan's suggestion. *See* T. McCRAW, MORGAN VS. LILIENTHAL: THE FEUD WITH THE TVA 24 & 116 n.1 (1970).

[127] *See* C. PRITCHETT, THE TENNESSEE VALLEY AUTHORITY: A STUDY IN PUBLIC ADMINISTRATION 34 (1943).

[128] *See generally* G. CLAPP, THE TVA: AN APPROACH TO THE DEVELOPMENT OF A REGION ch. II (1955).

[129] *See infra* notes 130-31 and accompanying text.

[130] Gordon Clapp, who was TVA's Director of Personnel in the 30's and who later became TVA's General Manager and Chairman of the Board of Directors, has said that this decision was made to save time and to exercise better cost control. G. CLAPP, THE TVA: AN APPROACH TO THE DEVELOPMENT OF A REGION at 29-30 (1955). *See also* M. OWEN, THE TENNESSEE VALLEY AUTHORITY 22 (1973).

[131] Within a year after its birth TVA had 9,173 employees. Kampelman, *supra* note 122, at 336. To accomplish the massive job of effectively harnassing the Tennessee River, TVA had to hire even more workers. In 1941, when TVA was beginning its national defense building program, the corporation had 22,506 employees of which 15,915 were trades and labor. C. PRITCHETT, THE TENNESSEE VALLEY AUTHORITY 270 (1943).

[132] In 1941 David E. Lilienthal (then vice-chairman and soon to become chairman of TVA's Board of Directors) and Robert H. Marquis (a TVA attorney who subsequently became TVA's General Counsel) wrote:

> Of particular importance is the ability of the corporation to establish such relationships with organized labor as will permit genuine collective bargaining . . . . This type of collective bargaining is precisely what national legislative policy has sought to encourage in the case of private enterprise; consistency would seem to require, therefore, that the Government itself adhere to the policy when it engages in business activities on its own account.

Lilienthal & Marquis, *The Conduct of Business Enterprises by the Federal Government*, 54 HARV. L. REV. 545, 566 n.70 (1941). For a similar statement attributed to Lilienthal, see S. SPERO, GOVERNMENT AS EMPLOYER 347-48 (1948).

Although President Roosevelt was a friend of organized labor, he was on record as being less

ganized labor and individual employees. In 1935 the TVA Board of Directors approved an Employee Relationship Policy[133] that was based upon extensive discussions within management and between management and organized labor.[134]

Although the Employee Relationship Policy was very similar to a collective bargaining agreement and was based upon extensive discussions with labor, the Policy was a unilateral statement by management and not an agreement. The Policy did provide, however, that TVA employees had a right to organize and to designate representatives "[f]or the purposes of collective bargaining and employee-management cooperation."[135] Furthermore, there would be no discrimination against representatives of employees and employees who joined unions.[136] The Policy established terms and conditions of employment, including hours and holidays,[137] overtime provisions,[138] and hiring and firing policies.[139] In addition, the Policy established a grievance procedure culminating in a final adjustment by the TVA Director of Personnel.[140]

In 1940 TVA entered into actual collective bargaining agreements covering its trades and labor employees.[141] Ten years later, TVA entered into a collective bargaining agreement covering most of its white collar employees.[142] Instead of bargaining individually

---

than enthusiastic about collective bargaining with public employees. In a famous letter written in 1937 to the President of the National Federation of Federal Employees, he explained:

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government organizations.

Letter to Luther Stewart from President Roosevelt (Aug. 16, 1937), *reprinted in* 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 235 (S. Rosenman ed. 1941). Nevertheless, at the dedication of TVA's Chickamauga Dam just three years after writing this letter, President Roosevelt praised the "splendid new agreement between organized labor and the TVA" and noted that "collective bargaining and efficiency have proceeded hand in hand." 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, at 360 (S. Rosenman ed. 1941). Since the dedication was on Labor Day, President Roosevelt, the consummate politician, may have been more interested in slapping Labor on the back than in expressing a change of heart regarding public sector unionism.

[133] This Employee Relationship Policy is reprinted in TENNESSEE VALLEY AUTHORITY, ANNUAL REPORT FOR FY 1936, 304-07 (1936) and in Appendix III of H. CASE, PERSONNEL POLICY IN A PUBLIC AGENCY 130-36 (1955) [hereinafter cited as Employee Relationship Policy].

[134] *See* Kampelman, *supra* note 122, at 340; G. CLAPP, THE TVA: AN APPROACH TO THE DEVELOPMENT OF A REGION 34-35 (1955); TENNESSEE VALLEY AUTHORITY, ANNUAL REPORT FOR FY 1936, 65-66 (1936).

[135] Employee Relationship Policy ¶ 3, *supra* note 133, at 131. The Policy further provided procedures for representation elections. *Id.* ¶ 6, at 131-32.

[136] *Id.* ¶ 5, at 131.

[137] *Id.* ¶ 9, at 132-33.

[138] *Id.* ¶ 10, at 133.

[139] *Id.* ¶¶ 13-16, at 133-34.

[140] *Id.* ¶ 7, at 132.

[141] GENERAL AGREEMENT BETWEEN THE TENNESSEE VALLEY AUTHORITY AND THE TENNESSEE VALLEY TRADES AND LABOR COUNCIL COVERING CONSTRUCTION EMPLOYMENT (Aug. 6, 1940); GENERAL AGREEMENT BETWEEN THE TENNESSEE VALLEY AUTHORITY AND THE TENNESSEE VALLEY TRADES AND LABOR COUNCIL COVERING ANNUAL AND HOURLY OPERATING AND MAINTENANCE EMPLOYMENT (Aug. 6, 1940).

[142] ARTICLES OF AGREEMENT BETWEEN THE TENNESSEE VALLEY AUTHORITY AND SALARY POLICY EMPLOYEE PANEL (Dec. 5, 1950). In 1943, TVA had recognized the Salary Policy Employee Panel as the bargaining agent for salary policy employees. *See* R. AVERY, EXPERIMENT IN MANAGEMENT

with different unions, TVA always has dealt with coalitions of unions.[143] TVA's first agreements covered trades and labor employees and were with an organization known as the Tennessee Valley Trades and Labor Council, whose membership consists of various trades and labor unions.[144] The subsequent agreement covering white collar employees was with the Salary Policy Employee Panel whose membership consists of various white collar unions and professional associations.[145]

TVA's efforts in the field of labor relations have generally been praised.[146] Over the years, TVA has developed a healthy and mature system of labor-management relations based on collective bargaining.[147] Nevertheless, TVA, like any employer, has a history of labor disputes.[148] Recognizing the inevitability of such disputes and grievances, TVA and

---

PERSONNEL DECENTRALIZATION IN THE TENNESSEE VALLEY AUTHORITY 88-93 (1954). TVA has relied upon section 3 of the TVA Act, 16 U.S.C. § 831 (1982), as primary authority for entering into collective bargaining agreements. *See* Van Mol, *The TVA Experience, reprinted in* COLLECTIVE BARGAINING IN THE PUBLIC SERVICE: THEORY AND PRACTICE 85-94 (1967) (Mr. Van Mol was TVA's General Manager.). *See also Federal Labor-Management Relations and Impasses Procedures, Hearings before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 97th Cong., 2d Sess. 85 & 97-98 (1983) (Oral and Written Statements of Herbert S. Sanger, Jr., TVA's General Counsel).

Of course, section 3 is not the sole authority in the TVA Act for entering into collective bargaining agreements. *See* 16 U.S.C. § 831(b) (1982) (authority to enter into "contracts, agreements, and arrangements"); 16 U.S.C. § 831c(d) (1982) ("the Corporation may make contracts, as herein authorized"); 16 U.S.C. 831c(g) (1982) (granting "necessary or appropriate" powers); 16 U.S.C. § 831dd (1982) ("Act shall be liberally construed").

[143] *See* Brookshire, *Bargaining Structure in the Public Sector: The TVA Model*, 5 J. COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR 257 (1976). *See also* Coleman v. Tennessee Valley Trades & Labor Council, 396 F. Supp. 671 (E.D. Tenn. 1975).

[144] *See supra* note 141.

[145] *See supra* note 142.

[146] *See* M. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE ch. XV (1976); Thompson, *Collective Bargaining in the Public Sector — The TVA Experience and Its Implications for Other Government Agencies*, 17 LAB. L. J. 89 (1966); R. AVERY, EXPERIMENT IN MANAGEMENT DECENTRALIZATION IN THE TENNESSEE VALLEY AUTHORITY (1954).

[147] In 1949, TVA's efforts were studied by a joint congressional committee pursuant to S. Con. Res. 10, 81st Cong., 1st Sess. (1949). The committee concluded, "The general agreement between TVA and the Tennessee Valley Trades and Labor Council has been in operation since 1940. It has operated successfully." JOINT COMM. ON LABOR-MANAGEMENT RELATIONS, LABOR-MANAGEMENT RELATIONS IN TVA, S. REP. NO. 372, 81st Cong., 1st Sess. 63 (1949) [hereinafter cited as TVA LABOR-MANAGEMENT RELATIONS]. In 1976, TVA's exempt status under the President's Federal Service Labor Management Relations Executive Order (*see supra* notes 17-18 and accompanying text) was confirmed. Exec. Order No. 1190, 41 Fed. Reg. 4807 (Feb. 2, 1976). The Federal Labor Relations Council explained that this action had been requested by both TVA and the TVA's employee representatives who had "pointed out that TVA and the labor organizations representing TVA employees have developed a unique, successful and productive bilateral labor-management relations program suited to their particular needs and have experienced nearly four decades of effective collective bargaining under that program." FEDERAL LABOR RELATIONS COUNCIL, INFORMATION ANNOUNCEMENT 1-2 (Feb. 2, 1976).

[148] For example, the joint congressional committee noted in its report on TVA labor-management relations that TVA had a number of minor work stoppages (TVA LABOR-MANAGMENT RELATIONS, *supra* note 147, at 27-29) but that "the record as far as work stoppages are concerned is an excellent one." *Id.* at 29. In 1982 TVA indicated that some 187 strikes and work stoppages had occurred between 1939 and 1982. The length of these incidents varied from 30 minutes to 50 days, and the number of employees involved ranged from 1 to 1,933. *Federal Labor-Management Relations and Impasses Procedures, Hearings before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 97th Cong., 2d Sess. 108-20 (1982).

organized labor have included in the agreements grievance provisions providing for arbitration.[149]

B. *The Law Applicable to TVA Collective Bargaining Agreements*

Until the enactment of the Federal Service Labor Management Relations Act,[150] there was no comprehensive national labor legislation establishing a system of collective bargaining in the public sector. Each piece of national legislation either implicitly or expressly exempted the public sector.[151]

The history of national labor legislation begins with the Norris-LaGuardia Act,[152] which restricts in general terms the jurisdiction of the federal courts to issue injunctions in cases arising out of labor disputes.[153] Because Congress, in enacting Norris-LaGuardia, sought to restrict government intervention in labor disputes, the statute did not contain an express exemption for the federal government.[154] In *United States v. United Mine Workers of America*,[155] the Supreme Court held that Norris-LaGuardia did not apply to a dispute involving striking miners deemed to be government employees.[156] The Court justified its decision primarily[157] by reference to a canon of statutory interpretation that general statutory terms not expressly applicable to the sovereign should not be construed as placing limitations upon the sovereign.[158]

---

[149] *See, e.g., Federal Labor-Management Relations and Impasses Procedures, Hearings before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 97th Cong., 2d Sess. 86 (1982) (testimony of Herbert S. Sanger, Jr., TVA General Counsel) In an early report, TVA "realized that grievances and disputes are not uncommon whenever people are brought together in a large organization, and that the presence of friction, tensions, misunderstandings, and real or imagined injustices is a serious threat to good morale and efficient workmanship." TVA ANNUAL REPORT FOR FY 1936, 66 (1936).

[150] *See supra* note 19 and accompanying text.

[151] *See infra* notes 152-66.

[152] 29 U.S.C. § 101-15 (1982).

[153] The statute also declared "yellow dog" contracts to be contrary to public policy and therefore unenforceable. 29 U.S.C. § 103 (1982). *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 205-28 (1963); A. GOLDMAN, THE SUPREME COURT AND LABOR-MANAGEMENT RELATIONS LAW 22-40 (1976).

[154] *See* United States v. United Mine Workers of America, 330 U.S. 258, 277-78 (1947). *See also id.* at 315-19 (Frankfurter, J., dissenting); *Id.* at 338 (Murphy, J., dissenting).

During the famous nineteenth century strike against the Pullman Company, the federal government had obtained an injunction restraining Eugene V. Debs and others from conspiring and combining to interfere with specific railway companies. *See* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 17-20 (1963); 2 P. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES ch. 18 (1955). The Supreme Court subsequently affirmed a judgment for contempt against Mr. Debs. *In re* Debs, 158 U.S. 564 (1895). This cause celebre was not a single isolated case of federal intervention. *See* United States v. United Mine Workers of America, 330 U.S. 258, 315 n.3 (1947) (Frankfurter, J., concurring) (citing additional instances of labor injunctions issued at the request of the federal government).

[155] 330 U.S. 258 (1947).

[156] *Id.* at 270. Pursuant to Executive Order No. 9728, 11 Fed. Reg. 5593 (May 21, 1946), the government had taken possession of and was operating a major portion of the nation's coal mines. 330 U.S. at 262 n.1.

[157] The Court also relied upon inferences drawn from the wording of the statute, 330 U.S. at 273-76, and some isolated comments taken from the congressional debates. *Id.* at 277-80. In a concurring opinion, Justice Frankfurter demonstrated that neither the inferences nor the random floor statements were entitled to any conclusive weight. *Id.* at 319-21 , 316-19 (Frankfurter, J., concurring).

[158] 330 U.S. at 272-73. Many state courts have used this same rationale in holding that state

In 1935, the Wagner Act[159] was enacted to provide a general regulatory scheme for private sector labor-management relations. The Act, however, expressly exempted "the United States, or any state or political subdivision thereof."[160] This express exemption was also included in the Taft-Hartley Act.[161] More recently, Congress enacted the Federal Service Labor Management Relations Act to provide a comprehensive system of labor relations for the federal government modeled loosely after the Labor Management Relations Act.[162] The Federal Service Act, however, does not apply to state and local governments,[163] the Congress,[164] TVA,[165] and a few other specified federal agencies.[166]

TVA traditionally has taken the position that the Tennessee Valley Authority Act is the preeminent source of rules of decision applicable to TVA collective bargaining issues. The TVA Act essentially is a corporate charter that creates the Tennessee Valley Authority as a government-owned corporation. Consistent with the corporate model, the shareholders elect a board of directors[167] that in turn "direct[s] the exercise of all the powers of

---

versions of the Norris-LaGuardia Act are not applicable to suits for an injunction against state and local government employees. *See, e.g.*, Communication Workers of America v. Arizona Bd. of Regents, 17 Ariz. App. 398, 498 P.2d 472 (1972); Anderson Federation of Teachers v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969); Wichita Public Schools Employees Union v. Smith, 194 Kan. 2, 397 P.2d 357 (1964); Hansen v. Commonwealth, 344 Mass. 214, 181 N.E.2d 843 (N.D. 1966); Delaware River & Bay Auth. v. Masters, Gates & Pilots, 45 N.J. 138, 211 A.2d 789 (1965); City of Albuquerque v. Campers, 86 N.M. 488, 525 P.2d 848 (1974); Rankin v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.2d 625 (1968); City of Minot v. General Givers and Helpers, 142 N.W.2d 612 (N.D. 1966); City of Pawtucket v. Pawtucket Teachers' Alliance, 87 R.I. 364, 141 A.2d 624 (1958); Port of Seattle v. ILMV, 52 Wash. 2d 317, 324 P.2d 1099 (1958). The Illinois and Minnesota supreme courts initially decided that their state anti-injunction statutes applied to governmental labor disputes, but both courts have overruled their decisions on this point. *See* H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS IN THE PUBLIC SECTOR 540-41 (2d ed. 1979).

[159] National Labor Relations Act of 1935, ch. 372, §§ 1-19, 49 Stat. 449 (1935) (codified as amended in 29 U.S.C. §§ 151-169 (1982).

[160] *Id.* § 2(3). The sparse history and background of the public sector exemption are ably developed in Comment, *The National Labor Relations Board's Jurisdiction over Employers Contracting with Exempt Public Entities*, 62 B.U.L. REV. 1197 (1982).

[161] Labor Management Relations Act of 1947, Pub. L. No. 101, 61 Stat. 136 (1947). The Wagner Act's public sector exemption was amended to add an express exemption for "any wholly owned Government corporation, or any Federal Reserve Bank." *Id.* § 101.

[162] 5 U.S.C. §§ 7101-35 (1982). *See generally* Comment, *Federal Sector Arbitration Under the Civil Service Reform Act of 1978*, 17 SAN DIEGO L. REV. 857 (1980).

[163] Although there is no exemption, as such, for state and local governments, the first section of the Act provides: "It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government." 5 U.S.C. § 7101(b) (1982).

[164] The act applies generally to agencies and agency employees. The term, agency, is defined to mean "an Executive Agency." 5 U.S.C. § 7103(a)(3) (1982).

[165] *Id.* § 7103(a)(3)(E).

[166] The General Accounting Office is exempt. 5 U.S.C. § 7103(a)(3)(A) (1982). This exemption is consistent with the general exemption of the legislative branch. *See supra* note 164 and accompanying text. Three civilian agencies charged with national defense functions are exempt. *Id.* § 7103(a)(3)(B)(Federal Bureau of Investigation); § 7103(a)(3)(C)(Central Intelligence Agency); and § 7103(a)(3)(D) (National Security Agency). Finally, two entities with important functions in administering the Civil Service Reform Act also are exempt. *Id.* § 7103(a)(3)(F)(Federal Labor Relations Authority); § 7103(a)(3)(G)(Federal Service Impasses Panel). Another portion of the Act exempts the armed forces by making the Act inapplicable to "a member of the uniformed services." *Id.* § 7103 (a)(2)(ii).

[167] The United States government is the sole shareholder of the corporation. *See generally* Jackson v. Tennessee Valley Authority, 462 F. Supp. 45 (M.D. Tenn. 1978), *aff'd*, 595 F.2d 1120 (6th

the Corporation."[168]

The TVA Act does not specify a detailed scheme of employer-employee relations comparable to the Labor Management Relations Act or the Federal Service Labor-Management Relations Act. Nevertheless, section 3 of the Act exempts TVA from "the provisions of the Civil Service Laws" and authorizes TVA's Board of Directors to hire employees, fix compensation, define duties and "provide a system of organization to fix responsibility and promote efficiency."[169] The exception provided by section 3 of the Act began the long-standing congressional policy of exempting TVA from general labor legislation. In 1940, for example, the Ramspeak Act[170] authorized the President to expand the civil service to include exempt agencies but provided a specific exclusion for TVA.[171] From this perspective, the exemption of TVA from the provisions of the Federal Service Labor Management Relations Act is simply a restatement of the federal policy previously established by the TVA Act.

Since federal statutes do not provide any clear rules applicable to TVA collective bargaining agreements, the agreements must be governed either by state law or federal common law. Because TVA is part of the federal government, one instinctively assumes that the suggested applicability of state law can be little more than a straw man.[172] Notwithstanding the Court's pronouncement in *Erie Railway Co. v. Tompkins*[173] that "[t]here is no Federal general common law,"[174] many specific and important legal issues continue to be resolved by reference to federal common law.[175] In particular, issues involving the proprietary interest[176] of the United States have been determined by reference to federal

---

Cir. 1979). Individuals are "elected" to the Board of Directors by Presidential appointment, "by and with the advice and consent of the Senate." 16 U.S.C. § 831(a) (1982).

[168] 16 U.S.C. § 831a(g) (1982).

[169] Section 3 provides, in pertinent part:

> The board shall without regard to the provisions of Civil Service laws applicable to officers and employees of the United States appoint such . . . employees . . . as are necessary for the transaction of its business, fix their compensation, define their duties, and provide a system of organization to fix responsiblity and promote efficiency.

16 U.S.C. § 831b (1982). TVA employees are federal employees. Tennessee Valley Authority v. Kinzer, 142 F.2d 833, 836 (6th Cir. 1944); Posey v. Tennessee Valley Authority, 93 F.2d 726, 727 (5th Cir. 1937).

[170] Act of Nov. 26, 1940, ch. 919, Title I, 54 Stat. 1211.

[171] *Id.* § 1. In 1947, Senator McKellar introduced a bill to include TVA in the civil service (S.1277, 80th Cong., 1st Sess. (1947)), but the measure died in committee. *See* H. CASE, PERSONNEL POLICY IN A PUBLIC AGENCY: THE TVA EXPERIENCE 106-07 (1955).

[172] In Salary Policy Employee Panel v. Tennessee Valley Authority, 731 F.2d 325, 331 (6th Cir. 1984), the court assumed that federal common law was applicable.

[173] 304 U.S. 64 (1938).

[174] *Id.* at 78.

[175] *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 756-832 (2d ed. 1973)[hereinafter cited as HART & WECHSLER 2d]; Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Michkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

[176] In this context, the phrase "proprietary interest" is not used to distinguish proprietary from governmental functions. The concept of issues involving the government's proprietary interest

law[177] — including federal common law.[178] In a number of cases the Supreme Court has held that federal common law rather than state law should control the federal government's relationship with its employees.[179] Since private sector employers and employees receive the benefit of a uniform federal common law of collective bargaining,[180] it would be absurd to deny this benefit to the federal government itself.

C. *The Presumption of Arbitrability and TVA Collective Bargaining Agreements*

The courts have relied specifically upon the *Warrior & Gulf* presumption of arbitrability in construing TVA collective bargaining agreements,[181] but this reliance stems from an uncritical acceptance of the *Trilogy* as national labor policy applicable to public entities like TVA. The issue first arose in *Tennessee Valley Trades and Labor Council v. Tennessee Valley Authority*,[182] involving TVA's unilateral reclassification of employees from labor to management. The Council objected to the reclassification, arguing that it was contrary to the TVA collective bargaining agreement.[183] The Council therefore sought to compel arbitration under the agreement's grievance provisions.[184] The court deemed the grievance provision to be ambiguous[185] and held that the *Warrior & Gulf* presumption was not overcome. Since TVA presented neither "forceful evidence of a purpose to exclude the claim from arbitration"[186] nor "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,"[187] the matter was sent to arbitration.[188] The court made no effort whatsoever to determine whether the parties actually had agreed to submit the matter to arbitration.

The same approach was adopted in *Salary Policy Panel v. Tennessee Valley Authority*.[189] The unions sought to compel arbitration of a number of grievances, and the *Warrior & Gulf* presumption again played a decisive role. The court observed that arbitration in the

---

encompasses all situations in which a rule of decision affects the government's interests as an entity in contrast to rules applicable to disputes (frequently between private parties) in which the federal government's interests as an entity are not involved.

[177] *But see* United States v. Standard Oil Co., 232 U.S. 301, 308-09 (1947)(suggesting "The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim.").

[178] *See generally* the admirable discussion in Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967). *See also* HART & WECHSLER 2d, *supra* note 175, at 770-76.

[179] Howard v. Lyons, 360 U.S. 593 (1959); United States v. Standard Oil Co., 332 U.S. 301 (1947). *See also* United States v. Gilman, 347 U.S. 507 (1954).

[180] *See supra* notes 33-34 and accompanying text.

[181] Salary Policy Employee Panel v. Tennessee Valley Authority, 731 F.2d 325, 331, 115 L.R.R.M. 3550, 3555 (6th Cir. 1984); Tennessee Valley Trades and Labor Council v. Tennessee Valley Authority, 488 F. Supp. 146, 153 (E.D. Tenn. 1980), *app. dismissed as moot*, 672 F.2d 918 (6th Cir. 1981).

[182] 488 F. Supp. 146 (E.D. Tenn. 1980), *app. dismissed as moot*, 672 F.2d 918 (6th Cir. 1982).

[183] 488 F. Supp. at 152.

[184] *Id.*

[185] *Id.* at 155.

[186] *Id.* (quoting United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 585 (1960)).

[187] 488 F. Supp. at 155 (quoting *Warrior & Gulf*, 363 U.S. at 582).

[188] *Id.*

[189] 731 F.2d 325 (6th Cir. 1984).

private and public sectors serves almost identical functions. In both sectors the process enables labor disputes to be resolved quickly, informally, and finally by experienced neutral third parties.[190] "In the public sector, arbitration helps to preserve industrial peace by giving employees some recourse when a dispute arises."[191] Once again the court refused to consider whether the parties actually had agreed to submit the matter to arbitration.[192] The court stated:

> Our task, therefore, is to examine the collective bargaining agreement to determine whether the parties have clearly agreed to exclude these types of labor disputes from arbitration. If there is no ambiguity in the agreement, then the court must adhere to the intent of the parties. If examination reveals ambiguity, however, then those ambiguities must be resolved in favor of arbitration.[193]

The rationale of this decision and the *Tennessee Valley Trades and Labor Council* decision improperly thrusts federal judges into a policy making role regarding the government's relations with its employees.

1. *United Mine Workers* Revisited

The *Warrior & Gulf* presumption of arbitrability requires that cases be sent to arbitration over the employer's objection and essentially without regard to the apparent meaning of the pertinent collective bargaining agreement.[194] Given the legislative policy of the Labor Management Relations Act, this restriction on a private employer's right to a judicial forum is appropriate. But to apply this private sector presumption to public sector agreements seems inconsistent with the rationale of *United States v. United Mine Workers*[195] that "[a] general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect."[196] Since this canon of construction was developed in the context of cases having nothing to do with labor injunctions,[197] there is no reason to assume that it is limited to labor injunction cases.[198]

---

[190] *Id.* at 330-31. The court also noted that adopting private sector labor law principles enables a court to avoid "develop[ing] a new body of law applicable to collective bargaining agreements involving government agencies." *Id.* at 330.

[191] *Id.* at 331.

[192] The district court in *Salary Policy Panel* also based its decision upon the presumption of arbitrability. Salary Policy Employee Panel v. Tennessee Valley Authority, 548 F. Supp. 268, 269 (E.D. Tenn. 1982). There was evidence, however, that "TVA and the Panel have customarily submitted such questions of grievability to arbitration in the past." *Id.* at 269.

[193] 731 F.2d at 332 (citations omitted).

[194] *See supra* notes 72-98, 101-18 and accompanying text. If TVA had no objection to submitting a particular dispute to arbitration, there would be no dispute. The matter would be submitted to arbitration.

[195] 330 U.S. 258 (1947).

[196] United States v. Wittek, 337 U.S. 246, 358-59 (1949). *Accord* Guarantee Co. v. Title Guaranty Co., 224 U.S. 152, 155-56 (1912); United States v. Herron, 20 Wall. 251, 255-56 (1873). *See also* Hancock v. Train, 426 U.S. 167, 178-79 (1976). *But see* HART & WECHSLER 2d, *supra* note 175, at 1324-25.

[197] *See* cases cited *supra* note 196.

[198] A number of state courts have relied upon the *United Mine Workers* rationale. In Wichita Public Schools Employees Union v. Smith, 194 Kan. 2, 397 P.2d 357 (1964), the plaintiff relied upon a general state collective bargaining statute in seeking to require the defendant city to conduct elections to determine bargaining units. The court, however, refused to construe the general

The *United Mine Workers* rationale merely suggests[199] the validity of the fundamental idea that the judicial branch should be reluctant in the absence of legislative approval to change the government's rights and duties. If generic words in an otherwise silent act of Congress are deemed not to impose restrictions upon the government, including TVA,[200] *a fortiori* the Labor Management Relations Act's express exclusion of "any wholly owned government corporation" from the definition of employer would seem to preclude the imposition upon TVA of principles expressly based upon the policy of that Act. This self-evident analysis barely needs stating, but the adoption of the Labor Management Relations Act and its judicial gloss as federal common law applicable to TVA would bring to pass the exact result that the Congress expressly decided to avoid. To insist that the restrictions are imposed as a matter of common law rather than legislation seems little more than a rhetorical slight of hand when the "common law" is an adoption of principles expressly based on statutory law.

2. The Judge as Lawmaker

No one disputes the propriety — indeed the necessity — of judicial lawmaking. The *Lincoln Mills* Court explained that the substantive law in suits to enforce private sector collective bargaining agreements is:

> [F]ederal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will

---

language of the state statute to include governmental language entities within the definition of employer. *Accord* Electric Workers v. Robinson, 91 Idaho 445, 423 P.2d 999 (1967); Keeble v. City of Alcoa, 204 Tenn. 286, 319 S.W.2d 249 (1958); Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P.2d 741 (1946); Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194 (1946); C.I.O. v. Dallas, 198 S.W.2d 143 (Tex. Civ. App. 1946).

[199] Canons of construction are notoriously slippery devices and cannot be pressed too far. *See, e.g.*, Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

[200] TVA certainly is a part of the federal government, *see generally* Jackson v. Tennessee Valley Authority, 462 F. Supp. 45, 50-54 (M.D. Tenn. 1978), *aff'd*, 595 F.2d 1120 (1979), and courts have relied upon the *United Mine Workers* rationale in determining a statute's effect upon TVA. *See, e.g.*, Webster County Coal Co. v. Tennessee Valley Authority, 476 F. Supp. 529, 530 (W.D. Ky. 1979). The *United Mine Workers* rationale is not distinguishable on the basis that TVA activities are proprietary rather than governmental. The governmental/proprietary dichotomy is not applicable to the federal government. All activities of the United States are governmental — none are proprietary. *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947). *But see* Rogers v. Tennessee Valley Authority, 692 F.2d 35, 37 (6th Cir. 1982). Thus in United States v. Wittek, 337 U.S. 346 (1949), the rule was applied to prevent the application of a rent control statute that arguably regulated the United States as a landlord. *Id.* Furthermore, even in respect to state and local governments, the courts have held that the governmental/proprietary dichotomy has no applicability in public sector labor matters. City of Los Angeles v. Los Angeles Bldg. & Const. Trade Council, 94 Cal. App. 2d 36, 45-46, 210 P.2d 305, 311 (1949); City of Cleveland v. Division 268, 41 Ohio Op. 236, 238-39, 90 N.E.2d 711, 715 (1949); City of Alcoa v. Int'l Brotherhood of Elec. Workers, 203 Tenn. 12, 23-25, 308 S.W.2d 476, 481-82 (1957). *See also* Miami Waterworks Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946).

> effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.[201]

The Court has further held that its *Lincoln Mills* analysis of federal common law subordinates judicial inventiveness to statutory mandate and legislative policy.[202]

The *Warrior & Gulf* Court followed the *Lincoln Mills* path when the Court explicitly derived the presumption of arbitrability from the congressional policy favoring private sector labor arbitration.[203] In contrast, the courts that have relied upon the *Warrior & Gulf* presumption in construing TVA collective bargaining agreements did not have any congressional imprimatur. Since national labor legislation is not applicable to TVA, that legislation cannot be read as a congressional statement of policy in respect to TVA.

Moreover, there are at least two objections to an independent judicial decision adopting the *Warrior & Gulf* rationale as public policy pertinent to a government's relations with its employees. First, a governmental employer should not be held to have unknowingly abdicated its responsibility for making certain employment-related decisions.[204] Second, a decision to emphasize arbitration as the preferred process for resolving public sector labor grievances is properly a matter for collective bargaining or legislation — not judicial decision.[205]

a. *Countervailing Public Policy*

The *Warrior & Gulf* presumption essentially is a gap filling device. The presumption ensures that virtually all disputes regarding a collective bargaining agreement are funneled to an arbitrator who is expected to exercise individual judgment in resolving factual issues or applying the contract to situations not envisioned by the parties.[206] Some public sector decisions, however, are so important that they should not be delegated to a private arbitrator.[207] Delegating significant governmental decisions to private arbitrators who are not accountable to the public is inappropriate. If applicable law requires that a particular decision must be made by a government official, the matter obviously cannot be delegated to an arbitrator.[208]

Some matters, however, may fall within a gray area in which the employer may have authority to delegate but would not want to delegate the authority. The *Warrior & Gulf* presumption provides a procrustean solution. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the

---

[201] 353 U.S. at 456-57 (citations omitted).

[202] *See supra* note 119.

[203] *See supra* notes 115-19 and accompanying text.

[204] *See infra* notes 206-07 and accompanying text.

[205] *See infra* notes 229-81 and accompanying text.

[206] *See supra* notes 87-94 and accompanying text.

[207] *See* Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329, 338-41 (1980).

[208] Board of Trustees of Junior College District No. 508 v. Cook County College Teachers Union, Local 1600, 62 Ill. 2d 470, 478-79, 343 N.E.2d 473, 477 (1976); Moravek v. Davenport Community School Dist., 262 N.W.2d 797, 804 (Iowa 1978); Board of Educ. of the Township of Rockaway v. Rockaway Township Educ. Ass'n, 120 N.J. Super. 564, 570-71, 295 A.2d 380, 384 (1972). Although the decision whether to dismiss an employee may be nondelegable, appropriate officials may decide generally not to dismiss except for just cause and delegate the administration of the just cause standard to an arbitrator. Cape Elizabeth School Bd. v. Cape Elizabeth Teachers Ass'n, 459 A.2d 166, 171-73 (Me. 1983).

arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[209] Under this stringent rule, virtually all issues must be submitted to arbitration unless there is an express and clearly applicable exclusion.[210] In a particular case, this result may be quite contrary to the employer's reasonable and probable intent when the collective bargaining agreement was negotiated.

Of course, parties to a collective bargaining agreement may override the *Warrior & Gulf* presumption by expressly excluding certain categories of grievances from arbitration.[211] Therefore, one might argue that public sector objections to the presumption can be resolved, as in a private sector agreement, by simply adding a list of non-arbitrable grievances to the contract. This theoretical solution, however, founders in the real world of negotiation.[212]

The tension between competing public policies which arises when the *Warrior & Gulf* presumption is applied to public sector labor relations is neatly illustrated by *Ostrer v. Pine Eagle School District No. 61*,[213] in which a state court dealt with the sensitive issue of academic tenure. Under applicable state law a teacher who had not been dismissed during a three year probationary period automatically achieved tenured status.[214] The plaintiff was a probationary teacher who wanted to submit his dismissal to arbitration.[215] The collective bargaining agreement was silent in respect to the arbitrability of the discharge but contained provisions that arguably made the matter arbitrable.[216] The *Warrior & Gulf*

---

[209] 363 U.S. at 582-83.

[210] This statement reflects the apparent holding in West Fargo Public School Dist. No. 6 v. West Fargo Educ. Ass'n, 259 N.W.2d 612 (N.D. 1977). That court noted: "The instant agreement contains no exclusion clause exempting maternity sick leave from arbitration." *Id.* at 620.

[211] *See, e.g.*, Communications Workers of America v. New York Telephone Co., 327 F.2d 94 (2d Cir. 1964); IUE v. General Electric Co., 407 F.2d 253 (2d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969).

[212] *Cf.* United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579 (1960) ("There are too many people, too many problems, too many unforseeable contingencies to make the words of the [collective bargaining agreement] the exclusive source of rights and duties." *Id.* (quoting Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959))

It is impossible to anticipate every type of grievance that a public sector employer would want decided by a judicial rather than an arbitral forum. Inclusion of such a list in a collective bargaining agreement would add the force of *expressio unius est exclusio alterius* to the *Warrior & Gulf* presumption and create a very powerful argument for submitting all unanticipated issues to arbitration. Moreover, any attempt to create a comprehensive list of non-arbitrable topics would have a significant adverse impact upon negotiations. By definition, the list of non-arbitrable topics would include hypothetical issues that might never arise in an actual grievance. Negotiating a collective bargaining agreement is difficult enough without forcing the parties to expend their time and energy on such hypothetical issues. *See* J. RUBIN & R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 145 (1975).

For example, suppose a particular government employer has no history of contracting out and no present plans to contract out in the future. Nevertheless, the employer might not want to agree in advance that if contracting out ever becomes an issue, the meaning of the silent collective bargaining agreement would be decided by an arbitrator rather than a court. If the employer is required to raise this hypothetical issue, the parties would be forced into premature negotiations in respect to a matter that may never come to pass. Once a party raises such an issue it is difficult to put the matter to rest in a way that will not prejudice either side's position. *See* C. LOUGHRAN, NEGOTIATING A LABOR CONTRACT 107-10 (1984).

[213] 40 Or. App. 265, 594 P.2d 1296 (1979).

[214] *Id.* at 269, 594 P.2d at 1298.

[215] *Id.* at 267, 594 P.2d at 1297.

[216] *Id.* at 271, 594 P.2d at 1299. If the plaintiff's discharge had been considered to be "teacher discipline" under the agreement, the matter would have been arbitrable under the agreement. *Id.*

presumption would have required the matter to be arbitrated, and the state employment relations board ordered the defendants to submit to binding arbitration.[217]

The *Ostrer* court, however, was not willing to resolve the issue of arbitrability by reference to the *Warrior & Gulf* presumption. Tenure was an important matter under the applicable state law. If the school board failed to exercise its sound discretion in respect to probationary teachers, "[t]he statutory scheme would then malfunction."[218] The court assumed that the school board had authority to provide for the arbitration of probationary teacher dismissals but held that an agreement to arbitrate the matter "must be clear and specific, and will not be implied."[219] This volte face[220] was a clear rejection of *Warrior & Gulf*.

The *Ostrer* court's rejection of *Warrior & Gulf* was a natural result of the court's concern over the effective functioning of the state's tenure system. The *Warrior & Gulf* presumption of arbitrability is based upon an express determination that the public policy favoring the arbitration of private sector labor grievances is supreme. The presumption begs any question of conflicting public policies by striking a clear balance favoring arbitration. If the *Ostrer* court had adopted the *Warrior & Gulf* presumption, the importance of competing public policies would have been defined out of the case.

The *Ostrer* decision suggests an inherent flaw in the blind adoption of the *Warrior & Gulf* presumption for construing public sector collective bargaining agreements. Judicial imposition of the presumption makes sense for the public sector only if a court is convinced that the fostering of arbitration in order to assure stability and peace is the preeminent public policy to be implemented in public sector labor grievances. There are, however, significant differences between private and public sector labor relations.

The system of private sector labor laws was not enacted in a vacuum. The Labor Management Relations Act (LMRA)[221] represents Congress' continuing attempt to remedy a serious and longstanding national problem. The extreme polarization of labor and management and the consequent internecine labor-management warfare beginning in the nineteenth century are well documented.[222] In 1935, the Wagner Act, the original

---

[217] *Id.* at 267, 594 P.2d at 1297.

[218] *Id.* at 269, 594 P.2d at 1298.

[219] *Id.* For an opinion involving a similar tenure law and reaching the same result for the same reason, see Chassie v. Directors of School Admin. District No. 36, 356 A.2d 708 (Me. 1976). *See also* School Bd. of Seminole County v. Cornelison, 406 So. 2d 484 (Fla. App. 1981). *But see* Iowa City Community School Dist. v. Iowa City Educ. Ass'n, 343 N.W.2d 139 (Iowa 1983). The *Ostrer* court did not explicitly state the basis for its presumption of nonarbitrability in respect to the discharge of probationary teachers. The *Warrior & Gulf* presumption would have decided the issue in total disregard to the proper functioning of the tenure system. The *Ostrer* court's decision assures that if such an important function is delegated to a private arbitrator, the delegation will be a conscious collective bargaining decision rather than the incidental result of the parties' failure to address the matter. In the absence of an express rationale, the *Ostrer* decision is best viewed as a case of simple contract interpretation. Given the importance of tenure, an implicit agreement to delegate the matter to private arbitration is implausible. In the specific context of tenure, the *Ostrer* court's presumption of nonarbitrability probably is an accurate tool for determining the reasonable and probable meaning of the parties' agreement.

[220] In a previous public sector decision the Oregon Court of Appeals had quoted *Warrior & Gulf* with approval. Corvallis School District 509J v. Corvallis Educ. Ass'n, 35 Or. App. 531, 535, 581 P.2d 972, 974-75 (1978). The *Ostrer* court dismissed this prior language as *dicta*, noting that *Warrior & Gulf* applied to "commercial collective agreements." 40 Or. App. at 269 n.6, 594 P.2d at 1298 n.6.

[221] 29 U.S.C. §§ 141-97 (1982).

[222] *See generally* H. MILLIS & R. MONTGOMERY, ORGANIZED LABOR (1945); P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY (1964).

component of the present LMRA, was enacted "[t]o diminish the causes of labor disputes."[223] Congress explained in its Statement of Findings and Policy that the actions of "some employers . . . lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce."[224] When Congress enacted the Taft-Hartley Act[225] in partial response to unprecedented industrial strife resulting from years of pent up self-sacrifice during World War II,[226] the policy of assuring labor peace and industrial stabilization remained in the forefront. As Congress declared in the preamble to the Act:

---

[223] The National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1935) (statement of purpose).

[224] *Id.* § 1. At the time of enactment, strike activities alone were resulting in millions of working days lost. For example, the Senate Committee on Education and Labor estimated that between 1922 and 1926, 17,050,000 working days were lost. S. REP. No. 573, 74th Cong., 1st Sess. (1935), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATIONS 280 (R. Koretz ed. 1970). The total damage to the economy was estimated to be "at least $1,000,000,000 per year." *See* S. REP. No. 573, 74th Cong., 1st Sess. (1935), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATIONS 280 (R. Koretz ed. 1970). These figures were staggering, but they did not even touch the thousands of people who died or were seriously injured in the labor wars of the late nineteenth and early twentieth century. *See* P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 76-83, 281-85, & 517-19 (1964). *See also* H. MILLIS & R. MONTGOMERY, ORGANIZED LABOR 668-89 (1945). Violence and brutality have been commonplace in the long battle between American labor and management. For example, shortly before the National Labor Relations Act became law the United Auto Workers struck plants in Toledo, Ohio. "In a clash between soldiers and strikers on May 25 [,1934] two strikers were killed and twenty-five injured. Violence continued, about two hundred strikers and non-strikers were hurt, and almost the same number arrested." P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 489 (1964). During the 1936 Little Steel Strike, a march on the Republic Steel plant in Chicago was dispersed by police. "The brutal behavior of the Chicago police, the clubbing of helpless marchers, the wanton killing of ten men, the maiming of many others has seldom been equaled in the savage industrial conflicts of the past." *Id.* at 518.

Numerous instances of nineteenth century labor violence are recounted in 2 P. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES (1955). For example, in the Homestead Steel Strike (*see generally id.* ch. 14), management employed a private army of Pinkerton agents to break the strike, and during one battle nine workers and three Pinkertons were killed. *Id.* at 210. In the battle of Coal Creek, (*see generally id.* at 219-29) miners had stormed a stockade to prevent the use of convict labor. In response state troops were called out with "field guns and Gatling guns. Greatly outnumbered and unable to withstand the artillery shelling, the miners were driven from their positions commanding the fort." *Id.* at 228. It is estimated that the Molly Maguires' activities in the late 1870's in Pennsylvania resulted in more than a hundred dead. P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 76 (1964).

There is a marked (and, in the view of the issues involved, understandable) tendency to write labor history with a pro-labor bias. The dark side of management and its private and public agents tends to be emphasized. Conversely virtually all representatives of labor are cloaked with the essential nobility of their cause. This bias inevitably tints all descriptions and analyses of violence in the history of the American labor movement. The existence of the violence, however, is not subject to serious dispute. Regardless of who or what caused this violence, there can be no doubt that it was a serious national problem that provided impetus for national legislation.

[225] The Taft-Hartley Act, ch. 120 § 1(b), 61 Stat. 136 (1947).

[226] The Senate Committee on Labor and Public Welfare reported:

> The need for congressional action has become particularly acute as a result of increased industrial strife. In 1945 this occasioned the loss of approximately 38,000,000 man-days of labor through strikes. This total was trebled in 1946 when there were 116,000,000 man-days lost and the number of strikes reached the unprecedented figure of 4,985.

S. REP. No. 105, 80th Cong., 1st Sess. (1947), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 589 (R. Koretz ed. 1970).

> Industrial strife . . . interferes with the normal flow of commerce and with the full production of articles and commodities for commerce . . . . It is the purpose and policy of this Act, in order to promote the full flow of commerce . . . to provide orderly and peaceful procedures for preventing the interference by either [employees or employers] with the legitimate rights of the other.[227]

The *Warrior & Gulf* presumption of arbitrability was consciously crafted by the Supreme Court to foster industrial stability and peace which is the primary goal of federal labor legislation. There is little doubt that labor arbitration has been an effective means for resolving disputes under private sector collective bargaining agreements. Given the severity of the problem of industrial strife addressed by Congress through the Labor Management Relations Act, a judicial decision to force parties to arbitration without regard to their agreement is both reasonable and consistent with legislative policy. It is an entirely different matter for a court, acting without legislative sanction, to impose the same presumption upon a different sector of the economy that lacks the long history of strife that has marked private sector labor relations.[228]

b. *Improper Judicial Policymaking*

Because there is no congressional policy favoring the arbitration of labor disputes under TVA collective bargaining agreements, a federal court that purports merely to adopt the *Warrior & Gulf* presumption actually is relying upon its own independent judgment of appropriate policy. Given the congressional silence, there can be no other source for the rule. To the extent that the court dictates management decisions by substituting its judgment for the governmental employer's judgment, judicial prudence should counsel against such an arrogation of the lawmaking power.

Traditionally some judicial forum has been available to resolve legal disputes, and lawmakers have been loath to force parties to commercial arbitration against their will.[229] This bias against unwitting agreements to arbitrate is illustrated by judicial treatment of arbitration provisions in form acceptances of offers covered by the Uniform Commercial Code ("UCC"). Section 2-207 is designed to resolve the "battle of the forms" in which one

---

[227] The Taft-Hartley Act ch. 120 § 31(b), 61 Stat. 136 (1947).

[228] To be sure, the public sector has experienced strikes and work stoppages. *See generally* H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS IN THE PUBLIC SECTOR ch. 6 (2d ed. 1979). The federal experience is recounted in M. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE ch. XVIII (1976). *See also supra* note 148 (TVA experience). But no one can credibly argue that the private and public sector experience in this regard is comparable.

[229] A leading commentator and enthusiastic supporter of arbitration urges: "No one should be compelled to have a specific dispute decided by an arbitrator unless he has clearly manifested such an intention." M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION ch. 12, at 99 (1968). A common way of implementing this concern is to require that an agreement to arbitrate must be in writing. The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), validates only "written provision[s]" *Id.* § 2. The drafters of the Uniform Arbitration Act placed the same requirement of a written agreement in section 1 of that Act. The Uniform Arbitration Act has been enacted in twenty-five states and the District of Columbia. 7 Uniform Laws Ann. 1 (Supp. 1984).

The Uniform Partnership Act provides that an agreement to submit a partnership claim or liability to arbitration requires unanimous agreement of the parties. Uniform Partnership Act § 9(3)(e). This provision has been criticized in the standard hornbooks. A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 52, at 302 (1968); H. REUSCHLEIN & W. GREGORY, HANDBOOK OF THE LAW OF AGENCY AND PARTNERSHIP § 197, at 298 (1979).

merchant's form acceptance of another merchant's form offer contains additional or different terms.[230] Assuming a contract has come into existence under these conditions, the UCC provides that the additional terms become part of the contract "unless . . . they materially alter it."[231] Cases occasionally arise in which the additional term in the acceptance is an arbitration clause. Such a clause does not become a part of the contract because an agreement to arbitrate is a material alteration of the original offer.

> The reason for this requirement, quite simply, is that by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of waiver.[232]

This rationale is not found upon a nineteenth century prejudice against arbitration. The differences between arbitration and judicial litigation are material.

The *Warrior & Gulf* presumption is quite contrary to the spirit of commercial arbitration. Indeed, the *Warrior & Gulf* Court expressly rejected the model of commercial arbitration.[233] Nevertheless the material differences between arbitration and litigation that concern the courts in the context of commercial disputes do not disappear when the context is changed to labor grievances. To attain the congressionally defined goal of industrial stability and peace, the *Warrior & Gulf* Court sacrificed the traditional concern for individual autonomy in respect to arbitration. This result does not mean, however, that concern for individual autonomy in the decision to arbitrate a labor grievance is nugatory.

A government agency could have legitimate reasons for preferring a judicial forum over arbitration. Commercial activities, for example, are more or less guided and constrained by the market place, but government entities are peculiarly sensitive to legal restrictions and the need to conform their actions to the scope of their legal authority. Judges are oriented toward legal analysis, and the concept of appellate review is specifically geared to assure the correct application of legal principles to a specific case. The Supreme Court frequently has recognized that labor arbitrators may have special expertise in respect to labor relations but that they are comparatively ill-suited to the task of interpreting public laws or divining public policy.[234] A government agency reasonably

---

[230] *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 1-2, at 24-39 (2d ed. 1980).

[231] U.C.C. § 2-207(2)(b).

[232] Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 333-34, 380 N.E.2d 239, 242, 408 N.Y.S.2d 410, 413 (1978). *Accord* Costal Indus., Inc. v. Automatic Steam Products Corp., 654 F.2d 375, 379 (5th Cir. 1981) (New York law); Schubtex, Inc. v. Allen Snyder, Inc., 49 N.Y.2d 1, 5-6, 399 N.E.2d 1154, 1156, 424 N.Y.S.2d 133, 135 (1979). *See also* Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 993-94, 101 Cal. Rptr. 347, 351 (1972); Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 285 N.C. 344, 357, 204 S.E.2d 834, 842-43 (1974). Some courts have indicated that whether an arbitration provision is material depends on the facts of a particular case. *See, e.g.*, N & D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722, 726 (8th Cir. 1976) (Minnesota law); American Parts Co. v. American Arbitration Ass'n, 8 Mich. App. 156, 170, 154 N.W.2d 5, 13 (1967).

[233] United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960).

[234] In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court refused to give a labor arbitration award preclusive effect or even to defer to the award in subsequent civil rights litigation. *Id.* at 55-60. The Court reasoned, *inter alia*, that arbitrators are inferior to courts in administering "the law of the land." *Id.* at 57. *Accord* McDonald v. City of West Branch, 104 S. Ct. 1799, 1803 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 743 (1981) "Significantly, a substan-

could prefer a judge to a private arbitrator in respect to the determination and application of legal principles.[235] There is nothing unusual about a government official preferring that issues of law and public policy be decided by a judge instead of by a private arbitrator. Perhaps the problem of lack of legal expertise can be remedied through judicial review of arbitration awards,[236] but judicial review takes time.

Even more significant is the arbitrator's authority to determine the facts relevant to a particular dispute. Factfinding in arbitration simply is not the equivalent of judicial factfinding. In *Alexander v. Gardner-Denver Co.*,[237] the Supreme Court held that a labor arbitration award does not preclude subsequent civil rights litigation and furthermore that a court should not even defer to a labor arbitrator's award in deciding a civil rights claim.[238] The Court explained:

> The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.[239]

The Court has reiterated this concern in other cases in which a grievance under a collective bargaining agreement also states a cause of action under a federal statute.[240]

The differences between arbitration and litigation make arbitration informal, speedy, and inexpensive, but a public employer might reasonably decide that certain matters concerning the expenditure of public funds or the conduct of public employees should be decided more formally and carefully. The same can be said in respect to judicial review. Broad judicial review is anathema to the perceived advantages of arbitration, but a public employer might desire broad judicial review when public issues are involved.

The prospect of a private arbitrator grafting new terms and conditions to the collective bargaining agreement could be very troubling to a government agency. The *Trilogy* Court envisioned arbitration as significantly different from the judicial process. The labor arbitrator was described as a neutral participant in the collective bargaining process.[241] In addition to determining contractual rights, an arbitrator, according to the

---

tial proportion of labor arbitrators are not lawyers." *Alexander*, 415 U.S. at 57 n.18. *Accord* McDonald v. City of West Branch, *supra*; Barrentine v. Arkansas-Best Freight System, Inc., *supra*. *See also* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study in* NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF 28TH ANNUAL MEETING 59, 85 (1975). In a recent survey only 64 percent of the arbitrators surveyed had law degrees. Bartlett, *Employment Discrimination and Labor Arbitrators: A Question of Competence*, 85 W. VA. L. REV. 873, 881 (1983).

[235] Professor Abrams suggests:

> In arbitration, the [agency] faces the risk that the neutral [arbitrator] will resolve the grievance dispute in a vacuum, devoid of external law considerations, or will misread those legal regulations to the detriment of the [agency]. By raising the power issue, the [agency] seeks to avoid the potential constraint of an award that might bind it to a course of action inconsistent with what it perceives to be its other obligations under the law.

Abrams, *The Power Issue in Public Sector Grievance Arbitration*, 67 MINN. L. REV. 261, 271-72 (1982-83).

[236] *See infra* notes 335-421 and accompanying text.

[237] 415 U.S. 36 (1974).

[238] *Id.* at 55-60.

[239] *Id.* at 57-58.

[240] McDonald v. City of West Branch, 104 S. Ct. 1799, 1803 (1984) (42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 743 (1981) (Fair Labor Standards Act).

[241] *Warrior & Gulf*, 363 U.S. at 581-82. *See also supra* notes 84, 88-91 and accompanying text.

Trilogy Court, is expected to accommodate the parties' interests.[242] For example, *Warrior & Gulf* involved a dispute over the employer's policy of contracting out work with a consequent impact upon the size of the employer's work force. There is doubt whether contracting out is even an appropriate subject for public sector collective bargaining.[243] In any event, if a governmental employer's authority to contract out is to be restricted, the restriction should come from an appropriate lawmaking body or at least be based upon the employer's agreement. Under the *Warrior & Gulf* rationale, the matter would be submitted to arbitration, and the arbitrator's decision would not necessarily be based upon the parties' specific agreement.[244]

Two further objections may be advanced to the wholesale application of the *Warrior & Gulf* presumption to public sector collective bargaining agreements. First, in the private sector grievance process, accommodation of the parties' interests is generally expected. In making an award, the arbitrator is guided by the parties' primary objective in resorting to arbitration: "to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs."[245] One "specialized need" of the public sector employer, however, is to act consistently with government policy. Arbitrators are not generally presumed to have special expertise in, or sensitivity to such public policy concerns.[246]

Second, the possibility exists that an arbitration award may occasionally reflect an accommodation of the arbitrator's personal interests. In both the public and private sectors, arbitrators who acquire a reputation for decisions evidencing a bias toward either unions or management may encounter difficulties in obtaining frequent employment.[247] Thus, the arbitrator's natural concern for job security imposes a subtle pressure on the arbitrator to seek compromise and to establish a balanced win-loss record.[248] The public

---

[242] *Warrior & Gulf*, 363 U.S. at 582. The *Warrior & Gulf* Court explained:

> The parties expect that his [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.

Id.

[243] *Compare* R. CLARK, C. CRAVER & H. EDWARDS, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 304 n.8 (2d ed. 1979) *with id.* at 26 (Supp. 1982). The Federal Service Labor-Management Relations Act identifies contracting out as a management right. 5 U.S.C. § 7106(a)(2)(B) (1982). In a decision under Executive Order No. 11491, *see supra* notes 17-18 and accompanying text, the Federal Labor Relations Council held that contracting out was not negotiable. "[T]he special public policy considerations relevant to Federal Government contracting are so substantial as to warrant rejection of private sector experience and law as controlling on the subject." Tidewater, Virginia Federal Employees Trades Council Case No. 71A-56 (1973).

[244] The issue of contracting out was recently required to be submitted to arbitration in Salary Policy Employee Panel v. Tennessee Valley Authority, 731 F.2d 325 (6th Cir. 1984).

[245] *See supra* note 242.

[246] *See supra* notes 234-35 and accompanying text.

[247] The private sector keeps close tab on arbitrators' award records. *See* Jones, *"His Own Brand of Industrial Justice": The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. Rev. 881, 890-92 (1983). And this same practice is followed in the public sector. *Id.* at 892 (discussing a blacklist compiled by the Michigan Office of the State Employer). *See also* M. LIEBERMAN, PUBLIC-SECTOR BARGAINING 102-05 (1980) [hereinafter cited as M. LIEBERMAN].

[248] *See* M. LIEBERMAN, *supra* note 247, at 102-05. The same problem arises in the private sector. *See* Hays, *The Future of Arbitration*, 74 YALE L. J. 1019 (1965), *criticized in* Wallen, *Arbitrators and Judges*

employer in particular might reasonably prefer that public policy issues be resolved in a judicial as opposed to an arbitral forum without regard to such extrinsic considerations.

Notwithstanding the problems inherent in public sector grievance arbitration, public sector employers and employee representatives view arbitration as a desirable process for resolving grievances. Accordingly public sector collective bargaining agreements commonly contain arbitration provisions.[249] The parties to a public sector collective bargaining agreement want to foster stability and peace; they are concerned with the requirements of law and public policy; and they have their own ideas regarding the efficacy of arbitration and the desirability of assuring that some disputes are resolved in a judicial forum. Through the process of collective bargaining the individual judgments of labor and management are melded (perhaps crudely) into an arbitration provision.

Nevertheless, given the differences in the arbitral and judicial fora, a governmental employer reasonably could prefer that certain disputes be resolved by resort to the judicial process.[250] The *Warrior & Gulf* presumption, however, embodies an independent judicial judgment of the appropriate weight to be given all the factors pertinent to choosing between litigation and arbitration. No one disputes the propriety of Congress' insistence that the goal of private sector industrial stabilization and peace be given virtually absolute priority — that is the basis of the *Warrior & Gulf* decision. But it is an entirely different matter for a court, in the absence of legislative action, to impose its independent judgment regarding these matters upon the parties to a collective bargaining agreement. Adoption of the *Warrior & Gulf* presumption effects a preemption of the parties' collective bargaining agreement, unless the objecting party can adduce "the most forceful evidence of a purpose to exclude the claim from arbitration."[251]

United States v. Gilman[252] involved a situation analogous to the problem of adopting *Warrior & Gulf* as federal common-law applicable to government collective bargaining agreements. In *Gilman*, the United States urged the Court to recognize a federal common-law right of indemnification from a federal employee whose negligence had resulted in a judgment against the government under the Federal Tort Claims Act.[253] Since there was no applicable statutory cause of action, the Court necessarily was called upon to exercise its independent judgment regarding the appropriate balance of interests between the government and its employees.

To the *Gilman* Court, the claim clearly implicated the relationship between the government and its employees.[254] There was no way of knowing what impact the creation

---

— *Dispelling the Hays Haze*, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS PROCEEDINGS OF THE 12TH ANNUAL INST. OF LABOR LAW 159-72 (1966).

[249] *See supra* note 21 and accompanying text.

[250] In view of the negative aspects of the differences between litigation and arbitration, a public employer might reasonably be skeptical regarding the benefits of arbitration. *See* M. LIEBERMAN, *supra* note 247, ch. 5; Abrams, *The Power Issue in Public Sector Grievance Arbitration*, 67 MINN. L. REV. 261, 270-71 (1982-83).

[251] United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. at 584-85.

[252] 347 U.S. 507 (1954).

[253] *Id.* at 508-09. The case arose out of a simple automobile accident.

[254] *Id.* at 509-10. The Court noted:

> Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches . . . . We have no way of knowing what the impact of the rule of indemnity we are asked to create might be. But we do know the question has serious aspects — considerations that pertain to the financial ability of employees, to their efficiency, to their morale.

Id.

of a common law right of indemnification might have on the efficiency and morale of the employees. The Court held that striking a balance of the various interests in the absence of congressional guidance[255] was inappropriate because:

> [h]ere a complex of relations between federal agencies and their staffs is involved . . . . [The government's claim] presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.[256]

State courts also have indicated that redefining the government's relationship with its employees is a matter for the legislature — not the courts.[257]

Judicial reluctance to interfere in the government's relationship with its employees is not unique to *Gilman*. In a much earlier case the Supreme Court was asked to review an executive branch decision to discharge an employee.[258] The Court refused because Congress had not provided for such review. "These are matters peculiarly within the province of those who are in charge of . . . the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers."[259]

---

[255] The only remotely relevant guidance in the legislative history of the Tort Claims Act was an obscure dialogue between an Assistant United States Attorney General and the Chairman of the House Judiciary Committee in which the assistant opined that the government had no right of indemnification. *Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 9-10, *quoted in* United States v. Gilman, 347 U.S. at 511-13 n.2.

[256] United States v. Gilman, 347 U.S. at 511-13 (footnote omitted). *See also* Bush v. Lucas, 103 S. Ct. 2404, 2417 (1983). *Cf.* NLRB v. Victor Rykebosch, Inc., 471 F.2d 20, 21 (9th Cir. 1972) ("The social and economic problems related to large-scale corporate farming [labor relations] are more appropriately resolved by debate and committee study in Congress than by adversary proceedings in court.").

[257] Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 302, 168 P.2d 741, 747-48 (1946); State Bd. of Regents v. United Packing House Food and Allied Workers, Local No. 1258, 175 N.W.2d 110, 113-15 (Iowa 1970); Rockwell v. Crestwood School District Bd. of Educ., 393 Mich. 616, 645, 227 N.W.2d 736, 749 (1975) ("The [state] Constitution provides that it is the Legislature, not the judiciary, that has the power to 'enact laws providing for the resolution of disputes concerning public employees.'"); Minneapolis Fed. of Teachers, Local 59 v. Obermeyer, 275 Minn. 347, 359-60, 147 N.W.2d 358, 366-67 (1969). *See also* City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 510, 131 A.2d 59, 62 (1957); Port of Seattle v. Int'l Longshoremen's and Warehousemen's Union, 52 Wash. 2d 317, 323, 324 P.2d 1099, 1103 (1958). The federal courts also have recognized that the collective bargaining rights of state employees is "a political matter and does not yield to judicial solution." Atkins v. City of Charlotte, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969) (three-judge court). *Accord* Newport News Fire Fighters Ass'n Local 794 v. City of Newport News, 339 F. Supp. 13, 17 (E.D. Va. 1972); Teamsters Local Union No. 822 v. City of Portsmouth, 423 F. Supp. 954, 957 (E.D. Va. 1975), *aff'd without op.*, 534 F.2d 328 (4th Cir. 1976); Government and Civic Employees Organizing Committee v. Windsor, 116 F. Supp. 354, 357 (N.D. Ala. 1953) (three-judge court), *aff'd per curiam*, 347 U.S. 901 (1954).

[258] Keim v. United States, 177 U.S. 290 (1900).

[259] *Id.* at 296. The lower federal courts have applied this doctrine when requested to review TVA decisions regarding its relationship with its employees. "It would be an abuse of our function to sit in judgment of the wisdom of [TVA's] internal staffing and organizational decisions." Ramsey v. Tennessee Valley Authority, 502 F. Supp. 230, 232 (E.D. Tenn. 1980)(change of duty station). *Accord* Chiriaco v. United States, 339 F.2d 588, 590 (5th Cir. 1964)(termination); Chatman v. Norris, 401 F. Supp. 943 (E.D. Tenn. 1975)(termination); Baskin v. Tennessee Valley Authority, 382 F. Supp. 641,

Members of the Supreme Court have dismissed the idea of a federal common law system of public sector collective bargaining rights and obligations derived entirely from independent judicial wisdom.[260] In recent years, the lower federal courts adopted a similar attitude toward rights under presidential executive orders providing for collective bargaining.[261] In *Mendelson v. Macy*,[262] for example, a discharged employee who had lost an appeal to the Civil Service Commission pursuant to the executive order sought judicial review.[263] In a routine administrative law decision, the court of appeals denied relief,[264] noting that "this is an area where judicial interference is misconceived, pregnant as it is with possibilities of disturbing the orderly and uniform personnel administration envisaged by Congress."[265]

The problem of the *Warrior & Gulf* presumption of arbitrability arises in a context different from *Gilman*, but the *Gilman* Court's rationale of judicial restraint is, if anything, more compelling in respect to the *Warrior & Gulf* presumption. A court that adopts the presumption as applicable to a TVA collective bargaining agreement imposes its independent will and judgment upon a coordinate branch of government. In contrast, the *Gilman* Court was leery of tinkering with the government's employer-employee relationship even though the executive branch, itself, was requesting the relief. The *Gilman* rationale is even more compelling when a court is asked to intrude in the government employment relationship over the governmental employer's express objection.

The need for judicial restraint with respect to the presumption of arbitrability is further illuminated by consideration of the recurrent notion that management's agreement to arbitrate is a quid pro quo for labor's agreement not to strike.[266] The *Trilogy* Court suggested that its three decisions implemented this exchange of consideration.[267] Since strikes by public employees are generally illegal,[268] the presumption is arguably an

---

648 (M.D. Tenn. 1974), *aff'd*, 519 F.2d 1402 (6th Cir. 1975)(termination); Pulley v. Tennessee Valley Authority, 368 F. Supp. 90, 93 (M.D. Tenn. 1973)(change from temporary to permanent employment status).

[260] In United States v. United Mine Workers of Am., 330 U.S. 258 (1947), Justices Black and Douglas noted that "Congress had never in its history provided a program [of collective bargaining for federal employees] . . . [, and it] would require specific congressional language to persuade us that Congress intended to embark upon such a novel program." *Id.* at 328-29 (Black and Douglas, JJ., concurring in part and dissenting in part).

[261] *See supra* notes 16-17 and accompanying text.

[262] 356 F.2d 796 (D.C. Cir. 1966).

[263] *Id.* at 798.

[264] *Id.* The agency action was "neither arbitrary nor capricious." *Id.* at 800.

[265] *Id.* In Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied sub nom.*, Manhattan-Bronx Postal Union v. O'Brien, 382 U.S. 978 (1965), a union sought an injunction requiring the Postmaster General to recognize the union as an exclusive bargaining representative in accordance with the applicable executive order. 350 F.2d at 453-54. The court refused. *Id.* at 457. The system of labor-management relations created by the executive order was a matter of executive policy and was not mandated by law. *Id.* at 452, 456. "If [the union believed] . . . the Postmaster General's decision . . . to be contrary to the President's wishes, it is obvious to whom their complaint should have been directed. It was not to the judicial branch." *Id.* at 457. *Accord* Nat'l Ass'n of Internal Revenue Employees v. Dillon, 356 F.2d 811, 812 (D.C. Cir. 1966); Lodge 1647 and Lodge 904 Am. Fed'n of Gov't Employees v. McNamara, 291 F. Supp. 286, 287 (M.D. Pa. 1980). *See also* Stevens v. Carey, 483 F.2d 188, 191 (7th Cir. 1973).

[266] *See supra* note 56 and accompanying text.

[267] *See Warrior & Gulf*, 363 U.S. at 574 n.4; United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567 (1960).

[268] A TVA or other federal employee who participates in a strike "may not accept or hold a position in the Government of the United States," 5 U.S.C. § 7311 (1982), and is subject to criminal

inappropriate rule of construction for such public sector collective bargaining agreements as those governing TVA labor relations because there is no quid pro quo for the submission of grievances to arbitration.[269] The Supreme Court relied on a strikingly similar analysis in the case of *Schneider Moving & Storage Co. v. Robbins*.[270] *Schneider Moving* involved a dispute between employees and trustees of pension funds established pursuant to collective bargaining agreements.[271] In rejecting the employees' suit to compel arbitration, the Court noted that the purpose of the *Warrior & Gulf* presumption is to further the peaceful resolution of labor disputes by requiring labor and management "to forgo the economic weapons of strikes and lockouts."[272] Since no such concerns were implicated in a dispute between employees and pension fund trustees, the Court held the presumption inapplicable.[273]

In *Schneider Moving* a strike by pension trustees was a factual impossibility,[274] whereas for such public employees as the TVA work force a strike is possible but illegal.[275] In either case, the invocation of an agreement not to strike as consideration for imposition of the *Warrior & Gulf* presumption is improper. It could of course be argued that good labor-management relations and a reduced likelihood of illegal work stoppages constitute a sufficient quid pro quo to justify adoption of a presumption of arbitrability in the public sector.[276] Public sector labor and management presumably weigh such considerations when negotiating arbitration provisions. It is, however, not appropriate for the judiciary to decide for a public agency what level of consideration justifies submitting all doubtful labor disputes to a private arbitrator.[277]

The concept of judicial restraint in shaping federal common law has some obvious limits. If an individual right guaranteed by the Constitution is involved, a court may provide an appropriate remedy notwithstanding its impact upon the relationship between the government and its employees. A constitutional right would have little meaning if courts refused to fashion appropriate remedies to implement the right. Thus the Su-

---

penalties. 18 U.S.C. § 1918 (1982). *See* Tennesse Valley Authority v. Bailey, 495 F. Supp. 711 (E.D. Tenn. 1980); Tennessee Valley Authority v. Local Union No. 110, 233 F. Supp. 997 (W.D. Ky. 1962). *See generally* M. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE ch. XVIII (1976). State and local government employees also are generally prohibited from striking. *See generally* H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS IN THE PUBLIC SECTOR ch. 6 (2d ed. 1979).

[269] *See* M. Lieberman, *supra* note 247, at 98.

[270] 104 S. Ct. 1844 (1984).

[271] The trust agreements were incorporated by reference in the collective bargaining agreements. 104 S. Ct. at 1847-48. The trustees suspected that the employers were making insufficient contributions to the trust funds and therefore sought an accounting. Robbins v. Prosser's Moving and Storage Co., 700 F.2d 433 (8th Cir. 1983) (*en banc*), *aff'd sub nom.*, Schneider Moving & Storage Co. v. Robbins, 104 S. Ct. 1844 (1984).

[272] 104 S. Ct. at 1849.

[273] *Id.*

[274] *Id.*

[275] *See supra* notes 148, 228 and accompanying text.

[276] *See* University of Hawaii Professional Assembly v. University of Hawaii, 66 Hawaii 207, ___, 659 P.2d 717, 720 (1983) ("Since strikes by public workers can be very disruptive and dangerous to the health of the state, calming tensions through arbitration is more imperative in the public sector than in the private sector.") *See also* Neptune City Bd. of Educ. v. Neptune City Education Ass'n, 153 N.J. Super. 406, 409, 379 A.2d 1281, 1283 (1977).

[277] The issue, of course, is entirely different when "the *Legislature* [has] considered that the unavailability to public employees of these 'economic weapons' entitles them to an efficient and expeditious procedure for settling labor disputes." Lewiston Firefighters Ass'n v. City of Lewiston, 354 A.2d 154, 166 (Me. 1976) (emphasis added).

preme Court has held that a damage remedy is available to a federal employee who is cavalierly fired for the sole reason that she is a woman.[278] The courts also have provided a remedy when the government has attempted to abridge employees' freedom of speech.[279] Similarly, if the Congress enacts legislation regarding the government's relationship with its employees,[280] there can be little objection to the courts fashioning an interstitial federal common law to fill gaps in the statute.[281] The interpretation of an arbitration provision in a TVA collective bargaining agreement, however, does not involve the implementation of either a constitutional right or a legislative program.

3. Common Law Reasoning from Legislative Policy

In some situations a federal judge may properly rely upon legislative precedent in fashioning federal common law. The leading example of this method is *Moragne v. State Marine Lines, Inc.*,[282] in which the Supreme Court overruled a prior decision[283] and held that a wrongful death action is available under federal maritime law.[284] The *Moragne* Court reached its decision by relying upon analogous state and federal wrongful death statutes. The Court reasoned:

> These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. *This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved.* The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional [*i.e.*, common] law.[285]

---

[278] Davis v. Passman, 442 U.S. 228 (1979). *See also* Walker v. Jones, 733 F.2d 923 (D.C. Cir. 1984).

[279] Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir. 1980) (D.C. police officer). *See also* McGurran v. Veterans Admin., 665 F.2d 321 (10th Cir. 1981). The many cases involving state employees (*e.g.*, Elrod v. Burns, 427 U.S. 347 (1976); Keyishian v. Board of Regents, 385 U.S. 589 (1967)) are perhaps distinguishable on the basis that 42 U.S.C. § 1983 is a congressional mandate requiring the federal courts to provide a remedy in first amendment cases involving a state's relationship with its employees. But in Bush v. Lucas, 103 S. Ct. 2404 (1983) the Court assumed that the plaintiff federal employee had suffered a reduction in grade in violation of the first amendment, *id.* at 2408, and nevertheless held that a damage remedy was inappropriate. *Id.* at 2417. The Court was reluctant to interfere in the government's employer-employee relationship when the Congress had created a complex legislative scheme to protect Civil Service employees from adverse personnel actions. *Id.* at 2417-18. The Court concluded, "we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating [the Constitutional damage remedy]." *Id.* at 2417.

[280] *See, e.g.*, 5 U.S.C. §§ 7101-35 (1982); 42 U.S.C. § 2000e-16 (1976).

[281] *See* United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580, 593 (1973) ("the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts").

[282] 398 U.S. 375 (1970).

[283] The Harrisburg, 119 U.S. 199 (1886).

[284] 398 U.S. at 409. Federal maritime law or admiralty is considered federal common law in the sense that it is a system of legal rights and principles developed by the courts in judicial opinions rather than enacted by a legislature. *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("Federal common law exists . . . in . . . admiralty cases."). *Cf.* United States v. Standard Oil Co., 332 U.S. 301, 308 (1947) (discussing "an area of 'federal common law' or perhaps more accurately 'law of independent federal judicial decision'").

[285] 398 U.S. at 390-91 (emphasis added).

If courts properly may rely upon analogous legislation to determine the appropriate public policy that should underlie a common law rule of decision, various public[286] and private[287] sector labor acts arguably establish relevant public policy favoring arbitration.

Countless courts have relied upon the principles embodied in the Labor Management Relations Act to resolve public sector labor law disputes. For example, in a recent case the Supreme Court reviewed a Federal Labor Relations Authority ("FLRA") interpretation of the Federal Service Labor Management Relations Act.[288] The Court began its analysis by quoting and relying upon private sector precedent in respect to the National Labor Relations Board: "[The FLRA, like the NLRB] is entitled to considerable deference when it exercises its special function of applying the general provisions of the Act to the complexities of federal labor relations."[289] Numerous other federal[290] and state[291] courts similarly have relied upon private sector precedent in deciding public sector labor law disputes. But courts have noted that the private sector principles in these cases were pertinent because the disputes involved public sector statutes that were consciously modeled after the Labor Management Relations Act.[292]

---

[286] *See supra* note 150 and accompanying text.

[287] *See supra* notes 159-62 and accompanying text.

[288] Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 104 S. Ct. 439 (1983).

[289] *Id.* at 444 (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)). *See also* Columbia Power Trades Council v. United States Dep't of Energy, 671 F.2d 325-27 (9th Cir. 1982).

[290] Turgeon v. FLRA, 677 F.2d 937, 940 (D.C. Cir. 1982); Malone v. United States Postal Service, 526 F.2d 1099, 1104 (6th Cir. 1975); Nat'l Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute, 493 F. Supp. 675, 680 (N.D. Cal. 1980); PATCO v. Bond, 477 F. Supp. 62, 67-68 (D.D.C. 1979).

[291] Liberal-NEA v. Bd. of Educ. of Unified School Dist., 211 Kan. 219, 228, 505 P.2d 651, 658 (1973); Lewiston Firefighters Ass'n v. City of Lewiston, 354 A.2d 154, 161 (Me. 1976); South Worcester County Reg. Voc. Sch. Dist. v. Labor Relations Comm., 377 Mass. 897, 904, 389 N.E.2d 389, 394 (1979); AFSCME, Local 1956 v. Public Employment Relations Comm., 114 N.J. Super. 463, 277 A.2d 231, 234 (1971); Ohland v. Dubay, 133 Vt. 300, 302-03, 336 A.2d 203, 205 (1975); WERC v. City of Evansville, 69 Wis. 2d 140, 152, 230 N.W.2d 688, 696 (1975).

[292] Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 104 S. Ct. 439, 444 (1983). *Accord* PATCO v. FLRA, 685 F.2d 547, 584 (D.C. Cir. 1983); Local 1219, Am. Fed. of Gov't Employees v. Donovan, 683 F.2d 511, 515 n.13 (D.C. Cir. 1982); Turgeon v. FLRA, 677 F.2d 937, 939-40 (D.C. Cir. 1982) ("In view of the clearly expressed intent of Congress to pattern the [Federal Labor Relations] Authority upon the model of the NLRB, it is appropriate for us to consider precedent developed under the NLRA in interpreting [the Federal Service Labor Relations Act]."); United States v. Air Traffic Controllers, 504 F. Supp. 432, 435-36 (N.D. Ill. 1980); Nat'l Federation of Federal Employees v. Commandant, Defense Language Institute, 493 F. Supp. 675, 680 (N.D. Cal. 1980). *Cf.* Cofrancesco v. City of Wilmington, 419 F. Supp. 109, 111 (D. Del. 1976) (construing state statute modeled after federal private sector law).

In cases involving state public employment relations acts consciously patterned after the Labor Management Relations Act, the state courts have expressly stated the same rationale. Firefighters Union Local 1106 v. City of Vallejo, 12 Cal. 3d 608, 615, 526 P.2d 971, 976, 116 Cal. Rptr. 507, 512 (1974); Social Workers' Union v. Alameda County Welfare Dep't, 11 Cal. 3d 382, 382, 521 P.2d 453, 459, 113 Cal. Rptr. 461, 467 (1974); Los Angeles Metro. Transit Auth. v. Brotherhood of RR Trainmen, 54 Cal. 2d 684, 688, 355 P.2d 905, 906, 8 Cal. Rptr. 1, 3 (1960); West Hartford Ed. Ass'n, Inc. v. DeCourcy, 162 Conn. 566, 578, 295 A.2d 526, 533 (1972); Town of New Canaan v. Connecticut State Bd. of Labor Relations, 160 Conn. 285, 291, 278 A.2d 761, 764 (1971); Town of Windsor v. Windsor Police Dep't Employees Ass'n, Inc., 154 Conn. 530, 536, 227 A.2d 65, 68 (1967); Rockwell v. Bd. of Educ., 393 Mich. 616, 635-36, 227 N.W.2d 736, 744 (1975); Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 53, 214 N.W.2d 803, 807 (1974); Van Buren Public School District v. Wayne County Circuit Judge, 61 Mich. App. 6, 24, 232 N.W.2d 278, 287 (1975); Montana

A natural corollary to the rationale of the many cases adopting the principles of the Labor Management Relations Act for the public sector is that such adoption may be inappropriate if the issue before a court does not involve a statutory provision modeled after the Labor Management Relations Act. In *University Police Officers Union v. University of Nebraska*,[293] the State Court of Industrial Relations had relied upon private sector precedent to find that the defendant university had committed unfair labor practices. The Nebraska Supreme Court reversed on the ground that the state statute involved did not expressly create any unfair labor practices. The private sector analogy was dismissed as irrelevant. In looking to private sector precedent, it "must be carefully understood . . . that decisions under the NLRA are of no help or benefit in attempting to determine actions absent similar provisions under the Nebraska statutes."[294]

The rationale of these cases suggests that if the appropriate legislature has established a legislative policy favoring the use of arbitration in respect to grievances under public sector collective bargaining agreements, the *Warrior & Gulf* presumption should be used to construe the agreement. Since the Federal Service Labor Management Relations Act clearly endorses grievance arbitration,[295] the presumption of arbitrability should be applicable to agreements under that Act. This approach has been adopted by a number of state courts in construing arbitration provisions in state and local public sector collective bargaining agreements.[296]

---

v. Public Employees Craft Council, 165 Mont. 349, 352, 529 P.2d 785, 786 (1974); Lullo v. Fire Fighters, Local 1066, 55 N.J. 409, 423, 262 A.2d 681, 688 (1970); Kalmath County v. Laborers Int'l Union of N. Am., 21 Or. App. 281, 288, 534 P.2d 1169, 1172 (1975).

Two Pennsylvania courts have stated flatly that private sector cases are of little value in construing public sector labor statutes. State College Ed. Ass'n v. Pennsylvania Labor Relations Bd., 9 Pa. Commw. 229, 236, 306 A.2d 404, 409 (1973); City of Sharon v. Fraternal Order of Police, 11 Pa. Commw. 277, 282, 315 A.2d 355, 358 (1973). The statements in these two cases, however, are at clear odds with the overwhelming trend of case law, and it is doubtful whether their rationale of flatly rejecting LMRA principles would be followed even in Pennsylvania. *See* Pennsylvania Labor Relations Bd. v. State College Area Sch. Dist., 461 Pa. 494, 499, 337 A.2d 262, 264 (1975); Costigan v. AFSCME, 462 Pa. 425, 432, 341 A.2d 456, 460 (1975); Township of Falls v. Commonwealth, 14 Pa. Commw. 494, 497, 332 A.2d 412, 413 (1974).

[293] 203 Neb. 4, 277 N.W.2d 529 (1979).

[294] *Id.* at 12, 277 N.W.2d at 535. *Accord* Detroit Fire Fighters Ass'n, Local 344 v. City of Detroit, 408 Mich. 663, 666, 293 N.W.2d 278, 280 (1980); Smigel v. Southgate Community Sch. Dist., 388 Mich. 531, 540, 202 N.W.2d 305, 307 (1972); Minnesota State College Bd. v. Public Employment Relations Board, Minnesota Federation of Teachers, 303 Minn. 453, 462, 228 N.W.2d 551, 555 (1975); Civil Service Employees Ass'n v. Helsby, 21 N.Y.2d 541, 547, 236 N.E.2d 481, 485, 289 N.Y.S.2d 203, 207 (1968); Pennsylvania Labor Relations Bd. v. Doctors Osteopathic Hosp., 1 Public Bargaining Cases ¶ 10,159 (Pa. Ct. of Common Pleas 1974); Vermont State Colleges Faculty Fed. v. Vermont State Colleges, 138 Vt. 451, 454, 418 A.2d 34, 36 (1980). *See also* School Bd. of Marion County v. Public Employees Relations Committee, 334 So. 2d 582, 583 (Fla. 1976); Nat'l Educ. Ass'n of Shawnee Mission, Inc. v. Bd. of Educ. of Shawnee Mission Unified Sch. District No. 512, Johnson County, 212 Kan. 741, 749, 512 P.2d 426, 433 (1973); Int'l Brotherhood of Teamsters, Local 320 v. City of Minneapolis, 302 Minn. 410, 415, 225 N.W.2d 254, 257 (1975); In re New Jersey, 1 Public Bargaining Cases ¶ 10,352 (N.J. 1974); Maywood Bd. of Educ. v. Maywood Educ. Ass'n, 168 N.J. Super. 45, 61, 401 A.2d 711, 719 (1979).

[295] The Act requires that collective bargaining agreements contain "provisions for the settlement of grievances, including questions of arbitrality," 5 U.S.C. § 7121(a)(1) (1982), and these required provisions must include "binding arbitration." *Id.* § 7121(b)(3)(c) (1982).

[296] In Joint School District No. 10, City of Jefferson v. Jefferson Educ. Ass'n, 78 Wis. 2d 94, 253 N.W.2d 536 (1977), the court adopted the *Warrior & Gulf* presumption, explaining "Our adherence to the *Trilogy* is in keeping with the strong *legislative* policy in Wisconsin favoring arbitration in the

If, however, the appropriate legislature has not espoused a policy favoring grievance arbitration in respect to a particular category of collective bargaining agreements, resorting to the *Warrior & Gulf* presumption is a non sequitur. The Supreme Court in the *Moragne* case anticipated and warned against this type of error. "On the other hand, the legislature may, in order to promote other, conflicting interests, prescribe with particularity the compass of the legislative aim, erecting a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation."[297]

International Association of Firefighters, Local 2359 v. City of Edmond[298] illustrates the kind

---

municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes." *Id.* at 112, 253 N.W.2d at 545 (emphasis added). *Accord* Lewiston Firefighters Ass'n v. City of Lewiston, 354 A.2d 154 (Me. 1976); Council of County and City Employees v. Spokane County, 32 Wash. App. 422, 427, 647 P.2d 1058, 1061 (1982).

"The Pennsylvania Supreme Court has note[d] that federal labor policy merely favors the submission of disputes to arbitration while Pennsylvanian law [i.e., 43 PA. STAT. ANN. tit. 43 § 1101.903 (Purdon Supp. 1983-84)] expressly requires arbitration." Mazzie v. Pennsylvania, 495 Pa. 128, 138 n.6, 432 A.2d 985, 990 n.6 (1981). *Accord* Scranton Fed. of Teachers v. Scranton School Dist., 498 Pa. 58, 65 n.5, 444 A.2d 1144, 1147 n.5 (1982); County of Allegheny v. Allegheny County Prison Employees Indep. Union, 476 Pa. 27, 31 n.6, 381 A.2d 849, 851 n.6 (1978). Therefore that court's adoption of the *Warrior & Gulf* presumption seems appropriate. Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh, 481 Pa. 66, 71, 391 A.2d 1318, 1321 (1978); Lincoln Univ. v. Lincoln Univ. Chapter of AAUP, 467 Pa. 112, 119, 354 A.2d 576, 580 (1976); Board of Educ. v. Philadelphia Fed'n of Teachers, 464 Pa. 92, 99, 346 A.2d 35, 39 (1975). *Accord* City of Miami v. Fraternal Order of Police, 378 So. 2d 20, 23-24 (Fla. App. 1980) (based upon Florida statute requiring arbitration of public sector grievances).

When a state public sector employment statute is modeled after the national labor legislation, a state court will adopt the *Warrior & Gulf* presumption with little analysis. *See, e.g.*, Kaleva-Norman-Dickson School Dist. v. Kaleva-Norman-Dickson School Teachers Ass'n, 393 Mich. 583, 591, 227 N.W.2d 500, 504 (1975).

Other courts have paralleled the TVA decisions and simply adopted the *Warrior & Gulf* presumption with no critical analysis. Policemen's and Firemen's Retirement Bd. v. Sullivan, 173 Conn. 1, 6, 376 A.2d 399, 403 (1977); Ottumwa Educ. Ass'n v. Ottumwa Comm. School Dist., 297 N.W.2d 228, 231 (Iowa 1980); Corvallis School Dist. 509J v. Corvallis Education Ass'n, 35 Or. App. 531, 535, 581 P.2d 972, 974 (1978). In West Fargo Public School Dist. No. 6 v. West Fargo Educ. Ass'n, 259 N.W.2d 612, 620 (N.D. 1977), the court assumed that there was a policy favoring the arbitration of grievances and adopted the presumption. Although the court discussed a provision of a pertinent public sector statute providing for binding arbitration (*id.* at 616 (quoting N. DAK. CODE § 15-38.1-12(1)(b))) and the fact that public sector agreements are similar to private sector agreements (*id.* at 618), the court made no effort to relate its adoption of *Warrior & Gulf* to the applicable state statute.

The Rhode Island Supreme Court has adopted the *Warrior & Gulf* presumption without deciding whether the legislature has adopted a policy favoring grievance arbitration. Providence Teachers' Union v. Providence School Comm., 433 A.2d 202, 205 (R.I. 1981); School Comm. v. Pawtucket Teachers Alliance, 120 R.I. 810, 815, 390 A.2d 386, 389 (1978). *See also* Jacinto v. Egan, 120 R.I. 907, 915 n.6, 391 A.2d 1173, 1177 n.6 (1978). In a prior decision, the court mentioned that the applicable state statute "parallels in many significant respects the federal scheme." Belanger v. Matteson, 115 R.I. 332, 338, 346 A.2d 124, 129 (1975), *cert. denied*, 424 U.S. 968 (1976), *cited as authority for adopting Steelworkers Trilogy* in School Committee v. Pawtucket Teachers Alliance, 120 R.I. 810, 912 n.3, 390 A.2d 386, 390 n.3 (1978). This statement, however, was made in the context of a union's duty of fair representation. *Belanger*, 115 R.I. at 338, 346 A.2d at 129. The court mentioned a legislative policy favoring interest arbitration but expressly distinguished grievance arbitration. In effect, and probably unknowingly, the Rhode Island Court has imposed upon local governments its own independent judgment of the desirability of grievance arbitration.

[297] 398 U.S. at 392.

[298] 619 P.2d 1274 (Okla. App. 1980).

of discerning investigation of legislative intent necessary as an antecedent to wholesale adoption of the *Steelworkers Trilogy* for the public sector. In considering whether to compel arbitration of a public sector grievance, the state court explained, "Great care must be taken in using cases from other jurisdictions in the labor relations field. Federal labor policy serves different ends in the private sector than our own . . . Act."[299] The court noted that the *Steelworkers Trilogy* was based upon a congressional policy favoring arbitration[300] but that the state statute was expressly neutral on the value of arbitration.[301] Therefore the *Warrior & Gulf* rationale was of limited value.[302]

The logic of the *City of Edmond* decision[303] is compelling.[304] The *Warrior & Gulf* presumption is premised upon a congressional policy favoring the arbitration of private sector labor grievances. Unless the appropriate legislature has established a parallel policy regarding public sector labor grievances, the courts should not resort automatically to the *Warrior & Gulf* presumption to resolve public sector issues.

The New York Court of Appeals also has been unwilling to make the uncritical assumption that public policy favors the arbitration of public sector grievances. In *Acting Superintendent of Schools of Liverpool Central School District v. United Liverpool Faculty Association*,[305] the court noted the existence of "the public policy (principally expressed in the Federal cases) which favors arbitration" of private sector grievances.[306] Although the New York legislature had enacted legislation specifically authorizing public sector grievance arbitration,[307] the court refused to adopt the *Warrior & Gulf* presumption.[308] Instead, a two-step analysis was adopted. First, a court must determine whether the grievance involves a subject matter that the law permits to be submitted to arbitration.[309] Second, the court must determine whether the parties actually agreed in the collective bargaining agreement to submit the matter to arbitration.[310]

In the private sector, the second step of the *United Liverpool* court's analysis is governed by the *Warrior & Gulf* presumption. The court, however, sought to interpret the agreement in a manner consistent with the parties' intention, and the presumption of arbitrability simply is not an accurate diviner of public sector intentions. The court explained:

> In the field of public employment, as distinguished from labor relations in the private sector, the public policy favoring arbitration — of recent origin —

---

[299] *Id.* at 1275.

[300] *Id.*

[301] *Id.* (referring to 11 OKLA. STAT. ANN. § 51-101D (1978)).

[302] The court, however did not reject the *Steelworkers Trilogy* as being totally irrelevant. The *American Mfg.* rationale was in effect adopted to compel arbitration of grievances over unambiguous collective bargaining agreement provisions. *See* 619 P.2d at 1275-76.

[303] *See supra* notes 298-302 and accompanying text.

[304] The Oklahoma courts, however, have not always been so discerning. *See* Voss v. City of Oklahoma City, 618 P.2d 925 (Okla. 1980).

[305] 42 N.Y.2d 509, 369 N.E.2d 746, 399 N.Y.S.2d 189 (1977).

[306] *Id.* at 512, 369 N.E.2d at 748, 399 N.Y.S.2d at 191.

[307] *See* N.Y. CIV. SERV. LAW § 207.1 (McKinney 1983).

[308] 42 N.Y.2d at 512-13, 369 N.E.2d at 748-49, 399 N.Y.S.2d at 192. For some reason, the court neither cited *Warrior & Gulf* nor discussed the decision by name. Nevertheless both parties argued the appeal on the assumption that *Warrior & Gulf* applied by analogy. In a footnote to a discussion of private sector law, the court stated: "In our view the not infrequent reference to a 'presumption of arbitrability,' while understandable, does not advance analysis and indeed in some instances serves rather to obfuscate." 42 N.Y.2d at 512 n.1, 369 N.E.2d at 748 n.1, 399 N.Y.S.2d at 192 n.1.

[309] 42 N.Y.2d at 514-15, 369 N.E.2d at 749-50, 399 N.Y.S.2d at 192-93.

[310] *Id.*

> does not yet carry the same historical or general acceptance, nor, as evidenced in part by some of the litigation in our court, has there so far been a similar demonstration of the efficacy of arbitration as a means for resolving controversies in governmental employment. Accordingly, it cannot be inferred as a practical matter that the parties to collective bargaining agreements in the public sector always intend to adopt the broadest permissible arbitration clauses.[311]

The court further noted that many decisions of public sector entities involve responsibility to the tax-paying public and are "fundamentally nondelegable."[312] Thus, since a presumption of arbitrability was not automatically inferable and could be inappropriate in the public sector, the court refused to sanction extension of *Warrior & Gulf* to public sector agreements, and instead created a presumption of nonarbitrability that could be rebutted by "clear, unequivocal agreement to the contrary."[313]

4. The Proper Methodology

If the *Warrior & Gulf* presumption of arbitrability is rejected as inappropriate for interpreting arbitration clauses in public sector collective bargaining agreements, the question arises how are these clauses to be interpreted?[314] There is no reason that traditional concepts of contract interpretation cannot be used to determine the agreement of the parties to a public sector contract with respect to arbitration.[315] In effect, the New York courts have used contract interpretation principles since their court of appeals rejected *Warrior & Gulf* in *Acting Superintendent of Schools of Liverpool Central School District v. United Liverpool Faculty Association.*[316]

The New York Court of Appeals did more than reject the presumption of arbitration. The court in effect established a presumption of nonarbitrability, holding that arbitration would be compelled only when a "dispute falls clearly and unequivocally within the class of claims agreed to be referred to arbitration."[317] This holding has by no means been the death knell for public sector grievance arbitration in New York.

The New York courts have drawn a distinction between interpreting the arbitration

---

[311] 42 N.Y.2d at 513-14, 369 N.E.2d at 749, 399 N.Y.S.2d at 192. *Accord* Service Employees Int'l Union v. County of Napa, 99 Cal. App. 3d 946, 160 Cal. Rptr. 810 (1980).

[312] 42 N.Y.2d at 514, 369 N.E.2d at 749, 399 N.Y.S.2d at 192. *Accord* Service Employees Int'l Union v. County of Napa, 99 Cal. App. 3d 946, 953-55, 160 Cal. Rptr. 810, 813-15 (1980).

[313] 42 N.Y.2d at 514, 369 N.E.2d at 749, 399 N.Y.S.2d at 192.

[314] In Salary Policy Employee Panel v. Tennessee Valley Authority, 731 F.2d 325 (6th Cir. 1984), the court suggested that this question of methodology is a significant consideration in determining whether to adopt the presumption. *Id.* at 330.

[315] *See, e.g.*, Salary Policy Employee Panel v. Tennessee Valley Authority, 548 F. Supp. 268, 269 (E.D. Tenn. 1982) (course of dealing between the parties), *aff'd on other grounds*, 731 F.2d 325 (6th Cir. 1984); Board of Education v. Barni, 66 A.D.2d 340, 345, 412 N.Y.S.2d 908, 910 (1979) (noscitur a sociis), *rev'd*, 49 N.Y.2d 311, 312, 401 N.E.2d 912, 914, 425 N.Y.S.2d 554, 556 (1980); Essex County Bd. of Supervisors v. Civil Service Employees' Ass'n, Inc., 67 A.D.2d 1047, 413 N.Y.S.2d 772 (1979) (past practice).

[316] 42 N.Y.2d 509, 369 N.E.2d 746, 399 N.Y.S.2d 189 (1977). *See supra* notes 305-13 and accompanying text.

[317] Acting Superintendent of Schools of Liverpool Cent. School Dist. v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 515, 369 N.E.2d 746, 750, 399 N.Y.S.2d 189, 193 (1977). *Accord* South Colonie Cent. School Dist. v. South Colonie Teachers Ass'n, 46 N.Y.2d 521, 388 N.E.2d 727, 415 N.Y.S.2d 403 (1979).

clause of an agreement and interpreting the rest of the agreement. In *Board of Education v. Barni*,[318] the collective bargaining agreement provided that teachers would not be disciplined without just cause[319] and further provided that "all grievances involving 'an alleged misinterpretation or misapplication of an express provision of [the] Agreement'"[320] would be submitted to arbitration. At issue was whether a dismissal was discipline under the agreement and therefore subject to the agreement's just cause limitation.[321] The lower court held that the agreement was ambiguous on this point and granted a stay of arbitration.[322] The court of appeals reversed, holding that ambiguities in the substantive portion of an agreement do not effect the issue of arbitrability.[323] If the arbitration provision encompasses a dispute, any ambiguity in the substantive portion of the agreement is to be resolved by the arbitrator. Since the arbitration clause was quite broad, the matter was sent to arbitration.[324]

The rationale in *Barni* follows naturally from the general idea that arbitration is a matter of agreement between the parties to a collective bargaining agreement. A dispute over the meaning of substantive terms in a collective bargaining agreement is ordinary grist for an arbitrator's mill. To suggest that the parties did not intend to submit such disputes to arbitration is not credible.

Critics of the New York presumption of nonarbitrability say that labor grievances are best resolved by arbitration rather than litigation,[325] and there is no doubt that arbitration is in many ways superior to litigation. But a rule of general arbitration is not necessarily appropriate in the public sector.[326] The New York rule assures that the issue of whether arbitration is best for the parties will be determined through collective bargaining. This is preferable to judicial fiat based on private sector precedent that ignores the broad policy concerns of the public sector employer.

In operation New York's presumption of nonarbitration does not evidence judicial

---

[318] 49 N.Y.2d 311, 401 N.E.2d 912, 425 N.Y.S.2d 554 (1980).

[319] Board of Education v. Barni, 66 A.D.2d 340, 344, 412 N.Y.S.2d 908, 910 (1979) (opinion of intermediate appeals court).

[320] 49 N.Y.2d at 314, 401 N.E.2d at 913, 425 N.Y.S.2d at 555 (quoting the collective bargaining agreement).

[321] *Id.*, 401 N.E.2d at 913, 425 N.Y.S.2d at 555.

[322] Board of Education v. Barni, 66 A.D.2d 340, 343, 412 N.Y.S.2d 908, 909 (1979).

[323] 49 N.Y.2d at 314, 401 N.E.2d at 913, 425 N.Y.S.2d at 555. *Accord* Franklin Cent. School v. Franklin Teachers Ass'n, 51 N.Y.2d 348, 356, 414 N.E.2d 685, 688, 434 N.Y.S.2d 185, 188 (1980).

[324] *See supra* note 320 and accompanying text. The case is somewhat complicated because the agreement apparently had more than one provision pertinent to arbitration. In addition to the general arbitration clause (*see supra* note 320 and accompanying text), the substantive portion of the contract requiring that discipline be with just cause included a separate sentence that "[a]ny such discipline . . . shall be subject to the professional grievance procedure hereinafter set forth." 66 A.D.2d at 344, 412 N.Y.2d at 910. The lower court in *Barni* limited its consideration to the meaning of this sentence and did not refer to the general arbitration clause. The court of appeals restricted its consideration to the general arbitration clause and did not refer to the discipline sentence. Although we might glean a negative inference that the discipline sentence limited the scope of arbitration, this inference seems a bit attenuated. The probable intent of the discipline sentence was to make it absolutely clear that disciplinary actions allegedly without just cause would be subject to arbitration.

[325] Eisenberg, *Some Recent Developments in Public Sector Grievance Arbitration: A View from New York, reprinted in* NAT'L ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 31ST ANNUAL MEETING 240 (1979); Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329, 336-38 (1980); *Developments in the Law — Public Employment*, 97 HARV. L. REV. 1611, 1721-24 (1984).

[326] *See supra* notes 201-81 and accompanying text.

hostility to public sector grievance arbitration. Instead the rule assures that the scope of arbitration clauses is left to collective bargaining. If the parties desire, they can reject the New York presumption of nonarbitrability and by contract adopt the *Warrior & Gulf* presumption. In *Mineola Union Free School District v. Mineola Teachers Association*,[327] for example, the New York court interpreted an arbitration clause covering "any controversy or dispute as to the meaning, interpretation or application of any provision of [the] Agreement."[328] Because there was no ambiguity in this provision, arbitration was compelled.[329] The *Mineola* case was easily decided, and the effect of the decision was to adopt the *Warrior & Gulf* presumption for interpreting the *Mineola* agreement. There was, however, an important difference between the *Mineola Union* rationale and the reasoning of courts that blindly adopt the *Warrior & Gulf* presumption. In *Mineola*, the decision was based upon the agreement of the parties rather than on a judgment by the judiciary based on factors extrinsic to the parties' agreement.

Absent legislative guidance, the New York presumption of nonarbitrability coupled with the *Mineola* rationale is the best judicial resolution of the troublesome problem of determining whether a public sector grievance is arbitrable. A presumption of nonarbitrability permits the parties to determine through collective bargaining the extent to which arbitration should be used. The parties to collective bargaining have a common interest in stability and peace and are more familiar with the actual needs of a particular governmental entity and its employees than is a court. If the parties agree to a broad arbitration clause with only limited exceptions, they are in effect saying that doubtful matters beyond the scope of the exceptions should be resolved in favor of arbitration. On the other hand, under a presumption of nonarbitrability a carefully crafted arbitration clause should not be broadened beyond the scope intended by either party to the agreement.

D. *Frivolous Grievances and TVA Collective Bargaining Agreements*

In contrast to the *Warrior & Gulf* presumption of arbitrability, the *United Steelworkers of America v. American Manufacturing Co.*[330] frivolous grievance rationale seems a natural candidate for adoption as federal common law applicable to TVA collective bargaining agreements.[331] *American Manufacturing* was a simple case of contract interpretation in

---

[327] 46 N.Y.2d 568, 389 N.E.2d 111, 415 N.Y.S.2d 797 (1979).

[328] *Id.* at 570, 389 N.E.2d at 113, 415 N.Y.S.2d at 798.

[329] *Id.* at 572, 389 N.E.2d at 115, 415 N.Y.S.2d at 799. *Accord* Board of Educ. of the Deer Park Union Free School Dist. v. Deer Park Teachers Ass'n, 50 N.Y.2d 1011, 1012, 409 N.E.2d 1356, 1357, 431 N.Y.S.2d 682, 683 (1980); Board of Education v. Barni, 49 N.Y.2d 311, 314, 401 N.E.2d 912, 913, 425 N.Y.S.2d 554, 555 (1980). *See also* West Fargo Public School Dist. v. West Fargo Educ. Ass'n, 259 N.W.2d 612, 620 (N.D. 1977) ("where there is a broad arbitration clause and no exclusion clause, doubt should be resolved in favor of arbitration").

[330] 363 U.S. 564 (1960).

[331] This conclusion assumes that the Congress has authorized TVA to submit grievances to arbitration. The Tennessee Valley Authority Act and its legislative history support this reasonable assumption. The Act places a great deal of discretion in TVA's Board of Directors (*see supra* notes 167-69 and accompanying text), including the establishment of an effective personnel system. Furthermore, the Act was intended to vest the corporation with "the flexibility of private enterprise." *See supra* notes 123 & 125 and accompanying text. This flexibility coupled with TVA's authority "to enter into such contracts, agreements, and arrangements, upon such terms and conditions . . . as it may deem necessary" (16 U.S.C. § 831h(b) (1982)) surely encompasses authority to submit grievances to arbitration. Certainly arbitration does not infringe upon the Attorney General's general responsibility to represent the United States in litigation matters. TVA is authorized to and has always used its own attorneys to represent the corporation in judicial proceedings. Algernon Blair Indus. Contrac-

which the Court determined the meaning of the parties' agreement and then enforced the agreement. Since the grievance clearly fell within the scope of the agreement's arbitration provision, the Court required the matter to be submitted to arbitration without resorting to rules of construction unrelated to the parties' actual or probable agreement.[332] If the parties to a public sector agreement negotiate an arbitration provision that encompasses all disputes, even frivolous or simple matters should be submitted to arbitration.[333] As the *American Manufacturing* Court suggested, the arbitration of frivolous grievances has therapeutic value in preserving harmonious labor relations. Furthermore the informal and speedy process of arbitration is superior to the judicial process for resolving complaints of dubious merit.[334] Finally, the *American Manufacturing* approach is particularly appropriate in the context of public sector labor relations, in that it properly leaves labor relations policy decisions to the mutual agreement of the parties rather than to independent judicial judgment.

E. *Judicial Review and TVA Collective Bargaining Agreements*

In *Salary Policy Employee Panel v. Tennessee Valley Authority*,[335] the holding in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*[336] limiting judicial review of the arbitration process was uncritically[337] extended to judicial review of an arbitrator's decision under a TVA collective bargaining agreement. The *Salary Policy* decision involved a grievance by a qualified TVA employee who applied for a vacancy that was filled by a nonemployee deemed to be better qualified.[338] The matter was jointly submitted to an arbitrator who decided that TVA had agreed to fill vacancies with qualified present employees.[339] The arbitrator awarded the position to the grieving employee retroactively.[340] Although the court did not agree with the award,[341] the court refused to vacate

---

tors, Inc. v. Tennessee Valley Authority, 540 F. Supp. 551 (M.D. Ala. 1982). Furthermore TVA in fact has been including arbitration provisions in its collective bargaining agreements for many years with the Congress' knowledge. *See, e.g.*, Labor-Management Relations in TVA, S. Rep. No. 372, 81st Cong., 1st Sess. 45 (1949) (describing a grievance procedure culminating in the decision of a neutral referee that "shall be accepted by both parties as final.").

[332] *See supra* notes 47-59 and accompanying text.

[333] *See, e.g.*, Shoreline School Dist. v. Shoreline Ass'n of Educ. Office Employees, 29 Wash. App. 956, 959, 631 P.2d 996, 998 (1981); East Pennsboro School Dist. v. Commonwealth, 467 A.2d 1356 (Pa. Commw. Ct. 1983).

[334] *See supra* note 58.

[335] 439 F. Supp. 1134 (E.D. Tenn. 1977). *See supra* notes 189-91 and accompanying text.

[336] 363 U.S. 593 (1960).

[337] The court explained, "Although T.V.A. is a government corporation not subject to the National Labor Relations Act, both parties agree that the same legal principles evolved under that Act are applicable to the instant action." 439 F. Supp. at 1135. The court's opinion does not suggest the basis of TVA's apparent agreement that *Enterprise Wheel* applied by analogy. TVA had agreed that the subject matter of the *Salary Policy* case was arbitrable, and the grievances had been "submitted jointly to an arbitrator." *Id.* Therefore the *Warrior & Gulf* presumption was not at issue. Instead the case turned upon the court's authority to review an arbitrator's decision. Since the adoption of *Enterprise Wheel* easily can be based upon the reasonable and probable meaning of the parties' agreement (*see infra* notes 345-48 and accompanying text), TVA's position in respect to *Enterprise Wheel* may have been a simple matter of ordinary contract interpretation.

[338] 439 F. Supp. at 1135.

[339] *Id.*

[340] *Id.*

it.[342] Quoting *Enterprise Wheel*, the court explained, "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[343] Most courts that have considered the scope of review of public sector arbitration awards have adopted the *Enterprise Wheel* rule.[344]

In a fundamental sense, the *Enterprise Wheel* theory of limited judicial review is analogous to the *American Manufacturing* concept that broad arbitration provisions encompass frivolous grievances and should be applied to TVA collective bargaining agreements. Judicial review of an arbitrator's decision always has been limited.[345] A party that agrees to submit a matter to arbitration necessarily accepts the various limitations and restrictions associated with the concept of arbitration, including the traditional notion that there is only limited judicial review of an arbitrator's decision.[346] This result is simply a specific application of the general rule of contract interpretation that "[u]nless a different intention is manifested . . . technical terms and words of art are given their technical meaning when used in a transaction within their technical field."[347] Thus, *Enterprise Wheel* should be applied to TVA collective bargaining agreements as a logical implication of the parties' agreement — not because public policy favors arbitration of grievances.[348]

1. Judicial Review of Arbitration Awards Contrary to Law or Public Policy

The concept of limited judicial review of arbitration awards, however, has never been an absolute bar to judicial supervision of arbitration. Courts will not enforce awards which

---

[341] The judge stated that he "would probably have reached a different conclusion on the merits had this been a *de novo* proceeding." *Id.* at 1137.

[342] *Id.*

[343] *Id.* at 1135 (quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)). *See also* Salary Policy Employee Panel v. Tennessee Valley Authority, 731 F.2d 325, 331-32 (6th Cir. 1984) (dictum).

[344] American Postal Workers Union AFL-CIO v. United States Postal Serv., 682 F.2d 1280, 1285 (9th Cir. 1982); Virgin Islands Nursing Ass'n's Bargaining Unit v. Schneider, 668 F.2d 221, 222-23 (3d Cir. 1981) (Virgin Island law); Sergeant Bluff-Luton Educ. Ass'n v. Sergeant Bluff-Luton School Dist., 282 N.W.2d 144, 147 (Iowa 1979); Westbrook School Comm. v. Westbrook Teachers Ass'n, 404 A.2d 204, 208 (Me. 1979); Willamina Educ. Ass'n v. Willamina School Dist. 30J, 50 Or. App. 195, 202, 623 P.2d 658, 662 (1981); Jacinto v. Egan, 120 R.I. 907, 912, 391 A.2d 1173, 1175-76 (1978); Woodstock Union High School Bd. of Directors v. Woodstock High School Teachers' Org., 136 Vt. 256, 260, 388 A.2d 392, 394 (1978); Glendale Professional Policemen's Ass'n v. City of Glendale, 83 Wis. 2d 90, 99 & n.2, 265 N.W.2d 594, 599 & n.2 (1978). The Federal Labor Relations Authority also follows *Enterprise Wheel*. Federal Aviation Science and Technological Ass'n, 2 F.L.R.A. 680, 681-82 (1980); Army Missile Material Readiness Command, 2 F.L.R.A. 433, 437 (1980).

[345] This rule is old and well-established. In 1854, the United States Supreme Court held: "If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." Burchell v. Marsh, 58 U.S. 344, 349 (1854). *Accord* Fudickar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 400 (1875) ("awards will not be opened for errors of law or fact").

[346] This point was made in Jacinto v. Egan, 120 R.I. 907, 911-12, 391 A.2d 1173, 1175 (1978).

[347] RESTATEMENT (SECOND) CONTRACTS § 202(3)(b) (1981). *See also* 3 CORBIN, CONTRACTS §§ 557-58 (1960); E. FARNSWORTH, CONTRACTS § 7.10 (1982); 4 WILLISTON, CONTRACTS § 618 (3d ed. 1961).

[348] *See* City of Oshkosh v. Oshkosh Public Library Clerical and Maintenance Employees Union Local 796-A, 99 Wis. 2d 95, 103-04, 299 N.W.2d 210, 215 (1980). The court in Salary Policy Employee Panel v. Tennessee Valley Authority, 439 F. Supp. 1134 (E.D. Tenn. 1977), referred to the public policy in respect to private sector arbitration and apparently assumed that policy to be equally applicable to the public sector (*id.* at 1136), but this matter was not at issue because of the stipulation of the parties. *See supra* note 337.

are not rationally related to an underlying agreement or are based upon fraud or prejudice.[349] Courts also have been willing to overturn arbitration awards that are contrary to law or public policy.[350] In *Garrity v. Lyle Stuart, Inc.*,[351] for example, the New York Court of Appeals was asked to affirm a lower court order confirming an arbitration award granting punitive damages.[352] The court refused, stating:

> Punitive sanctions are reserved to the State . . . . The evil of permitting an arbitrator . . . to award punitive damages is that it displaces the court and the jury, and therefore the State, as the engine for imposing a social sanction.[353]

Following similar reasoning, New York courts have also refused to enforce arbitrators' awards that effectuate the splitting of professional fees contrary to public policy.[354]

The California Supreme Court used the same rationale in *Franklin v. Nat C. Goldstone Agency*[355] when it refused to enforce an arbitration award under a contract with an unlicensed building contractor.[356] In order to assure the safety and protection of the public, California licensed building contractors.[357] To implement this requirement, the State refused to enforce unlicensed contractors' contracts.[358] The Court explained that the rationale of its decision was not "to secure justice between parties who have made an illegal contract, but from regard for a higher interest — that of the public, whose welfare demands that certain transactions be discouraged."[359]

The federal courts also have overturned entire arbitration agreements as contrary to public policy. In *Wilko v. Swan*,[360] the Supreme Court voided an executory agreement to arbitrate disputes related to a private investor's purchase of securities.[361] By enacting the Securities Act of 1933,[362] the Court reasoned, Congress created a federal cause of action for misrepresentations related to the sale of securities.[363] The same act declared that stipulations waiving compliance with the act are void.[364] Relying upon these sections, the Court held that the executory agreement to deprive the plaintiff of his statutory right to select a judicial forum for the final resolution of his federal cause of action was void.[365]

---

[349] These traditional bases for judicial review have been adopted for the review of public sector awards. *See generally* Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329, 341-48 (1980). *See also* Comment, *Arbitration Awards in Federal Sector Public Employment: The Compelling Need Standard of Appellate Review*, 1977 B.Y.U. L. REV. 429 (1977).

[350] *See generally* Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981).

[351] 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

[352] *Id.* at 355, 353 N.E.2d at 794, 386 N.Y.S.2d at 832.

[353] *Id.* at 358, 353 N.E.2d at 795-96, 386 N.Y.S.2d at 833-34. *Accord* Silverberg v. Schwartz, 75 A.D.2d 817, 819, 427 N.Y.S.2d 480, 482-83 (1980).

[354] Silverberg v. Schwartz, 75 A.D.2d 817, 818-19, 427 N.Y.S.2d 480, 481-82 (1980); Psychoanalytical Center, Inc. v. Burns, 62 A.D.2d 963, 963-64, 404 N.Y.S.2d 106, 107 (1978).

[355] 33 Cal. 2d 628, 204 P.2d 37 (1949).

[356] *Id.* at 629, 204 P.2d at 38.

[357] *Id.* at 632, 204 P.2d at 40.

[358] *Id.*

[359] *Id.* (quoting Takeuchi v. Schmuck, 206 Cal. 782, 786-87, 276 P. 345, 346 (1929)(en banc)). *Accord* Loving & Evans v. Blick, 33 Cal. 2d 603, __, 204 P.2d 23, 27-28 (1949) (companion case).

[360] 346 U.S. 427 (1953).

[361] *Id.* at 438.

[362] 15 U.S.C. §§ 77a-77aa (1982).

[363] *Id.* § 77l(2).

[364] *Id.* § 77n.

[365] 346 U.S. at 431-38.

Both federal and state courts have employed statutory construction similar to that employed by the Supreme Court in *Wilko* to avoid executory agreements to arbitrate antitrust claims.[366]

There is a limit, however, to the *Wilko* rationale. Parties to a dispute may always settle their differences by private agreement, therefore, they may privately agree to settle a dispute by arbitration. Accordingly, the courts have held that binding arbitration of a claim which arose under the Securities Act of 1933 is permissible, notwithstanding the preclusive provisions of the Act, when the agreement to arbitrate is entered into after the dispute arises.[367] When a dispute is purely a matter of personal interest between private parties who have agreed to submit the dispute to arbitration, there can be little public policy objection. In contrast, public sector arbitration, by definition, involves matters of public interest.

2. Private Sector Labor Arbitration and Public Policy

Enterprise Wheel notwithstanding, the courts have reviewed private sector labor arbitration awards for consistency with law and public policy.[368] Arbitration awards that require the employer to commit an unfair labor practice have been vacated.[369] Similarly a court will not enforce an arbitration award allowing an employer to order its employees to violate a state motor vehicle law.[370]

In *Alexander v. Gardner-Denver Co.*,[371] the Supreme Court reaffirmed the strong federal policy favoring labor arbitration[372] but held that the arbitration award did not preclude the federal courts from engaging in judicial review of an arbitration decision under the aegis of the Civil Rights Act of 1964.[373] In that case, a black employee alleged that he had been discharged from employment because of his race.[374] The applicable

---

[366] American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 825-27 (2d Cir. 1968). *Cf.* Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 628-30, 237 N.E.2d 223, 226-27, 289 N.Y.S.2d 968, 973-74 (1968) (state antitrust law).

[367] Murtagh v. Univ. Computing Co., 490 F.2d 810, 816 (5th Cir. 1974), *cert. denied*, 419 U.S. 835 (1974); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1212-13 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972); Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970); Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 245-46 (3d Cir. 1968).

[368] *See* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, *reprinted in* NAT'L ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 30TH ANNUAL MEETING 29, at 46-48 (1978).

In Local No. P-1236 v. Jones Dairy Farm, 519 F. Supp. 1362 (W.D. Wis. 1981), the court vacated an award as contrary to a public policy encouraging whistle blowers who complain to the United States Department of Agriculture.

[369] Glendale Mfg. Co. v. Local No. 520, Int'l Ladies' Garment Workers' Union, 283 F.2d 936, 938-39 (4th Cir. 1960); Botany Industries, Inc. v. New York Joint Bd., Amalgamated Clothing Workers, 375 F. Supp. 485, 491 (S.D.N.Y. 1974)(violation of Labor Management Relations Act's hot-cargo ban), *vacated on other grounds sub nom.*, Robb v. New York Joint Bd., Amalgamated Clothing Workers, 506 F.2d 1246 (2d Cir. 1974); Puerto Rico District Council of United Brotherhood of Carpenters & Joiners v. Ebanisteria Quintata, 56 L.R.R.M. 2391, 2392 (D.P.R. 1964).

[370] General Teamsters v. Consolidated Freightways, 464 F. Supp. 346 (W.D. Pa. 1979). *Accord* United Auto Workers Local 985 v. Chace Co., 262 F. Supp. 114, 117-18 (E.D. Mich. 1966)(violation of state statute).

[371] 415 U.S. 36 (1974).

[372] *Id.* at 46, 59.

[373] 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1982). The employee specifically alleged that his discharge was in violation of 42 U.S.C. § 2000e-2(a)(1) (1982).

[374] 415 U.S. at 39.

collective bargaining agreement provided that "there shall be no discrimination against any employee on account of race . . . . [and that] [n]o employee will be discharged . . . except for just cause."[375] The matter was submitted to an arbitrator who ruled that the employee had been discharged for just cause.[376] Rather than appeal this decision, the discharged employee filed suit in federal court alleging violation of the Civil Rights Act of 1964.[377]

Upon appeal of the lower courts' dismissal of the employee's suit,[378] the Supreme Court stressed the ability of the federal courts to review arbitral decisions for conformity with federal law.[379] In addition the Court noted that industrial arbitrators are expected to restrict their decisions to the parties' agreement and private interests.[380] Therefore "[t]he arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties . . . ."[381] Because the Court felt that arbitrators have no special competence in resolving matters of statutory interpretation[382] and that the arbitration factfinding process is inferior to judicial factfinding, it refused to defer to the arbitrator's decision in the manner traditionally mandated by *Enterprise Wheel*.[383] In subsequent cases, the Court has adopted the same analysis in response to arguments that an arbitration award precludes a cause of action under 42 U.S.C. § 1983[384] and the Fair Labor Standards Act.[385]

More recently in *W.R. Grace & Co. v. Local Union 759*,[386] the Court considered whether a labor arbitration award that requires a company to violate a court order is enforceable.[387] The Court had no doubts that such an award should be vacated as a matter

---

[375] *Id.* (quoting the agreement).

[376] *Id.* at 42. The arbitrator did not mention the claim of racial discrimination.

[377] *Id.* at 42-43.

[378] *Id.* at 43.

[379] *Id.* at 47-51.

[380] *Id.* at 53.

[381] *Id.* at 53. The Court then explained that if an arbitration award is based "solely upon the arbitrator's view of the requirements of enacted legislation" and is not an interpretation of the agreement, the award will not be enforced. *Id.* (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

[382] 415 U.S. at 57. Arbitrators' special expertise is in the "law of the shop, not the law of the land." Furthermore many arbitrators are not lawyers. *Id.* at 57 n.18.

[383] 415 U.S. at 57-58. *See supra* note 239 and accompanying text.

[384] McDonald v. City of West Branch, 104 S. Ct. 1799, 1802-03 (1984).

[385] Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 736-46 (1981).

[386] 103 S. Ct. 2177 (1983).

[387] The case involved the seniority provisions in the company's collective bargaining agreement. In response to civil rights complaints by some of the company's workers, the company worked out a conciliation agreement with the Equal Employment Opportunity Commission. The agreement was contrary to the collective bargaining seniority provisions, and the company filed suit in federal court to enjoin grievance arbitration on the matter. 103 S. Ct. at 2180. The district court held that the conciliation agreement's modification of the collective bargaining agreement was permissible under the Civil Rights Act and binding upon the parties. Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, 403 F. Supp. 1183, 1187 (N.D. Miss. 1975). No party sought a stay of this order. While the decision was on appeal, the company laid off personnel pursuant to the conciliation agreement. 103 S. Ct. at 2181. Eventually, the court of appeals reversed the lower court, holding that the original seniority provisions were lawful and not subject to modification without the Union's consent. Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, 565 F.2d 913 (5th Cir. 1978). An arbitrator subsequently made a backpay award for the employees who were laid off pursuant to the district court order that had not been stayed. 103 S. Ct. at 2181. The company contended that this backpay award was contrary to the public policy that court orders should be followed. *Id.* at 2183.

of public policy,[388] but held that the award in question did not actually require violation of a court order.[389]

3. Public Sector Labor Arbitration and Public Policy

The courts generally have recognized the need for judicial review of public sector arbitration awards that are contrary to law or public policy. Lacking statutory expertise, an arbitrator may be reluctant to consider applicable laws in deciding a grievance. Instead, he may restrict himself to the agreement.[390] If an arbitrator declines even to consider a controlling extra-contractual legal issue, judicial review should be available.[391]

Numerous courts have recognized the need for broad judicial review of public sector arbitration awards. *Wisconsin Employment Relations Commission v. Teamsters Local No. 563*,[392] for example, involved a local ordinance that required city employees to be city residents.[393] Notwithstanding the ordinance, an arbitrator ruled that discharge of a nonresident employee was not for just cause and that the employee must be reinstated.[394] Although the Wisconsin Supreme Court agreed that the doctrine of limited judicial review of arbitration awards was applicable,[395] the court refused to order enforcement of the award.[396] The Wisconsin court reasoned that the city and the union could not have amended the ordinance by means of an express private contractual agreement between themselves.[397] Therefore "a contractual provision conferring upon a third party [i.e., the

---

For a discussion of cases following the rule enunciated in *W. R. Grace*, *see* 1983-84 *Annual Survey of Labor Law — Enforceability of Title VII Conciliation Agreements that Conflict with Collective Bargaining Contracts*: EEOC v. Safeway Stores, Inc., 26 B.C.L. REV. 332 (1984).

[388] 103 U.S. at 2183-84. *Accord* Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm, 519 F. Supp. 1362, 1369 (W.D. Wis. 1981) (rejecting arbitrator's approval of disciplinary action against employees who had complained to the U.S.D.A.). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING ch. 25 § 5 (1976).

[389] The Court noted that the award was for damages and did not require the company to violate the judicial order. 103 S. Ct. at 2185. Furthermore, the "[e]nforcement of [the] award will not create intolerable incentives to disobey court orders." *Id.*

[390] In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court said: "The arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties . . . ." *Id.* at 53. A respected scholar and arbitrator has recommended that an arbitrator "confronted with an irreconcilable conflict between the parties' agreement and 'the law' . . . should follow the contract." St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, *reprinted in* NAT'L ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 30TH ANNUAL MEETING 29, at 34 (1978). The arbitrator refused to consider state law in Cuyahoga County Welfare Dep't v. AFSCME, Local 1746, 76 Lab. Arb. (BNA) 729, 731-32 (1981) (Siegel, Arb.). *See also* United States Postal Serv. v. National Ass'n of Letter Carriers, 73 Lab. Arb. (BNA) 1174, 1181-83 (1979) (Garrett, Arb.) (Civil Service Commission policy not controlling).

[391] *See, e.g.*, Local 866, International Brotherhood of Teamsters v. Lodi Bd. of Educ., 149 N.J. Super. 147, 151-53, 373 A.2d 435, 437-38 (1977).

[392] 75 Wis. 2d 602, 250 N.W.2d 696 (1977).

[393] *Id.* at 604, 250 N.W.2d at 697.

[394] The Wisconsin Employment Relations Commission directed the city to comply with the award, but a Wisconsin trial court set aside this order. 75 Wis. 2d at 606-07, 250 N.W.2d at 698.

[395] *Id.* at 610-11, 250 N.W.2d at 700. The court cited United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 567 (1960), and other private sector decisions in support of this proposition. 75 Wis. 2d at 611 n.6, 250 N.W.2d at 700 n.6.

[396] 75 Wis. 2d at 614, 250 N.W.2d at 702.

[397] *Id.* at 612, 250 N.W.2d at 701.

arbitrator] the power to interpret the contract in such a manner that a violation [of the ordinance] will occur is also void."[398]

The reasoning of the Wisconsin court in *Wisconsin Employment Relations Commission* implicates profound notions that go to the heart of constitutional government. The problem of an arbitral award contrary to public law was not before the *Trilogy* Court when *Enterprise Wheel* was decided. Private sector agreements typically do not implicate this issue because most private sector activities are left to individuals' private choice. In the few instances where private sector arbitrators' awards have been contrary to law, the courts have refused to enforce the award notwithstanding the strong public policy favoring private sector labor arbitration.[399] In contrast a public sector employer is entirely a creature of law and lawfully may take no action that is not either required by law or committed by law to the employer's discretion. In a nation committed to the rule of law, there are clear procedural steps that must be taken in order to make new laws or change existing law. Any suggestion that laws may be made or unmade through arbitration, without regard to these procedures, is fundamentally inconsistent with the concept of a society ruled by laws.[400]

Accordingly, courts reviewing public sector arbitration awards have routinely refused to enforce awards that are contrary to local ordinances,[401] state statutes,[402] or constitutions.[403] The reasoning advanced in support of these decisions also can apply to administrative rules and regulations promulgated under authority of law.[404] Administrative rules and regulations should be amended in accordance with procedures specified by law.

---

[398] *Id.* at 613, 250 N.W.2d at 701. *Accord* Tippecanoe Educ. Ass'n v. Bd. of Trustees, 429 N.E.2d 967, 973 (Ind. App. 1982); School Comm. of Boston v. Boston Teacher's Union, 378 Mass. 65, 70-71, 389 N.E.2d 970, 973-74 (1979); Wisconsin Professional Police Ass'n v. County of Dane, 106 Wis. 2d 303, 315-17, 316 N.W.2d 656, 662-63 (1982). This reasoning is precisely the analysis that the Supreme Court endorsed in the *W.R. Grace* case. 103 S. Ct. at 2183-84. *See supra* notes 386-389 and accompanying text.

[399] *See supra* notes 368-70 and accompanying text.

[400] This point was eloquently made by the Supreme Court in Tennessee Valley Authority v. Hill, 437 U.S. 153, 195 (1978) (quoting R. BOLT, A MAN FOR ALL SEASONS, Act I, P. 147 (Three Plays, Heinemann ed. 1967)).

[401] Wisconsin Employment Relations Comm'n v. Teamsters Local No. 563, 75 Wis. 2d 602, 612-14, 250 N.W.2d 696, 701 (1977); *cf.* Int'l Brotherhood of Teamsters v. City of Minneapolis, 302 Minn. 410, 418, 225 N.W.2d 254, 259 (1975) (City could not agree to collective bargaining agreement provision contrary to city charter).

[402] *See* Bd. of Trustees v. AFT, Local 1942, 103 L.R.R.M. 2597, 2602 (Conn. 1979); Glendale Prof. Policemen's Ass'n v. City of Glendale, 83 Wis. 2d 90, 105-06, 264 N.W.2d 594, 602 (1978); *Semble*, Boston Teachers Union v. School Committee of Boston, 370 Mass. 455, 467, 350 N.E.2d 707, 774 (1976); Tremblay v. Berlin Police Union, 108 N.H. 416, 420-23, 237 A.2d 668, 671-73 (1968). *Cf.* Rhode Island Council 94 v. State, 456 A.2d 771 (R.I. 1983) (legislative policy permits arbitration award contrary to state civil service law). This rule is a statutory rule of decision in Pennsylvania. 43 PA. STAT. ANN. tit. 43, § 1101.703 (Purdon 1983 Supp.), *discussed in*, Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 507-09, 337 A.2d 262, 268-70 (1975).

[403] Wisconsin Professional Police Ass'n v. County of Dane, 106 Wis. 2d 303, 317, 316 N.W.2d 656, 662-63 (1982). *Cf.* Kelly v. United States Postal Serv., 492 F. Supp. 121, 127 (S.D. Ohio 1980)(failure to exhaust grievance procedures does not prevent court from deciding first amendment claim).

[404] *See* Lodge 2424, Int'l Ass'n of Machinists v. United States, 564 F.2d 66, 69-71 (Ct. Cl. 1977). *Cf.* 5 U.S.C. § 7122(a)(1) (1982) (providing for administrative review by the Federal Labor Relations Authority of Awards "contrary to any . . . rule, or regulation."). In Univ. of Hawaii v. Univ. of Hawaii Professional Assembly, 659 P.2d 732, 733-34 (Hawaii 1983), the court held that an arbitrator lacked authority to ignore a Ph.D. requirement in the university's Faculty Handbook establishing promotion criteria.

For purposes of analyzing the susceptibility of public sector labor arbitration awards to judicial review, it is helpful to identify two categories of judicial review. In one set, courts hold the terms of an award to be unlawful because the award directs a public entity to violate a particular law.[405] Judicial enforcement of such an award cannot be justified unless the apparent conflict between the award and the law can be harmonized.[406] A public policy favoring grievance arbitration is insufficient to vest the courts with authority to enforce awards that require an entity to violate the law.[407] Also falling within this first set are public sector decisions indicating an arbitration award contrary to public policy should not be enforced. For example, an award that benefitted participants in an unlawful public sector strike at the direct expense of fellow employees who did not violate the law has been considered contrary to public policy and hence unenforceable.[408] Similarly, if the courts of a particular jurisdiction hold as a matter of public policy that punitive damages can be assessed only by the courts,[409] a public sector arbitration award of punitive damages cannot stand.[410]

The first category of judicial review involved cases in which an award requires the violation of law or public policy. In contrast, the second category involves the problem of delegation. If applicable law provides that particular decisions must be made only by a government official, the decision may not be lawfully delegated to a private arbitrator.[411] A strict interpretation of laws regarding the delegability of particular decisions would be inappropriate if applicable legislation provides for collective bargaining and establishes a legislative policy favoring grievance arbitration. Collective bargaining legislation should be read as modifying laws regarding delegation. In this situation, courts have held that there is no delegation problem if the government entity makes a general abstract decision but leaves the resolution of particular cases to arbitration.[412]

---

[405] *See, e.g.*, Wisconsin Employment Relations Comm'n v. Teamsters Local No. 563, 75 Wis. 2d 602, 250 N.W.2d 696 (1977), *discussed supra* notes 392-98 and accompanying text.

[406] In Appeal of Chester Upland School Dist., 55 Pa. Commw. 102, 109, 423 A.2d 437, 441 (1981), the court held that the apparently contrary statute was directory only.

[407] Some states have resolved this problem through legislation providing that certain laws (typically civil service laws) do not apply if the parties have entered into a collective bargaining agreement contrary to the specified law. *See infra* note 435 and accompanying text. There is no such statute applicable to TVA collective bargaining agreements.

[408] Board of Trustees of Community College v. Cook County College Teachers Union, Local 1600, 74 Ill. 2d 412, 425-26, 386 N.E.2d 47, 52-53 (1979).

[409] *See supra* notes 351-53 and accompanying text.

[410] School City of East Chicago v. East Chicago Fed. of Teachers, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981).

[411] *See, e.g.*, Tippecanoe Educ. Ass'n v. Bd. of School Trustees, 429 N.E.2d 967, 973-74 (Ind. App. 1982); Wisconsin Professional Police Ass'n v. County of Dane, 106 Wis. 2d 303, 317-19, 316 N.W.2d 656, 662-63 (1982) (under state constitution, only the sheriff was allowed to decide which deputies would serve as the sheriff's alter ego in attendance in the court); *see also supra* notes 207-08 and accompanying text.

[412] Univ. of Hawaii Professional Assembly v. Univ. of Hawaii, 659 P.2d 720, 725 (Hawaii 1983) (University Bd. of Regents with authority over tenure and promotion could establish standards to be implemented through grievance arbitration); Cape Elizabeth School Bd. v. Cape Elizabeth Teachers Ass'n, 459 A.2d 166, 169-72 (Me. 1983) (dismissal only for just cause); Fortney v. School Dist. of West Salem, 108 Wis. 2d 167, 174-78, 321 N.W.2d 225, 230-32 (1982) (discharge only for just cause); Glendale Professional Policeman's Ass'n v. City of Glendale, 83 Wis. 2d 90, 102-07, 264 N.W.2d 594, 601-03 (1978) (promotion based upon seniority).

4. *Salary Policy Employees Panel* Reconsidered

In the *Salary Policy Employees Panel* case,[413] TVA argued that the arbitrator's decision under the collective bargaining agreement that vacancies should be filled by qualified TVA employees in preference to better qualified nonemployees was contrary to the TVA Act.[414] The court rejected this argument, reasoning "that no clear violation of the T.V.A. Act has been shown; therefore, the arbitrator's interpretation of the contract should be enforced in order to promote the national policy favoring arbitration of labor disputes . . . ."[415] While the result of the case is defensible, the rationale is improper.

First, there is no national policy favoring the arbitration of TVA labor disputes. Second, and more importantly, the courts are assigned ultimate responsibility for interpreting the laws, and this responsibility should not be abdicated, especially when the lawfulness of a proposed government action is at issue. The *Salary Policy* court's "clear violation" requirement, in effect, vests private arbitrators with lawmaking authority in respect to close questions of law. The adoption of this rationale by the *Salary Policy* court is all the more disturbing in that the result reached by the court is not inconsistent with the agreement of the parties. The TVA Act easily could have been interpreted as not forbidding the award in question.[416] The point is that this legally binding interpretation of an Act of Congress would have been more appropriately made by a judge than an arbitrator.

One particular aspect of the *Salary Policy* decision merits more detailed discussion. Two provisions of the TVA Act provide that TVA's Board of Directors is to assure that TVA's personnel system is run in such a manner as to "promote efficiency."[417] The argument could be made that issues relating to the efficiency of TVA operations are nondelegable — such issues must be decided by TVA rather than by private arbitrators. As such, the arbitration provision itself would be subject to avoidance as inherently contrary to law. There is of course no language in the TVA Act that specifies that matters relating to "efficiency" are nondelegable. In enacting the TVA Act, Congress clearly

---

[413] *See supra* notes 189-93 and accompanying text.

[414] 439 F. Supp. at 1136.

[415] *Id.*

[416] The most troublesome section of the TVA Act provided: "In the . . . selection of employees . . and in the promotion of any such employees . . . no political test or qualification shall be permitted or given consideration, *but all such appointments and promotions shall be given and made on the basis of merit and efficiency*." 16 U.S.C. § 831e (1982) (emphasis added). The emphasized words could be read as precluding the filling of vacancies with qualified employees in preference to more qualified non-employees. The court simply abdicated its responsibility for interpreting the statute and declared that the issue was not clear.

The same result could have been reached in the *Salary Policy* case by simply recognizing that a general rule of preferring qualified employees over non-employees would enhance general employee morale and encourage existing employees to excel in the performance of their duties. This general rule would encourage efficiency and excellence among employees and appointments and promotions would be made on the basis of existing employees' merit and efficiency. *See infra* note 419. In addition, the above emphasized portion of the statute should not be taken out of context. The use of the word "but" rather than "and" suggests that the primary objective of the section is to prohibit any promotion made on the basis of a "political test or qualification." *But see* Salary Policy Employee Panel v. Tennessee Valley Authority, 439 F. Supp. at 1136.

[417] 16 U.S.C. § 831e (1982), reprinted in pertinent part, *supra*, in text accompanying note 392. The TVA Act further provides: "The board is authorized . . . . [t]o establish, maintain, and operate laboratories and experimental plants . . . in the most economical manner and at the highest standard of efficiency." 16 U.S.C. § 831d(h) (1982). *See also* 16 U.S.C. § 831e (1982)(discussed *supra* note 392).

intended to vest TVA with wide discretion to select among various alternative methods for accomplishing its mission.[418] The use of grievance arbitration can make important contributions to efficient operations, and promoting qualified employees from within the organization clearly enhances overall efficiency.[419] Thus, TVA's decision to submit such matters to arbitration is authorized by implication under the TVA Act.[420] Established principles of law demand that the court defer to TVA's exercise of its discretion under the Act.[421] Therefore, the *Salary Policy* court could have upheld both the validity of the TVA arbitration provision and the specific award at issue in that case without resort to the inappropriate concept of "clear violation."

III. Concluding Comments Regarding State and Local Governments

The TVA experience has served as a paradigm for developing a thesis regarding the general applicability of the *Steelworkers Trilogy* rationales to the public sector. While TVA is in some ways a unique entity, the analysis presented in this article is not idiosyncratic. Most of the considerations pertinent to the arbitration of TVA grievances also are pertinent to arbitration in the state and local public sectors. Because state legislative policy varies, however, particular conclusions suggested as appropriate for TVA cannot be uniformly adopted for all public sector agreements.[422]

Before the question of applying principles derived from the *Trilogy* becomes relevant, however, several threshold issues must be resolved. First, the legal authority of local entities to engage in collective bargaining activities traditionally has been narrowly construed.[423] In addition many courts have expressed a concern regarding the propriety of

---

[418] *See supra* notes 123-25 and accompanying text.

[419] TVA always has been committed to the idea that its collective bargaining agreements make a positive contribution toward the fulfillment of its mission. *See, e.g.*, Van Mol, *The TVA Experience, reprinted in* Collective Bargaining in the Public Service: Theory and Practice 85-94 (1967) (Mr. Van Mol was General Manager of TVA); Lilienthal & Marquis, *The Conduct of Business Enterprises by the Federal Government*, 54 Harv. L. Rev. 545, 566-67 (1941) (Mr. Lilienthal was vice-chairman, soon to become chairman of TVA's Board of Directors; Mr. Marquis was a TVA attorney who eventually became TVA's General Counsel.). Thus collective bargaining is an effective way to implement the TVA Act. *See* Tennessee Valley Trades and Labor Council v. Tennessee Valley Authority, 488 F. Supp. 146, 152-53 (E.D. Tenn. 1980), *app. dismissed mem.*, 672 F.2d 918 (6th Cir. 1981).

TVA's collective bargaining agreements expressly provide:

> TVA and the Council recognize that cooperation . . . is necessary to accomplish the public purposes for which TVA has been established, and that such cooperation rests squarely on mutual understandings arrived at through collective bargaining . . . . Therefore TVA and the Council hereby agree to set up procedures . . . [for] adjustment of disputes and grievances.

General Agreement between the Tennessee Valley Authority and the Tennessee Valley Trades and Labor Council, Art. II.2 (negotiated August 6, 1940; revised through March 15, 1981) (covering construction employment). *Accord* General Agreement between the Tennessee Valley Authority and the Tennessee Valley Trades and Labor Council, Art. II.2 (negotiated August 6, 1940; revised through March 15, 1981) (covering annual and hourly operating and maintenance employment); Articles of Agreement between the Tennessee Valley Authority and the Salary Policy Employee Panel, Art. II.B (negotiated Dec. 5, 1950; revised through Oct. 1, 1981).

[420] *Cf.* cases cited *supra* note 259.

[421] *See supra* note 259 and accompanying text.

[422] Likewise, collective bargaining agreements of agencies covered by the Federal Service Labor Management Relations Act must be construed according to the legislative policies established by that Act.

[423] *See generally* Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 Iowa L. Rev. 539 (1969). *See also* Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885 (1973).

delegating essentially governmental decisions to private arbitrators.[424] Therefore at the state and local levels, one must determine first whether the contracting public entity has authority to enter into collective bargaining agreements and to agree to submit particular matters to arbitration. Assuming that a public entity has general authority to bargain collectively and to agree to grievance arbitration, the question becomes whether a particular grievance is within the scope of the applicable agreement's arbitration clause. In the public sector, a court should answer this question using traditional methods of contract interpretation. The actual, reasonable, or probable agreement of the parties should control.

A court should be reluctant to use the *Warrior & Gulf* presumption of arbitrability to construe a state or local public sector agreement. The presumption is based on congressional policy concerning private sector labor relations that is clearly inapplicable to the public sector, including state and local governmental employers.[425] The proper reluctance of the federal courts to meddle with federal agencies' employment relations policies is not a prudential policy limited to interrelationships within the federal government. The same considerations are relevant when a state court is asked to enforce a state or local public sector agreement. Likewise state judges are no more qualified than federal judges to make the fundamental management decision inherent in adopting the *Warrior & Gulf* presumption of arbitrability. Several state courts have acknowledged these concerns by refusing to construe state labor legislation as controlling public sector employee relations.[426]

If, however, the legislature of a particular state establishes a policy favoring the arbitration of public sector grievances, a judicial presumption of arbitrability should be considered as an appropriate means of implementing that legislative policy. Actual analysis must be on a state by state basis and is complicated by the general paucity of state legislative history. If there is no relevant state legislation or if pertinent legislation is neutral regarding the desirability of grievance arbitration, resort to the analysis advanced above concerning TVA is appropriate.[427] According to that analysis, a presumption of arbitrability should not be imposed on state and local public sector labor relations unless the presumption is demonstrably consistent with the parties' agreement.[428]

State legislative policy concerning public sector labor arbitration is often enunciated in statutory form. These statutes typically may be categorized as permissive, mandatory or preclusive. A state statute of the permissive type generally provides that a public entity "may" agree to binding grievance arbitration. A court might perceive this formulation as a statement of policy favoring grievance arbitration.[429] This permissive language should not

---

[424] Although courts once were concerned about the general authority of a public entity to submit to binding arbitration, this trend has changed. *Compare* City and County of Denver v. Denver Firefighters, 663 P.2d 1032, 1038-39 (Colo. 1983) *with* Fellows v. La Tronica, 151 Colo. 300, 304-06, 377 P.2d 547, 550-51 (1962). *See* Roberts v. City of St. Joseph, 637 S.W.2d 98, 102-03 (Mo. App. 1982). *See generally* Comment, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129 (1968).

[425] *See supra* notes 115-19 and accompanying text.

[426] *See supra* notes 158 & 198 and accompanying text. This same concern has been raised by state courts in other contexts. *See supra* note 257 and accompanying text.

[427] *See, e.g.*, International Ass'n of Firefighters, Local No. 2359 v. City of Edmond, 619 P.2d 1274, 1275 (Okla. Ct. App. 1980) (expressly neutral statute).

[428] The New York experience is instructive. *See supra* notes 316-29 and accompanying text.

[429] Council of County and City Employees v. Spokane County, 32 Wash. App. 422, 427, 647 P.2d 1058, 1061 (1982) (citing WASH. REV. CODE ANN. § 41.56.122(2) (1984-85 Supp.)). Courts

be stretched so far. On the contrary, read in a historical context, permissive statutes do not support so clear an interpretation. Until recently there was doubt whether public sector entities had implicit authority to agree to the arbitration of grievances.[430] From this perspective, public sector statutes providing that governmental entities "may" agree to grievance arbitration serve a significant purpose of clarifying the legal capacity of such entities, but do not necessarily establish legislative policy favoring the submission of public sector grievances to arbitration.

The situation under either a mandatory or preclusive statute is more clear-cut. If a particular statute requires rather than permits grievance arbitration, a legislative policy favoring arbitration is self-evident. In such a case a court should adopt the presumption of arbitration to implement the legislature's pronouncement of policy.[431] If state law positively forbids the submission of a particular grievance to arbitration, however, a court clearly should not order arbitration.

A more difficult issue arises when the relief sought in a particular grievance might be permissible under the applicable agreement but would be contrary to law. If the arbitrator's award would be necessarily contrary to law, a court should not require arbitration. Nevertheless, prospective fear of an illegal arbitration award should not operate to preclude judicial resort to ordering arbitration. If the parties have agreed to submit a particular matter to arbitration, courts should be reluctant to refuse arbitration simply because an illegal award may result. Since arbitrators have a great deal of discretion in fashioning remedies, courts should not assume that an illegal remedy will be selected. The better course, especially in a state with a legislative policy favoring arbitration, is to enforce the parties' agreement and send the matter to arbitration.[432] If the arbitrator ultimately makes an unlawful award, judicial review is available.

---

generally have adopted the *Warrior & Gulf* presumption of arbitrability with little or no analysis of applicable legislation. *See supra* note 296.

[430] *See supra* note 423 and accompanying text.

[431] Pennsylvania and Florida have mandatory statutes (PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1983-84); FLA. STAT. ANN. § 447.401 (West 1981)), and the courts have interpreted them as establishing a strong policy favoring the arbitration of public sector grievances. *See supra* note 296. Alaska, Minnesota, and the national government also have mandatory statutes. ALASKA STAT. § 23.40.210 (1984); MINN. STAT. ANN. § 179.70(1) (West Supp. 1984); 5 U.S.C. § 7121(a)(1) (1982).

[432] School Comm. v. Tyman, 372 Mass. 106, 114, 360 N.E.2d 877, 881-82 (1977); Port Washington Union Free School Dist. v. Port Washington Teachers Assoc., 45 N.Y.2d 411, 418-19, 380 N.E.2d 280, 283-84, 408 N.Y.S.2d 453, 456 (1978); Nyack Bd. of Educ. v. Nyack Teachers Ass'n, 84 A.D.2d 580, 580-81, 443 N.Y.S.2d 425, 426-27 (1981), *aff'd mem.*, 55 N.Y.2d 959, 434 N.E.2d 264, 449 N.Y.S.2d 194 (1982); North Beach Education Ass'n v. North Beach School Dist., 31 Wash. App. 77, 84-86, 639 P.2d 821, 824-25 (1982). In the *Tyman* case, the court noted that although the ultimate decision to grant academic tenure could not be delegated to a private arbitrator, a tenure dispute nevertheless could be sent to arbitration. Thus, the court stated:

> If a violation is found by the arbitrator, he may not grant tenure to the teacher, but he may fashion a remedy which falls short of intruding into the school committee's exclusive domain. Some violations of evaluation procedures may be trivial and not justify any relief. Not all violations of a teacher's rights, even constitutional rights, will justify reinstatement. The arbitrator might direct merely that the omitted procedures be followed and the teacher's record corrected as appears appropriate.

372 Mass. at 114, 360 N.E.2d at 881-82. In School Comm. v. Raymond, 369 Mass. 686, 690-91, 343 N.E.2d 145, 148 (1976), the court held that an arbitrator could not order reinstatement of a terminated employee but could award damages. In Bd. of Educ. v. Bernard's Township Educ. Ass'n, 79 N.J. 311, 318-19, 399 A.2d 620, 624 (1979), the court enforced an agreement to submit a nondelegable question to advisory arbitration.

In contrast to the *Warrior & Gulf* presumption of arbitrability, the holding of *American Mfg.* concerning the arbitrability of frivolous grievances should be applied to state and local collective bargaining agreements as a matter of course. If the parties have legal authority to submit a particular class of grievances to arbitration and have agreed to arbitration, even frivolous claims should be arbitrated. Public policy is not relevant to the court's decision except to assist in establishing legal authority to agree to arbitration and to override any antiquated notion that courts should not enforce executory arbitration agreements.

The question of judicial review of state and local public sector labor arbitration is more complex. When the parties contract to submit a matter to arbitration, they have agreed by definition to a limited scope of judicial review. A particular state may statutorily define the scope of review of public sector grievance arbitration and typically these statutes codify the general notion of judicial review of arbitration awards,[433] including the idea that an arbitrator cannot exceed the power conferred by the parties.[434] Since government entities cannot validly contract to violate law or public policy, arbitration awards contrary to law or public policy necessarily are in excess of the arbitrator's powers.

Some states have enacted laws dealing with the precise issue of collective bargaining agreement provisions that appear to be inconsistent with state law. A Massachusetts statute provides that in the event of a conflict between a collective bargaining agreement and any of nineteen specifically enumerated state laws "the terms of the collective bargaining agreement shall prevail."[435] If a particular term is inconsistent with a law that is not enumerated in the statute, the term is invalid.[436] A comparable approach was adopted by the Rhode Island court in *Rhode Island Council 94 v. State*,[437] involving an arbitration award alleged to be contrary to state civil service laws. The original civil service law contained a provision requiring that civil service laws be followed even though a particular matter might be arbitrable.[438] Since this provision had been specifically repealed,[439] the court inferred that "the Legislature did not intend to impose the merit system upon parties submitting to binding arbitration."[440] This approach seems quite reasonable as

[433] *See, e.g.*, WIS. STAT. ANN. § 111.86 (West 1981 & Supp. 1983-84) & ch. 788 (West 1981 & Supp. 1983-84); R.I. GEN. LAWS § 28-9-18 (Supp. 1984), *construed applicable to public sector in* Jacinto v. Egan, 120 R.I. 907, 917, 391 A.2d 1173, 1178 (1978). A number of states rely upon their version of the Uniform Arbitration Act. *See, e.g.*, Lisbon School Committee v. Lisbon Educ. Ass'n, 438 A.2d 239 (Me. 1981); Bd. of Educ. of Charles County v. Education Ass'n of Charles County, 286 Md. 358, 408 A.2d 89 (Md. 1979); Pennsylvania Labor Relations Bd. v. Bald Eagle Area School Dist., 499 Pa. 62, 451 A.2d 671 (1982). One-half of the states have enacted the Uniform Arbitration Act. *See* 7 UNIFORM L. ANN. (Supp. Pamphl. 1985).

[434] *See, e.g.*, Uniform Arbitration Act § 12(a)(3); R.I. GEN. LAWS § 28-9-18(b) (1984).

[435] MASS. GEN. LAWS ANN. ch. 150E, § 7(d) (West 1982). Other states have similar statutes. CONN. GEN. STAT. ANN. § 7-474(f) (West 1972); WIS. STAT. ANN. § 111.93(3) (West Supp. 1983-84). For an able student comment on the Massachusetts statute, see Comment, *The Non-Delegation Doctrine and Massachusetts Public Employee Grievance Arbitration*, 5 W. NEW ENG. L. REV. 699 (1983). The Massachusetts statute also provides for collective bargaining supremacy in respect to municipal ordinances and various rules and regulations. MASS. GEN. LAWS ANN. ch. 150E, § 7(d) (West 1982). Of course, the particular collective bargaining agreement provision must be within the statutory scope of permissible negotiations. *Id.* (referring to section 6 of the statute).

[436] Berkshire Hills Regional School Dist. Comm. v. Berkshire Hills Educ. Ass'n, 375 Mass. 522, 526-27, 377 N.E.2d 940, 944 (1978); City of Boston v. Boston Police Superior Officers Fed'n, 9 Mass. App. 898, 898-99, 402 N.E.2d 1098, 1099 (1980).

[437] 456 A.2d 771 (R.I. 1983).

[438] *See id.* at 774.

[439] *See id.*

[440] *Id.*

long as the action of the state legislature does not run afoul of the delegation doctrine based upon the applicable state constitution.

Finally, state courts must grapple with the scope of judicial review of public sector arbitration awards contrary to state policy. Almost by definition this type of review will involve a high degree of judicial discretion. In considering whether a particular award violates public policy, a judge should weigh a number of factors, including the fact that the parties have agreed to arbitration in order to assure stability and peace in the public sector. A court should be wary of imposing its own conception of public policy in contravention of the public and private benefits that arise from public sector arbitration. A court should be particularly reluctant to vacate an arbitration award on public policy grounds when the state legislature has established a public policy favoring the arbitration of public sector grievances.

Conclusion

Because the arbitration of public sector labor grievances implicates a complex of considerations related to a governmental entity's relations with its employees, the courts should not impose their independent judgment in respect to these considerations upon governmental entities. Grievance arbitration clearly contributes to the stability and peace of a government's relations with its employees. The question is whether the benefits outweigh the costs in respect to a particular government entity. The weighing of these benefits and costs is best accomplished through collective bargaining or the legislative process. The proper role of a court in construing a public sector arbitration provision is to interpret accurately the intended agreement of the parties. Absent legislative guidance, the courts should not extend legislative policy favoring arbitration in the private sector to public sector labor relations.

In light of these principles, this article has examined arguments for the application of the *Steelworkers Trilogy* to the public sector. The article advocates adoption of the *American Manufacturing* principle that arbitration provisions should be interpreted as encompassing even frivolous grievances. Likewise, the concept of limited judicial review of arbitration provisions established in the *Enterprise Wheel* case is appropriate to public sector labor arbitration. But the blind extension of the *Warrior & Gulf* presumption of arbitrability to the public sector is inappropriate. A court should not indulge this presumption unless applicable legislation or the agreement of the parties establishes a general or specific policy favoring public sector arbitration.

BOSTON COLLEGE LAW SCHOOL

VOLUME XXVI DECEMBER 1984 NUMBER 1