2010

The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions – Will Gold Turn to Rust?

David L. Gregory

Michael K. Zitelli

Chistina E. Papadopoulos

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

David L. Gregory, Michael K. Zitelli & Chistina E. Papadopoulos, *The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions – Will Gold Turn to Rust?*, 60 Cath. U. L. Rev. 47 (2011).

Available at: <https://scholarship.law.edu/lawreview/vol60/iss1/4>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

THE FIFTIETH ANNIVERSARY OF THE *STEELWORKERS TRILOGY*: SOME REFLECTIONS ON JUDICIAL REVIEW OF LABOR-ARBITRATION DECISIONS—WILL GOLD TURN TO RUST?

David L. Gregory,⁺ Michael K. Zitelli^{*} & Christina E. Papadopoulos[†]

I. BRIEF SUMMARY OF THE <i>STEELWORKERS Trilogy</i>	52
A. <i>United Steelworkers v. American Manufacturing Co.</i>	52
B. <i>United Steelworkers v. Warrior & Gulf Navigation Co.</i>	53
C. <i>United Steelworkers v. Enterprise Wheel & Car Corp.</i>	54
II. FROM MAVERICK ACTIVISM TO A MODEL OF (RELATIVE) JUDICIAL RESTRAINT: THE SIXTH CIRCUIT AND THE SAGA OF THE <i>MICHIGAN</i> <i>FAMILY RESOURCES</i> DECISIONS	55
A. <i>Michigan Family Resources, Inc. v. SEIU Local No. 517M</i>	56
B. <i>The Trend After Michigan Family Resources, Inc.</i> III	65
III. THE TRILOGY AT FIFTY	66
IV. THE TREND FOR JUDICIAL REVIEW OF ARBITRATION AWARDS: LABOR AND BEYOND	70
V. CONCLUSION	74

The *Steelworkers Trilogy*, wherein the United States Supreme Court endorsed arbitration over litigation as the preferred means of resolving grievances in private-sector, labor-management relations,¹ is one of the most important blocks of decisions in labor law. Correspondingly, the Court granted private arbitrators significant power and set forth principles governing

⁺ David L. Gregory is the Dorothy Day Professor of Law and the Executive Director of the Center for Labor and Employment Law, St. John's University School of Law. J.S.D., 1987, Yale Law School; LL.M., 1982, Yale Law School; J.D. *magna cum laude*, 1980, University of Detroit; M.B.A. in Labor Relations, 1977, Wayne State University; B.A. *cum laude*, 1973, The Catholic University of America. The author can be contacted at 8000 Utopia Parkway, Jamaica, New York 11439; (718) 990-6019; and gregoryd@stjohns.edu.

^{*} J.D. Candidate, 2011, St. John's University School of Law; Junior Fellow, the Center for Labor and Employment Law, St. John's University School of Law; B.S. *summa cum laude*, 2007, State University of New York College at Cortland.

[†] J.D. Candidate, 2012, St. John's University School of Law; Junior Fellow, the Center for Labor and Employment Law, St. John's University School of Law; B.S., 2009, Cornell University School of Industrial and Labor Relations.

1. The *Steelworkers Trilogy* refers to the *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

presumptive judicial deference to labor-arbitration decisions.² The Court made it very difficult, albeit not impossible, for those challenging adverse arbitration results to subsequently persuade federal courts to set aside labor-arbitration decisions rendered in conformance with *Trilogy* principles.³

This year marks the fiftieth anniversary of the *Trilogy*.⁴ The 2009 Term of the United States Supreme Court marked the eve of the anniversary with a flurry of decisions regarding the scope of judicial deference to arbitration, including, but not limited to, the private-sector, labor-management relations context.⁵

2. See *Am. Mfg. Co.*, 363 U.S. at 567–68; *Warrior & Gulf Navigation Co.*, 363 U.S. at 581–85; *Enter. Wheel & Car Corp.*, 363 U.S. at 598–99.

3. See *Am. Mfg. Co.*, 363 U.S. at 567–68; *Warrior & Gulf Navigation Co.*, 363 U.S. at 585; *Enter. Wheel & Car Corp.*, 363 U.S. at 599.

4. See *supra* note 1. Significant law review articles and keynote addresses regarding the *Trilogy* include: Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1988); David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973); Peter Feuille et al., *Judicial Review of Arbitration Awards: Some Evidence*, 41 LAB. L. J. 477 (1990); William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1984); Michael H. LeRoy & Peter Feuille, *As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 STAN. L. & POL'Y REV. 191, 193–94 (2007); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993); Michael Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547 (2005); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977); W. Daniel Boone, Keynote Address at the National Academy of Arbitrators Annual Meeting: Back to the Basics: Arbitration as “Part of a System of Industrial Self-Government” (May 27, 2010); William B. Gould IV, Keynote Address at the National Academy of Arbitrators Annual Meeting: *Steelworkers Trilogy After a Half Century* (May 27, 2010) [hereinafter Gould, *Steelworkers Trilogy*]; Andrew M. Kramer, Keynote Address at the National Academy of Arbitrators Annual Meeting: Fifty Years After the *Steelworkers Trilogy*: Some New Questions and Old Answers (May 27, 2010).

5. The Supreme Court issued several decisions in the 2009 Term dealing with alternate-dispute resolution, including, but not limited to, labor arbitration in the private sector. In *Granite Rock Co. v. International Brotherhood of Teamsters*, the Court held that the dispute between an employer and a union over the formation date of their collective-bargaining agreement (CBA) was an issue for the district court, not an arbitrator, to resolve. 130 S. Ct. 2847, 2853 (2010). The Court reasoned that the union’s arbitration demand required judicial resolution of two questions: when the CBA was formed, and whether its arbitration clause covered the matters the union wished to arbitrate. *Id.* at 2860–63.

In *Rent-A-Center, West, Inc. v. Jackson*, the Court held that, under the Federal Arbitration Act (FAA), an arbitration agreement signed as a condition of employment that explicitly delegated to an arbitrator the decision of whether that agreement was enforceable should be left to the arbitrator instead of the district court. 130 S. Ct. 2772, 2775–79 (2010). When the employer, Rent-A-Center, West, Inc., filed a motion to compel arbitration, the employee, Antonio Jackson, opposed the motion on the basis that the agreement, including the delegation clause, was unconscionable. *Id.* at 2775. The employer argued that the arbitrator should have exclusive authority to determine the enforceability of the agreement, and, therefore, the unconscionability claim was improperly before the court. *Id.* The Court noted that there are two types of validity

In the years following the *Trilogy*, the United States Court of Appeals for the Sixth Circuit became transparently activist and set aside labor-arbitration decisions at a disturbingly accelerated pace.⁶ This judicial proclivity to nullify arbitration decisions with which some judges simply disagreed reached its zenith in 2006 in the Sixth Circuit's decision of *Michigan Family Resources, Inc. v. Service Employees International Union Local No. 517M*.⁷ Judge Jeffrey

challenges: one that challenges specifically the agreement to arbitrate and another that challenges the entire contract. *Id.* at 2778. Despite the agreement's severability, the Court held that Jackson's challenge was to the whole contract and its validity was for the arbitrator to decide. *Id.* at 2778–79.

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court decided that, under the FAA, an arbitrator may not compel class arbitration for parties whose arbitration clauses were silent on the issue of class arbitration. 130 S. Ct. 1758, 1770, 1776 (2010). The Court found that the arbitration panel exceeded its authority when the panel imposed its own policy choice rather than identifying and applying a rule of decision derived from the FAA, maritime law, or state law. *Id.* at 1770.

In *Reed Elsevier, Inc. v. Muchnick*, the district court referred the parties, including a group of plaintiffs who were both registered and unregistered copyright-holders and the owners and publishers of an online database, to mediation because of the growing size and complexity of the lawsuit. 130 S. Ct. 1237 (2010). The plaintiffs moved for the district court to certify a class for settlement and to approve the settlement agreement, which the district court did. *Id.* at 1242. The court of appeals held that the district court lacked jurisdiction to approve a settlement with respect to claims arising from the infringement of unregistered works, but the Supreme Court reversed, concluding that the district court in fact had the authority to approve the settlement. *Id.* at 1242–43. The Supreme Court expressed no opinion on the merits of the settlement. *Id.* at 1243–44.

The Court in *Union Pacific Railroad v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment* held that a panel of the National Railroad Adjustment Board (NRAB) failed “to conform, or confine itself” to the jurisdiction awarded to it by Congress when the panel refused to adjudicate five cases “for lack of jurisdiction.” 130 S. Ct. 584, 590–95, 598–99 (2009). The union was not satisfied with the results of the grievance procedures specified in its collective-bargaining agreement and sought arbitration before the NRAB. *Id.* at 593. Dissatisfied with the NRAB's order, the union filed a petition for review in district court, which affirmed the NRAB's order. *Id.* at 594. The Court of Appeals for the Seventh Circuit reversed, finding that the NRAB's proceedings violated due process. *Id.* at 595. The Supreme Court affirmed the judgment but held that the framework should have been statutory, not constitutional. *Id.* at 596, 599. Congress had authorized the NRAB to adjudicate unsettled grievances of railroad employees following internal-resolution procedures, as well as to prescribe rules for the presentation and processing of claims. *Id.* at 590. Ultimately, only Congress defines the NRAB's jurisdiction. *Id.* The Court reasoned that if the NRAB lacked authority to define the jurisdiction of its panels, then certainly the panels themselves lacked that same authority; therefore, the panel's refusal to adjudicate those cases failed to confine it to matters within the scope of its jurisdiction. *Id.* at 590–91.

6. See *infra* Part II.

7. 438 F.3d 653 (6th Cir. 2006) (*Mich. Family Res., Inc. II*), *rev'd en banc*, 475 F.3d 746 (6th Cir. 2007). Professor David Gregory, the principal author of this Article, is a member of the National Academy of Arbitrators. He and fellow NAA members and law professors, Jay Grenig and Terry Bethel, authored the NAA amicus brief that successfully urged the Sixth Circuit to rehear and ultimately reverse its original decision in *Michigan Family Resources, Inc.* See Brief of Amicus Curiae National Academy of Arbitrators in Support of Appellant, *Mich. Family Res.*,

S. Sutton's powerful concurrence, however, presciently cautioned the unduly activist majority that it must conform to the *Trilogy* principles:

If we are to take seriously what the Supreme Court said in this area and what it has done (to my knowledge it has not authorized the vacation of a labor arbitration award since 1960), I do not understand how we can alter the parties' delegation of decision-making authority in this case merely because one of those parties (the employer) now thinks that the arbitrator botched the interpretation of the contract. At most, the employer has shown that the arbitrator misapprehended the meaning of the contract and misapprehended the rules for construing contracts. As the district court rightly reasoned and as our per curiam opinion correctly agrees, the collective bargaining agreement required parity only as to cost-of-living increases from the federal government, said nothing about employer-funded cost-of-living increases and established the minimum increases that union employees could expect in a given year, increases tied in no way to the increases given to non-union employees. Read together, the provision of limited parity requirements and the provision of express minimum-salary requirements for union employees strongly imply the exclusion of an overarching parity requirement between union and non-union employees. And that implication is strong enough that the arbitrator should not have pinned his interpretation of the contract on the parties' practices in implementing it. If a district court in a diversity case had interpreted the contract in this manner, no one would doubt that we should correct the error.

But that of course is not the point. An arbitrator selected by the parties, not a federal district court judge, interpreted this contract, and that makes all the difference. We have here none of the tell-tale signs for vacating an award: bias by the arbitrator, a conflict of interest, a transparent effort to "dispense his own brand of industrial justice," or a dispute that is not arbitrable. Instead we have an arbitrator who certainly was "arguably construing" the contract and who just as certainly made a "serious error" in construing the contract, a confluence of circumstances that does not invest us with authority to "overturn [the] decision." Throughout his ten-page opinion, the arbitrator references, quotes and analyzes the contract. Even the flaw in his analysis does not disprove that he was attempting to construe the contract. "[T]he above language," he says, "becomes ambiguous because of the Employer's prior decision

to characterize both its individual payment and its payment from the federal funding source as [a cost-of-living increase].” Whether the “becomes” phrase was a slip of the pen or a slip in thought, it was still “the above language”—the contract language—that he was trying to figure out. Even the district court characterized these efforts as construction: “[T]he Arbitrator considered evidence to aid *in construing* the [agreement] when, in fact, no construction was necessary.” All that happened here is that the arbitrator committed a legal error, a serious legal error to be sure, but an error of interpretation nonetheless, which does not authorize us to vacate the award.⁸

Judge Sutton’s wise counsel for judicial restraint became the controlling rationale when the Sixth Circuit, upon rehearing en banc, returned to conformance with *Trilogy* principles.⁹

This Article examines the three-year period following *Michigan Family Resources*, 2007–2010, to assess the Sixth Circuit’s treatment of labor-arbitration decisions because the circuit, sitting en banc, reversed the original decision.¹⁰ Especially when compared with its prior maverick behavior, the Sixth Circuit has become a veritable model of appellate court judicial restraint.¹¹ This is certainly not to say that the horizon is utterly quiescent. It is obvious that several other circuits were, and are, continuing to cavalierly side-step *Trilogy* principles in order to vacate labor-arbitration decisions with which federal judges simply disagree on the substantive merits.¹²

After providing a brief synthesis of the *Trilogy* decisions, this Article will focus specifically on the *Michigan Family Resources* decision, its reversal en banc, and the Sixth Circuit’s subsequent experience. Although the post-*Michigan Family Resources* situation in the Sixth Circuit is a virtual paragon of judicial restraint and deference to labor-arbitration decisions,¹³ stark examples of inappropriate judicial activism continue to erupt in several other circuits.¹⁴ Meanwhile, the Supreme Court continues to reiterate the wisdom of the *Steelworkers Trilogy* through the 2009–2010 Term.¹⁵

8. *Mich. Family Res., Inc. II*, 438 F.3d at 660 (6th Cir. 2006) (Sutton, J., concurring) (internal citations omitted).

9. *Mich. Family Res., Inc. v. Serv. Emps. Int’l Union Local No. 517M (Mich. Family Res., Inc. III)*, 475 F.3d 746, 748 (6th Cir. 2007).

10. *Id.*

11. See *infra* text accompanying notes 59–64, 126–35.

12. See *infra* Part III.

13. See *infra* Part II.B.

14. See *infra* Part III.

15. See *supra* note 5.

I. BRIEF SUMMARY OF THE *STEELWORKERS TRILOGY*A. *United Steelworkers v. American Manufacturing Co.*

In *United Steelworkers v. American Manufacturing Co.*, a union employee brought an action for compensation benefits while he was out of work because of an injury.¹⁶ The parties settled after receiving a physician's diagnosis of permanent partial-disability.¹⁷ The union later filed a grievance on the ground that "the seniority provision of the collective bargaining agreement" entitled the employee to return to work.¹⁸ The employer refused to arbitrate and the union brought an action in district court.¹⁹ The district court granted the employer's motion for summary judgment on the basis that the employee was barred from claiming "any seniority or employment rights" because he had accepted the permanent partial-disability settlement.²⁰ The Sixth Circuit affirmed the judgment, though reasoning differently; it held that the grievance was frivolous and not subject to arbitration.²¹

The Supreme Court reversed, explaining that "[a]rbitration should have been ordered" because there was a "dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement."²² The Supreme Court held that courts should not judge the merits of such claims, but instead leave arbitrators to interpret the contract.²³ The Court warned that, "[w]hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function . . . entrusted to the arbitration tribunal."²⁴

American Manufacturing Co. also echoed the oft-cited theory from *Textile Workers Union v. Lincoln Mills of Alabama*,²⁵ a pre-*Trilogy* case, reiterating that an arbitration clause is the *quid pro quo* for a no-strike clause.²⁶ The Court stated that "the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the 'no strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other."²⁷

16. 363 U.S. 564, 566 (1960).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 569.

23. *Id.* at 567-68.

24. *Id.* at 569.

25. 353 U.S. 448 (1957) ("[T]he agreement not to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.").

26. *Am. Mfg. Co.*, 363 U.S. at 567.

27. *Id.*

B. United Steelworkers v. Warrior & Gulf Navigation Co.

In another case of the *Trilogy*, when an employer began contracting out maintenance work and consequently laid off union employees, the union filed a grievance charging that the employer induced a partial lockout of union employees in violation of the “no lockout” provision of their collective-bargaining agreement.²⁸ The district court granted the employer’s motion to dismiss the complaint on the ground that the agreement did not empower the arbitrator to review the defendant’s business judgment.²⁹ It also held that the collective-bargaining agreement did not limit the management’s function of contracting out work.³⁰ The court of appeals affirmed, holding that matters which were strictly a function of management could not be arbitrated because they were excluded from the grievance procedure.³¹

The Supreme Court’s decision reflected the federal policy of “promot[ing] industrial stabilization through the collective bargaining agreement.”³² The Court emphasized arbitration’s place in the labor setting, noting that “arbitration is the substitute for industrial strife.”³³ The Court disagreed with the lower courts’ view that complaints regarding contracting out work were automatically excluded from this agreement’s grievance provision, citing the agreement’s language that, if “differences” arose, the grievance procedure would apply.³⁴ Accordingly, the Court reversed on the ground that a dispute “as to the meaning and application of the provisions” of the collective-bargaining agreement was subject to arbitration.³⁵ The Court stated that “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”³⁶ Thus, because the issue of contracting out work was not explicitly excluded by the arbitration clause, the parties were obligated to resolve the claim through arbitration.³⁷

Court opinions and commentators often cite to the Supreme Court’s characterization that “the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.”³⁸

28. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 575–76 (1960).

29. *Id.* at 577.

30. *Id.*

31. *Id.*

32. *Id.* at 578.

33. *Id.*

34. *Id.* at 583.

35. *Id.* at 585.

36. *Id.* at 582–83.

37. *Id.* at 584–85.

38. *Id.* at 581; see, e.g., *Suzal v. Dir.*, U.S. Info. Agency, 32 F.3d 574, 584 (D.C. Cir. 1994) (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 581); Alvin J. Goldman, *Selecting the Correct Standard for Judicial Review of Airline Grievance Arbitration Decisions*, 9 U. PA. J.

C. *United Steelworkers v. Enterprise Wheel & Car Corp.*

In *United Steelworkers v. Enterprise Wheel & Car Corp.*, the union filed a grievance after the employer discharged a group of employees.³⁹ When the employer refused to arbitrate, the union brought suit for “specific enforcement of the arbitration provisions of the agreement.”⁴⁰ The collective-bargaining agreement included an arbitration clause and particular terms governing employee discharge.⁴¹ The district court ordered arbitration.⁴² The arbitrator found that the employees should have been suspended for, at most, ten days, and therefore the discharge was unjustified.⁴³ Additionally, the arbitrator “awarded reinstatement with back pay, minus pay for a 10-day suspension and such sums as these employees received from other employment.”⁴⁴

When the employer refused to comply with the award, the union petitioned the district court for enforcement, and the district court ordered the employer to comply.⁴⁵ On appeal, the Fourth Circuit found that the award was unenforceable, naming three reasons.⁴⁶ First, it held that the award did not specify the exact amount to be deducted from the back pay.⁴⁷ Second, the court held that it could not enforce an award for “back pay subsequent to the date of termination of the collective-bargaining agreement.”⁴⁸ Finally, it held that because the collective-bargaining agreement had expired, the award for reinstatement of the discharged employees was unenforceable.⁴⁹

The Supreme Court agreed with the Fourth Circuit that the district court’s judgment should be modified in order that both parties could complete arbitration to reach a definite determination of the amounts due to the wrongfully discharged employees.⁵⁰ However, the Supreme Court reversed the judgment of the court of appeals in all other respects.⁵¹ The Court reasoned that arbitrators are not obligated to provide reasons for an award.⁵² Accordingly, “a mere ambiguity” in the arbitrator’s opinion did not justify the

LAB. & EMP. L. 743, 763–64 (2007) (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 581) (discussing the *Steelworkers Trilogy* in analyzing the developing law on the use of arbitration to address issues arising under collective-bargaining agreements).

39. 363 U.S. 593, 595 (1960).

40. *Id.* Although the agreement expired between the time of the discharge and the arbitration award, “the union . . . continued to represent the workers at the plant.” *Id.* at 595.

41. *Id.* at 594.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 595–96.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 599.

51. *Id.*

52. *Id.* at 598.

court's refusal to enforce the award.⁵³ The Supreme Court's decision was consistent with the notion that courts should refuse to review the merits of arbitration awards under collective-bargaining agreements.⁵⁴ Thus, the Court declared that issues of contract interpretation were best resolved by arbitrators, and courts should decline to review the merits of an arbitration award.⁵⁵

Arguably, the most frequently cited passage from *Enterprise Wheel & Car Corp.* and, more generally, the *Steelworkers Trilogy*, is:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.⁵⁶

This succinctly summarizes the nature and role of an arbitrator in adjudicating disputes between employers and employees in the context of a collective-bargaining agreement.

II. FROM MAVERICK ACTIVISM TO A MODEL OF (RELATIVE) JUDICIAL RESTRAINT: THE SIXTH CIRCUIT AND THE SAGA OF THE *MICHIGAN FAMILY RESOURCES* DECISIONS

The Supreme Court last decided a labor-arbitration dispute in the 2001 case, *Major League Baseball Players Ass'n v. Garvey*, reiterating that, as long as an arbitrator arguably construes a contract, a court should not overturn the decision.⁵⁷ The Supreme Court's willingness to hear *Garvey* indicates "a strong admonition to the judiciary to adhere to the Court's teachings regarding deference to arbitration awards."⁵⁸ However, despite the Supreme Court's directive to defer to the parties' agreement to have disputed matters resolved through arbitration, the Sixth Circuit developed notoriety for vacating arbitration awards employing a four-part test to analyze the basis of an arbitration decision.⁵⁹ As a result, in the fifty years since the *Steelworkers Trilogy* decisions, the Sixth Circuit overturned almost thirty percent of challenged arbitration awards.⁶⁰ This high percentage, especially in light of the supposed deference to arbitration decisions, raised the eyebrows of parties,

53. *Id.*

54. *Id.* at 596.

55. *Id.*

56. *Id.* at 597.

57. 532 U.S. 504, 509 (2001) (per curiam).

58. ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 843 (14th ed. 2006) (discussing why the Supreme Court agreed to hear *Garvey* and its summary disposition despite the fact that "there was no division between the Circuits on a point of law, ordinarily a prerequisite for Supreme Court consideration").

59. See *infra* Part II.A.

60. *Mich. Family Res., Inc. II*, 438 F.3d 653, 662–72 (6th Cir. 2007) (Sutton, J., concurring), *rev'd en banc*, 475 F.3d 746 (6th Cir. 2007).

scholars, and practitioners across the labor-law spectrum because the Sixth Circuit's activist approach was contrary to the principles of collective bargaining and arbitration.⁶¹ After 2007, however, the court finally turned the page on its unorthodox approach and rendered a decision on rehearing that conformed to the *Trilogy* standards articulated by the Supreme Court.⁶²

A. Michigan Family Resources, Inc. v. SEIU Local No. 517M

In *Michigan Family Resources, Inc. v. SEIU Local No. 517M*, the Court of Appeals for the Sixth Circuit reinforced its reputation for vacating arbitration decisions, holding that an arbitrator's award failed to "draw its essence" from the collective-bargaining agreement.⁶³ This marked the twenty-ninth time in twenty years that the Sixth Circuit had vacated an arbitration award.⁶⁴ In the

61. See *infra* Part II.A.

62. See *Mich. Family Res., Inc.* III 475 F.3d 746, 750–57 (6th Cir. 2007); *infra* Part II.A.

63. See *Mich. Family Res., Inc. II*, 438 F.3d at 654.

64. Judge Sutton's concurring opinion in *Michigan Family Resources, Inc. II* included an appendix cataloguing all of the Sixth Circuit's decisions reviewing arbitration awards. 438 F.3d at 663–72 (Sutton, J., concurring). According to that appendix, there have been ten published opinions vacating awards. *Id.* at 665–66. The opinions include the following: *Appalachian Regional Healthcare, Inc. v. United Steelworkers, Local 14398*, 245 F.3d 601, 605–607 (6th Cir. 2001); *Wyandot, Inc. v. Local 227, United Food & Commercial Workers Union*, 205 F.3d 922, 929–30 (6th Cir. 2000); *International Brotherhood of Electrical Workers, Local 175 v. Thomas & Betts Corp.*, 182 F.3d 469 (6th Cir. 1999); *Beacon Journal Publishing Co. v. Akron Newspaper Guild, Local No. 7*, 114 F.3d 596, 599–601 (6th Cir. 1997); *Ficks Reed Co. v. Local Union 112, Allied Industrial Workers*, 965 F.2d 123, 126 (6th Cir. 1992); *International Ass'n of Machinists, Local Lodge No. 2770 v. Lourdes Hospital Inc.*, 958 F.2d 154, 157 (6th Cir. 1992); *AP Parts Co. v. UAW*, 923 F.2d 488, 491–92 (6th Cir. 1991); *Ohio Edison Co. v. Ohio Edison Joint Council*, 947 F.2d 786, 787 (6th Cir. 1991); *International Brotherhood of Electrical Workers, Local 429 v. Toshiba Am., Inc.*, 879 F.2d 208, 209–11 (6th Cir. 1989); *Dobbs, Inc. v. Local No. 614, International Brotherhood of Teamsters*, 813 F.2d 85, 86, 88 (6th Cir. 1987). Judge Sutton's concurrence includes nineteen unpublished opinions vacating awards. *Mich. Family Resources, Inc. II*, 438 F.3d at 670–72 (Sutton, J., concurring). These decisions include: *Armco Employees Independent Federation Inc. v. AK Steel Corp.*, 149 F. App'x 347, 352–53 (6th Cir. 2005); *Sterling Fluid Sys. (USA), Inc. v. Chauffeurs Local Union # 7*, 144 F. App'x 457, 463 (6th Cir. 2005); *Alken-Ziegler, Inc. v. UAW Local Union 985*, 134 F. App'x 866, 868 (6th Cir. 2005); *Paper Workers, Local Union No. 5-998 v. LWD, Inc.*, 99 F. App'x 683, 685 (6th Cir. 2004); *International Union of Electrical Workers v. Hurd Corp.*, 7 F. App'x 329, 335 (6th Cir. 2001); *Omnisource Corp. v. United Steelworkers, Local 9130*, No. 98-3603, 1999 WL 552600, at *2 (6th Cir. July 26, 1999); *General Drivers, Local 89 v. Willamette Indus., Inc.*, No. 98-5476, 1999 WL 503465, at *5 (6th Cir. July 6, 1999); *United Food & Commercial Workers Union, Local No. 1099 v. Kroger Co.*, No. 98-3423, 1999 WL 232698, at *3 (6th Cir. Apr. 12, 1999); *Marathon Oil Co. v. Cylinder Gas Employees-Local Union No. 283*, No. 97-1780, 1998 WL 702357, at *3 (6th Cir. Sept. 25, 1998); *Hamilton-Stevens Group, Inc. v. UAW, Local 1688*, No. 93-3472, 1994 WL 664935, at *3 (6th Cir. Nov. 23, 1994); *Voss Steel Employees Union v. Voss Steel Corp.*, Nos. 92-2068, 92-2309, 1994 WL 28610, at *5 (6th Cir. Jan. 31, 1994); *Wrap v. United Paper Workers International Union, Local Union 1766*, Nos. 92-5031, 92-5032, 1993 WL 84523, *3–4 (6th Cir. Mar. 24, 1993); *Browning-Ferris Industries of Tenn., Inc. v. Teamsters Local Union No. 984*, No. 90-5933, 1991 WL 203110, at *9 (6th Cir. Oct. 10, 1991); *Mor-Flo Industries, Inc., Chattanooga Division v. International Brotherhood of Electrical Workers*, No. 90-5605, 1991 WL 29202, at

case, the employer, Michigan Family Resources (MFR), filed a complaint against the Service Employees International Union (SEIU), a union representing some MFR employees.⁶⁵ MFR sought to have an arbitration award in the union's favor vacated, and the United States District Court for the Western District of Michigan granted summary judgment in favor of the employer.⁶⁶ SEIU appealed the decision to the Sixth Circuit, seeking an enforcement of the arbitration award in accordance with the terms of the collective-bargaining agreement negotiated between the parties.⁶⁷

The collective-bargaining agreement between MFR and its SEIU-represented employees included several articles outlining which MFR employees would be entitled to annual-wage increases.⁶⁸ The agreement also contained a provision requiring "the parties to arbitrate any disputes that they cannot resolve on their own," mandating that the decision of the arbitrator to be "*final and binding upon both parties*."⁶⁹ After MFR notified its union employees that their annual wage increase would be 2.5%, though the non-union employees' increase would be 4.0%, SEIU filed a grievance against MFR.⁷⁰ Although the pay increase for union employees satisfied the terms of the collective-bargaining agreement, the grievance alleged that the collective-bargaining agreement "required parity between union and non-union employees."⁷¹

The arbitrator issued an award in favor of SEIU, determining that, though the agreement was "not entirely clear" on whether parity was required, the ambiguity must be resolved based on MFR's prior behavior in granting specific wage increases.⁷² Because MFR had a practice of issuing identical increases to union and non-union employees in the past, the arbitrator granted

*6-7 (6th Cir. Mar. 7, 1991); *Tenn. Valley Authority v. Salary Policy Employee Panel*, No. 89-6397, 1990 WL 166443, at *1 (6th Cir. Nov. 1, 1990); *United Textile Workers, Local 815 v. BASF Corp.-Fibers*, No. 89-5721, 1990 WL 47468, at *1-3 (6th Cir. Apr. 18, 1990); *Magic Chef, Inc. v. International Molders Union*, No. 87-5046, 1987 WL 39085, at *1 (6th Cir. Dec. 3, 1987); *United Paperworkers International Union, Local No. 943 v. Wheaton Industries*, No. 85-6090, 1986 WL 18482, at *1 (6th Cir. Dec. 16, 1986); *Westvaco Corp. v. United Paperworkers' International Union, Local Union No. 680*, No. 85-5777, 1986 WL 17764, at *2-3 (6th Cir. Sept. 15, 1986).

65. *Mich. Family Res., Inc. II*, 438 F.3d at 654, 656.

66. *Id.*; see also *Mich. Family Res., Inc. v. Serv. Emps. Int'l Union Local No. 517M*, 380 F. Supp. 2d 886, 887 (W.D. Mich. 2004) (*Mich. Family Res., Inc. I*), *aff'd*, 438 F.3d 653 (6th Cir. 2006), *rev'd en banc*, 475 F.3d 764 (6th Cir. 2007).

67. Brief of Defendant-Appellant at 2, *Mich. Family Res., Inc. v. Serv. Emps. Int'l Union Local No. 517M*, 438 F.3d 653 (6th Cir. 2007) (No. 04-2564).

68. *Mich. Family Res. Inc. II*, 438 F.3d at 654-55.

69. *Id.* at 655 (emphasis added) (quoting Article 5(c) of the collective-bargaining agreement, which granted the arbitrator full authority to resolve disputes).

70. *Id.*

71. *Id.*

72. *Id.*

an award in favor of the union.⁷³ MFR sought to vacate the award in federal court, and the district court granted its motion for summary judgment.⁷⁴ The court held that “the Arbitrator went beyond the express terms of the [collective-bargaining agreement] by imposing additional requirements upon the parties and considering past practices, which are specifically disclaimed by the [collective-bargaining agreement’s] waiver provisions.”⁷⁵

On appeal, the Sixth Circuit displayed its tendency to thoroughly review arbitration awards, despite the standard for review being “one of the narrowest standards of judicial review in all of American jurisprudence.”⁷⁶ In doing so, the court distinguished between arbitration awards that disregard the terms of a collective-bargaining agreement and those that do not, affording itself the ability to vacate the award when the former type of award presents itself.⁷⁷ Delineating the distinction requires a determination of whether an award “draws its essence” from the collective-bargaining agreement.⁷⁸ To do this, the Sixth Circuit employed a four-part test, whereby if *any* prong was satisfied, the award was vacated.⁷⁹ The Sixth Circuit explained that

[a]n award does not “draw its essence” from the collective bargaining agreement . . . when any of the following is true: “(1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement, or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement.”⁸⁰

The Sixth Circuit interpreted the parties’ collective-bargaining agreement and found that the agreement did not require the wage increases to be at parity.⁸¹ As a result, the court, applying the four-part test, concluded that “[w]hen the arbitrator required parity in employer-funded salary increases, he thus imposed an ‘additional requirement not expressly provided for in the agreement,’ one that ‘conflict[ed] with express terms of the agreement,’ and

73. *Id.* at 655, 657.

74. *Id.* at 656.

75. *Mich. Family Res., Inc. I*, 380 F. Supp. 2d 886, 890 (W.D. Mich. 2004), *aff’d*, 438 F.3d 653 (6th Cir. 2006), *rev’d en banc*, 475 F.3d 746 (6th Cir. 2007).

76. *Mich. Family Res., Inc. II*, 438 F.3d at 656 (quoting *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 514–15 (6th Cir. 1999)).

77. *Id.* (“When an award ‘draws its essence from the collective bargaining agreement,’ we will uphold it; when it does not, we will vacate the award.”) (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987)).

78. *Id.*

79. *Id.*

80. *Id.* (quoting *Sterling China Co. v. Glass Workers Local No. 24*, 357 F.3d 546, 556 (6th Cir. 2004)) (citing *Cement Divs., Nat’l Gypsum Co. v. United Steelworkers, Local 135*, 793 F.2d 759, 766 (6th Cir. 1986)).

81. *Id.* at 657.

one that accordingly did not draw its essence from the agreement.”⁸² Furthermore, in affirming the district court, the Sixth Circuit held that the arbitration award was properly vacated “because the Arbitrator considered evidence [of MFR’s past practices and customs] to aid in construing the [collective bargaining agreement] when, in fact, no construction was necessary.”⁸³

In reaching its ultimate decision, the Sixth Circuit acknowledged the union’s argument, supported by Supreme Court precedent, that “an arbitration award should not be vacated merely because the arbitrator commits a legal error in construing the collective bargaining agreement.”⁸⁴ However, as the concurrence illustrated,⁸⁵ despite the Supreme Court precedent in terms of reviewing arbitration awards, the Sixth Circuit felt bound by its four-part test.⁸⁶ The Sixth Circuit’s tenacious activism trumped the *Trilogy*.

Judge Sutton concurred, but identified a variety of inherent problems with the Sixth Circuit’s approach to arbitral decisions, particularly regarding the four-part test.⁸⁷ Identifying the *Steelworkers Trilogy* as the Supreme Court’s desire “to end the federal courts’ hostility to labor-arbitration awards,”⁸⁸ Judge Sutton acknowledged that “[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.”⁸⁹ Furthermore, Judge Sutton drew inspiration from *Major League Baseball Players Ass’n v. Garvey*, a Supreme Court decision directing that “[s]o long as ‘an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.’”⁹⁰ The *Trilogy* continues to stand for the principle that a court should refrain from interpreting contract language where the contract provides that the matter at issue be submitted to arbitration.⁹¹ The significance of strong

82. *Id.* (internal citations omitted) (quoting *Sterling China Co.*, 357 F.3d at 556).

83. *Id.* (second alteration in original) (quoting *Mich. Family Res., Inc. I*, 380 F. Supp. 2d 886, 890 (W.D. Mich. 2004), *aff’d*, 438 F.3d 653 (6th Cir. 2006), *rev’d en banc*, 475 F.3d 746 (6th Cir. 2007)).

84. *Id.*

85. *See id.* at 658–63 (Sutton, J., concurring) (explaining Supreme Court precedent and noting the ways in which the Sixth Circuit has departed from that precedent, calling for the court to “reconsider the Supreme Court’s directives”).

86. *Id.* at 657 (majority opinion).

87. *Id.* at 661–63 (Sutton, J., concurring).

88. *Id.* at 658.

89. *Id.* (alteration in original) (quoting *United Steelworkers v. Enter. Wheel & Car. Corp.*, 363 U.S. 593, 596 (1960)).

90. *Id.* (quoting *Major League Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam)). Judge Sutton, relying on *United Steelworkers v. Enterprise Wheel & Car Corp.*, reiterated that “an arbitrator’s award premised on his construction of the contract permissibly ‘draws its essence from the collective bargaining agreement’ and should be upheld.” *Id.* (quoting *Enter. Wheel & Car Corp.*, 363 U.S. at 597).

91. *Id.* at 658 (citing *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960)).

deference to the arbitrator's decision, as Judge Sutton pointed out, is that the parties bargained for the arbitrator's, not the court's, construction of the agreement.⁹² Thus, "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his."⁹³ Accordingly, Judge Sutton stated that the court's standard for review of arbitration awards was the narrowest he could identify; nonetheless, he concurred in vacating the arbitration award in *Michigan Family Resources, Inc.*⁹⁴

Even though Judge Sutton felt bound by the Sixth Circuit's use of the four-part test to review arbitration awards and concurred in the opinion as a result, he was uneasy about the test's application.⁹⁵ He stated, "This formulation, I respectfully believe, has made it easier to vacate an arbitration award on the merits than the Supreme Court meant it to be."⁹⁶ Specifically, Judge Sutton maintained that the first two prongs of the four-part test were directly contradictory to Supreme Court precedent.⁹⁷ Both prongs, Judge Sutton

92. *Id.* (citing *Enter. Wheel & Car Corp.*, 363 U.S. at 599).

93. *Id.* (quoting *Enter. Wheel & Car Corp.*, 363 U.S. at 599). Judge Sutton went on to quote another of the *Trilogy* cases, stating that

[r]egardless of what our view might be of the correctness of [the arbitrator's] contractual interpretation, the Company and the Union bargained for that interpretation, and that interpretation must be upheld even if time and further review show that the parties in the end have bargained for nothing more than error.

Id. at 658–59 (alteration in original) (citation omitted) (quoting *WR Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 765 (1983)) (internal quotation marks omitted). The Supreme Court, said Judge Sutton, demands that "the delegation of decision-making authority chosen by the contracting parties" be respected. *Id.* at 659.

94. *Id.* at 659, 663. Judge Sutton declared:

We have here none of the tell-tale signs for vacating an award: bias by an arbitrator, a conflict of interest, a transparent effort to "dispense his own brand of justice," or a dispute that is not arbitrable. Instead we have an arbitrator who certainly was "arguably construing" the contract and who just as certainly made a "serious error" in construing the contract, a confluence of circumstances that does not invest us with authority to "overturn [the] decision."

Id. at 660 (quoting *Garvey*, 532 U.S. at 509).

95. *Id.* at 663 ("Because I am bound by our four-part test and our practice in applying it, I feel obliged to concur in the decision vacating this arbitration award—even though this case strikes me as presenting precisely the kind of 'serious error' that the Supreme Court has expected we would permit arbitrators to make.").

96. *Id.* at 661. Judge Sutton recognized that the Supreme Court urged that the "proper approach to arbitration under collective bargaining agreements" is to "refus[e] . . . to review the merits of an arbitration award." *Id.* (quoting *Enter. Wheel & Car Corp.*, 363 U.S. at 596). Therefore, Judge Sutton found that Supreme Court precedent requires that, absent "fraud" or the "arbitrator's dishonesty," arbitration awards should be upheld "so long as the arbitrator is 'arguably construing' the contract, even when that construction results in a 'serious error.'" *Id.* (quoting *Garvey*, 532 U.S. at 509).

97. *Id.* ("Nor is it clear to me how the first two parts of our test—(1) whether the award conflicts with 'express terms' of the agreement or (2) whether the award 'imposes additional

offered, “seem to be in tension with *Garvey*’s directive that a ‘serious error’ in interpreting a contract does not provide an independent ground for vacating an arbitration award so long as the arbitrator was ‘arguably construing’ the contract.”⁹⁸ After adopting the four-part test, the Sixth Circuit vacated an alarming number of arbitration awards,⁹⁹ nearly twenty-seven percent of all labor-arbitration cases it heard, illustrating “that the four-part test has been anything but deferential in application.”¹⁰⁰

The Sixth Circuit’s decision to vacate the arbitration award had a heavy impact on the labor-management community, proving once again that a determined activist court can almost always semantically contrive a rationale to overrule an arbitrator’s award despite the terms of the collective-bargaining agreement specifying that arbitration would be the sole and final authority for dispute resolution between the parties.¹⁰¹ The *Michigan Family Resources, Inc.* decision was met with much opposition urging the court to reexamine its methodology.¹⁰² For example, the National Academy of Arbitrators (“the Academy”)¹⁰³ filed an amicus brief with the court, stressing the necessity of

requirements that are not expressly provided in the agreement’—can be reconciled with Supreme Court precedent.”).

98. *Id.* (quoting *Garvey*, 532 U.S. at 509).

99. The Sixth Circuit “vacated 29% (10 out of 34) of labor-arbitration awards that [it had] reviewed on merits-based grounds” and vacated 25% (19 out of 75) awards of unpublished opinions on similar grounds. *Id.* at 662. Notably, Judge Sutton points out, “all of this has happened at the same time the Supreme Court has said that ‘courts will set aside the arbitrator’s interpretation of what their agreement means only in rare instances.’” *Id.* (quoting *E. Associated Coal Corp. v. United Mine Workers*, Dist. 17, 531 U.S. 57, 62 (2000)).

100. *Id.* at 663.

101. See Brief of National Academy of Arbitrators, *supra* note 7, at 11–13, 15–16 (“Had the parties wanted the Court’s judgment about the meaning of their contract, they could have easily agreed to forego arbitration and pursue remedies in court. Here, they opted for arbitration and the benefits it affords, typically identified as faster and less costly than litigation and, most important, final.”).

102. See, e.g., Brief for the American Federation of Labor and Congress of Industrial Organizations, as Amicus Curiae, in support of Defendant-Appellant at 2, 12, *Mich. Family Res., Inc. v. Serv. Emps. Int’l Union Local No. 517M*, 475 F.3d 746 (6th Cir. 2007) (No. 04-2564) (urging the court to abandon its four-part test and reverse the judgment of the district court); Brief of National Academy of Arbitrators, *supra* note 7, at 2 (advocating that the court abandon its four-part test because it “exceeds the scope of judicial review permitted by Supreme Court decisions and undermines the parties’ agreement that arbitration awards are to be final and binding”).

103. Founded in 1947, the National Academy of Arbitrators is a neutral organization whose principal purpose is to

establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . . ; to promote the study and understanding of the arbitration of labor-management and employment disputes

upholding arbitration awards and encouraging the Sixth Circuit to “abandon its four-part test for determining whether an arbitrator’s award draws its essence from the collective bargaining agreement.”¹⁰⁴ Using the four-part test required the court to assign meaning to the contract language, but the Academy argued that such practice “far exceed[ed] the scope of judicial review permitted by Supreme Court decisions and undermine[d] the parties’ agreement that arbitration awards are to be final and binding,” ultimately subverting the parties’ bargain and the arbitration process.¹⁰⁵ In applying the test, the court must assess the merits of the case, an action inappropriate for a court reviewing arbitration awards.¹⁰⁶ The major problem with applying the four-part test is that each prong “focuses on whether the arbitrator’s decision was correct, not whether his decision was based—or even arguably based—on . . . the contract.”¹⁰⁷ Finally, in its brief arguing for the abandonment of the four-part test, the Academy explained that it would not review the case at issue in detail because the arguments advanced in Judge Sutton’s concurring opinion could not be improved.¹⁰⁸

Despite the court’s vacation of the arbitration award, Judge Sutton correctly identified that “[a]ll that happened [in the case was] that the arbitrator committed a legal error, a serious legal error to be sure, but an error of interpretation nonetheless, which does not authorize us to vacate the award.”¹⁰⁹

Brief of National Academy of Arbitrators, *supra* note 7, at 1 (alteration in original) (internal quotation marks omitted).

104. *Id.* at 2. The Academy thought it was appropriate to file a brief with the court because the court’s decision in *Michigan Family Resources, Inc.* had “the potential for disturbing the salutary regime established by the Supreme Court’s prior decisions,” and the involvement of the law in the arbitration process “should serve to effectuate the purposes for which employers and unions have developed voluntary arbitration.” *Id.* at 1–2.

105. *Id.* at 2–4, 6–7. The test, the Academy argued, “is inconsistent with the standards articulated by the Supreme Court and misconstrues [the Sixth Circuit’s] role in the dispute settlement process of arbitration.” *Id.* at 3.

106. *Id.* at 2.

107. *Id.* at 6.

Parties who are dissatisfied with the result of a case can appeal to a court for a different interpretation, arguing that the “plain meaning” of the contract language compels a rejection of the arbitrator’s reading of the agreement. Using the plain meaning rule inevitably results in cases like the one at issue here, where the Court reversed the arbitrator’s award because there was only “one proper interpretation.”

Id. at 10. But, through consenting to an arbitration agreement, “the parties made it clear . . . that the Court was to play no such role in resolving their disputes. Here, the parties hired the arbitrator to do that and, whether his decision was correct or not, they agreed to be bound by his work. *Id.* at 13.

108. *Id.* at 3.

109. *Mich. Family Res., Inc. II*, 438 F.3d 653, 660 (6th Cir. 2006) (Sutton, J., concurring), *rev’d en banc*, 475 F.3d 746 (6th Cir. 2007); *see also* Brief of National Academy of Arbitrators, *supra* note 7, at 12 (“[E]ven if the arbitrator should not have considered past practice, it is impossible to conclude that the arbitrator’s interpretation did not draw its essence from the contract. The arbitrator assigned meaning to contract language, even if he got it wrong. The

This is precisely the unstable ground on which the initial decision stood.¹¹⁰ The Sixth Circuit returned to fealty to *Trilogy* principles, which Judge Sutton illustrated so particularly in his concurrence with the original decision,¹¹¹ and abandoned its infamous four-part test.¹¹²

Profound deference to the arbitrator's decision is "consistent with the parties' bargain and . . . flaws at any rate can be corrected by the remedy of choosing better arbitrators."¹¹³ Arbitration provides an expeditious forum for labor-management disputes that might otherwise escalate to strikes, lockouts, or other interferences with production.¹¹⁴ However, for arbitration to be a successful mechanism, "the process [must] end[] when the arbitrator rules."¹¹⁵ Accordingly, where court decisions "encourage the disappointed party to seek review, thus continuing the dispute the arbitration agreement was intended to end," the underlying goals of the process cannot be met.¹¹⁶

On rehearing, Judge Sutton appropriately delivered the opinion of the court in conformity with the letter and the spirit of the *Trilogy*.¹¹⁷ The Sixth Circuit reversed its original decision and entered an order enforcing the arbitrator's award.¹¹⁸ The court abandoned its use of the four-part test, determined that the arbitrator acted within the scope of his authority in resolving the dispute, and found no fraud or dishonesty present.¹¹⁹ In doing so, the court concluded that the arbitrator was arguably construing the contract in determining that parity must be present in wage increases.¹²⁰ Because there was nothing to indicate that the arbitrator made more than an error, though possibly a "serious" one, when interpreting the agreement, the court exercised its proper authority and deferred to the parties' assent to resolve disputes through arbitration.¹²¹

Deviating from its initial approach in the case, the Sixth Circuit acknowledged, and this time followed, the Supreme Court's "insistence that the federal courts must tolerate 'serious' arbitral errors."¹²² The court

Court vacated the award because the arbitrator used a rule of interpretation that the Court would not have used.").

110. See *Mich. Family Res., Inc. II*, 438 F.3d at 660 (Sutton, J., concurring).

111. *Id.* at 658, 663.

112. *Mich. Family Res., Inc. III*, 475 F.3d 746, 753 (6th Cir. 2007).

113. *Mich. Family Res., Inc. II*, 438 F.3d at 662 (Sutton, J., concurring).

114. Brief of National Academy of Arbitrators, *supra* note 7, at 11–12.

115. *Id.* at 17.

116. *Id.* "Rules that jeopardize the finality of the [arbitration] process undermine the utility of arbitration as an instrument of industrial peace." *Id.*

117. *Mich. Family Res., Inc. III*, 475 F.3d at 748.

118. *Id.*

119. *Id.* (overruling *Cement Divs. Nat'l Gypsum Co. v. United Steelworkers*, 793 F.2d 759 (6th Cir. 1986)).

120. *Id.*

121. *Id.*

122. *Id.* at 753 (suggesting that "judicial consideration of the merits of a dispute is a rare exception, not the rule").

identified that, "in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt [the court] will presume that the arbitrator was doing just that."¹²³

The opinion on rehearing offered the flip side of the coin, illustrating the basic *Trilogy* principles of arbitration and suggesting a changed approach by the Sixth Circuit in reviewing awards.¹²⁴ Although the court maintained that the "'arguably construing' inquiry . . . will permit only the most egregious awards to be vacated," it acknowledged that this approach is necessary and significant because it "respects the parties' decision to hire their own judge to resolve their disputes, a view that respects the finality clause in most arbitration agreements . . ."¹²⁵

The three judges who concurred in part and dissented in part agreed with the majority that the four-part test must be abandoned and acknowledged that the test had "allowed [the Sixth Circuit] too much latitude to review the merits of arbitrator interpretations of collective bargaining agreements, in contravention of the dictates of the Supreme Court's *Steelworkers Trilogy*."¹²⁶ However, the three judges felt that the lack of guidance from the Supreme Court, a result of only two post-*Trilogy* decisions by the Court,¹²⁷ called for the adoption of another test, one that replaced the four-part test with "an inquiry that looks only for 'procedural aberrations' committed by the arbitrator, not for legal error."¹²⁸ This, the concurrence/dissent argued, would mirror an application of what the Supreme Court provided for in *Misco*.¹²⁹

123. *Id.*

124. *Id.* at 751-54.

125. *Id.* at 753-54 (indicating that this view can also be remedied by choosing better arbitrators).

126. *Id.* at 757.

127. *Id.*; see *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-10 (2001) ("Judicial Review of a labor-arbitration decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. . . . [I]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." (citations omitted) (internal quotation marks omitted)); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-38 (1987) (reminding litigants that the courts have a limited role in labor-arbitration decisions and noting that "as long as the arbitrator is even arguably construing or applying the contract and acting within his scope of authority," even "serious error" does not allow the court to overturn the decision).

128. *Mich. Family Res., Inc. III*, 475 F.3d at 757.

129. *Id.* at 760; see *Misco*, 484 U.S. at 40 n.10. In *Misco*, the Court provided that

[i]n the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the

B. The Trend After Michigan Family Resources, Inc. III

Sixth Circuit reviews of labor-arbitration awards have since remained consistent with *Michigan Family Resources, Inc. III*. Since the rehearing decision on January 26, 2007, the Sixth Circuit has reviewed approximately thirteen labor-management arbitration award disputes based on collective-bargaining agreements.¹³⁰ Of these, approximately four have been published in the Federal Reporter, and, of the four, three decisions have upheld the arbitrator's award;¹³¹ only one has vacated the award.¹³² Of the remaining nine unpublished opinions, the court upheld eight awards¹³³ and vacated one.¹³⁴

agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.

Id.

130. See *infra* notes 131–34 and accompanying text.

131. See *Truck Drivers Local No. 164 v. Allied Waste Sys., Inc.*, 512 F.3d 211, 213 (6th Cir. 2008) (holding that the arbitrator did not operate outside the scope of his authority by resolving the dispute, and that the arbitrator arguably construed and applied the collective-bargaining agreement); *NetJets Aviation, Inc. v. Int'l Bhd. of Teamsters, Airline Div.*, 486 F.3d 935, 939–40 (6th Cir. 2007) (holding that an arbitration award finding a pilot's conduct was not just cause for termination under the collective-bargaining agreement did not violate public policy even if a public-policy review was permitted under the Railway Labor Act); *Black v. Surface Transp. Bd.*, 476 F.3d 409 (6th Cir. 2007) (holding that the Surface Transportation Board did not act arbitrarily and capriciously in upholding an arbitration award determining that employees lost their benefits when they refused to fill vacancies in the rail system).

132. See *Totes Isotoner Corp. v. Int'l Chem. Workers Union Council/UFCW Local 664*, 532 F.3d 405, 418 (6th Cir. 2008) (holding that a supplemental labor-arbitration award exceeded the scope of an arbitrator's authority).

133. See *Columbia Gas of Ohio, Inc. v. Utility Workers, Local 349*, 329 F. App'x 1, 6 (6th Cir. 2009) (holding that the enforcement of an arbitration award does not violate public policy); *Satyam Computer Servs., Ltd. v. Venture Global Eng'g, L.L.C.*, 323 F. App'x 421, 429 (6th Cir. 2009) (holding that it is within the district court's discretion to deny a motion to vacate a judgment that enforced an arbitration award); *Kroger Co. v. United Food & Commercial Workers Union Local 876*, 284 F. App'x 233, 241–42 (6th Cir. 2008) (holding that the arbitrator did not act outside his authority and arguably interpreted and construed the collective-bargaining agreement); *Mich. Sugar Co. v. Bakery Workers Int'l Union, Locals 259-G, 260-G, 261-G, 262-G*, 278 F. App'x 623, 628–29 (6th Cir. 2008) (holding that the arbitrator appeared to be engaged in interpretation and, thus, the arbitration award would be upheld); *Roll Coater, Inc. v. Chauffeurs Local Union No. 215*, 263 F. App'x 445, 449 (6th Cir. 2008) (holding that the arbitrator was arguably construing the collective-bargaining agreement); *Earle v. NetJets Aviation Inc.*, 262 F. App'x 698, 702 (6th Cir. 2008) (holding that the arbitrator, in denying grievances, was "arguably construing" a collective-bargaining agreement and incorporating agreements and regulations); *Bauer v. Carty & Co., Inc.*, 246 F. App'x 375, 379–80 (6th Cir. 2007) (holding that the employee failed to show clear and convincing evidence of fraud, as required to vacate the arbitration award); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local 174 v. Mich. Mech. Servs., Inc.*, 247 F. App'x 649, 654 (6th Cir. 2007) (holding that the arbitrator at least arguably construed the relevant contractual provisions).

134. *R.H. Cochran & Assocs., Inc. v. Sheet Metal Workers Int'l Ass'n Local Union No. 33*, 335 F. App'x 516, 520–21 (6th Cir. 2009) (affirming the district court's vacation of an arbitration award because the district court's finding that the employer raised a timeliness objection before

Therefore, of the thirteen decisions since January 2007 in which the Sixth Circuit reviewed arbitration awards, eleven were upheld and only two were vacated. It appears that the Sixth Circuit has repudiated its activist approach toward arbitration review and finally embraced the ideals of deference set forth in the *Trilogy*.¹³⁵

II. THE TRILOGY AT FIFTY

In the *Steelworkers Trilogy*, the Supreme Court declared that section 301 of the Labor Management Relations Act of 1947¹³⁶ required the courts to embrace a policy favoring arbitration, holding that doubts should be resolved in favor of arbitration.¹³⁷ By the close of the twentieth century, however, the Court had reversed the presumption of arbitrability.¹³⁸ In *Wright v. Universal Maritime Service Corp.*, the Court held that a longshoreman was not required by his collective-bargaining agreement to use the arbitration procedure for claims alleging violation of the Americans with Disabilities Act.¹³⁹ In that case, the Court applied a “clear and unmistakable” standard, requiring that waivers of the right to sue for statutory claims be “particularly clear.”¹⁴⁰

In the third and final case of the *Steelworkers Trilogy*, *Enterprise Wheel & Car Corp.*, the Supreme Court declared that arbitrators do “not sit to dispense [their] own brand of industrial justice,” and awards must “draw[] [their] essence from the collective bargaining agreement.”¹⁴¹ Some lower courts perceived this as creating a loophole and used the “essence” language to serve their own purposes of vacating awards with which they disagreed.¹⁴² It appeared as though Supreme Court intervention would be instructive when the Court issued its decision in *United Paperworkers International Union v. Misco, Inc.*¹⁴³ The opinion emphasized that courts should not doubt

the arbitration panel was not clear error, and the union was barred by the invited error doctrine from appealing the district court’s allegedly improper use of affidavits).

135. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960) (stating that the function of the court is very limited with regard to arbitration decisions); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (recognizing that federal policy is in favor of promoting industrial stabilization through the collective-bargaining agreement); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (“The refusal of the courts to review the merits of an arbitration award is the proper approach.”).

136. 29 U.S.C. § 185 (2006).

137. See *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83.

138. See David E. Feller, *Putting Gilmer Where It Belongs: The FAA’s Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253, 258 (2000) [hereinafter Feller, *The FAA’s Labor Exemption*].

139. 525 U.S. 70, 79 (1998).

140. *Id.* at 79–80.

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

142. See Feller, *The FAA’s Labor Exemption*, *supra* note 138, at 278.

143. 484 U.S. 29, 38 (1987).

arbitrators' decisions.¹⁴⁴ Nonetheless, *Misco* was insufficient to realign the lower courts, which continued to question arbitrators' awards and reasoning.¹⁴⁵ For example, the Eighth Circuit contravened the *Steelworkers Trilogy* in an opinion that justified vacating an award when an arbitrator failed to explain his reasoning.¹⁴⁶

As the lower courts' defiance continued, the Supreme Court sent "strong signals" to the lower courts to defer to the judgment of arbitrators.¹⁴⁷ In *Major League Baseball Players Ass'n v. Garvey*, the Court reemphasized that "[c]ourts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement."¹⁴⁸

Lower courts will sometimes set aside an award if the courts believe the arbitrator inaccurately defined a term of the collective-bargaining agreement. For instance, the Fifth Circuit vacated an arbitrator's award because it disagreed with the arbitrator's interpretation of a clause in a collective-bargaining agreement, which allowed the employer to discharge employees without notice for "immoral conduct."¹⁴⁹ In this case, the arbitrator had reinstated an employee who was discharged immediately following her employer's discovery that she had lied about why she needed to leave work for forty-five minutes.¹⁵⁰ The Fifth Circuit held that, by definition, lying was immoral conduct, and therefore the arbitrator's award should be reversed because it was not derived from the contract.¹⁵¹

In another Fifth Circuit case, the court acknowledged the limited nature of review under section 301, but then invoked the use of a "plain meaning" rule,¹⁵² which postulated that a court may set aside an award because the

144. See *id.*; see also Feller, *The FAA's Labor Exemption*, *supra* note 138, at 279 ("[T]he Court made it clear that under section 301 courts should not second guess the arbitrator.").

145. See Feller, *The FAA's Labor Exemption*, *supra* note 138, at 279.

146. See *George A. Hormel & Co. v. United Food & Commercial Workers, Local 9*, 879 F.2d 347, 351 (8th Cir. 1989) ("[W]here an arbitrator . . . offers no clear basis for how he construed the contract to reach his decision without such consideration, there arises a strong possibility that the award was not based on the contract.").

147. Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363, 370-71 (2007) (discussing how the federal policy favoring arbitration influenced the Supreme Court in encouraging arbitrators to be the judges of whether arbitral forums were adequate to vindicate statutory rights); see also Boone, *supra* note 4, at 27-28 (discussing the Court's reaffirmation and reiteration of the policy that courts should heavily defer to an arbitrator's decision).

148. 532 U.S. 504, 509 (2001).

149. See *Bruce Hardwood Floors v. UBC, S. Council of Indus. Workers, Local Union No. 2713*, 103 F.3d 449, 452 (5th Cir. 1997).

150. *Id.* at 450-51.

151. *Id.* at 452 & n.4.

152. *Delta Queen Steamboat Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602, 604 (5th Cir. 1990). The Fifth Circuit is not alone in its reasoning; see *Georgia-Pacific*

arbitrator took action “contrary to express contractual provisions.”¹⁵³ In *Delta Queen Steamboat Co. v. District 2, Marine Engineers Beneficial Ass’n*, an arbitrator reinstated a riverboat captain, Philip Ritchie, who had been terminated for almost causing a collision between his vessel and a barge.¹⁵⁴ The collective-bargaining agreement prohibited discharge without “proper cause.”¹⁵⁵ Despite Captain Ritchie’s gross carelessness, the arbitrator found no proper cause for discharging Ritchie because prior company mishaps involving other employees had resulted in actual collisions and damages, but led to no disciplinary action for those employees.¹⁵⁶ The Fifth Circuit held that Ritchie’s gross carelessness was sufficient cause for disciplinary action.¹⁵⁷ In reality, the Fifth Circuit used its view that gross carelessness was sufficient cause for termination as justification to vacate the reinstatement portion of the arbitral award.¹⁵⁸

Yet another ground exists for courts to challenge labor-arbitration-awards—public policy.¹⁵⁹ The Eighth Circuit set aside an arbitrator’s award that reinstated an employee who had violated federally mandated safety regulations on the grounds that the employee could not appreciate the potential danger of the situation because his job training had not adequately addressed the scenario that the employee encountered.¹⁶⁰ The Eighth Circuit vacated this award in part because it found that, similar to other cases where arbitration awards had been abandoned, the employee deliberately acted in a way that jeopardized public safety.¹⁶¹

Similarly, in employer-promulgated arbitration systems, courts may modify or decline to enforce arbitration agreements that they find unconscionable.¹⁶² Courts derive this power from the Federal Arbitration Act (FAA),¹⁶³ which states that written arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

Corp. v. Local 27, United Paperworkers International Union, 864 F.2d 940, 944–46 (1st Cir. 1988), for a First Circuit case involving similar facts and outcome.

153. David E. Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 BERKELEY J. EMP. & LAB. L. 296, 303 (1998) [hereinafter Feller, *Taft and Hartley Vindicated*].

154. *Delta Queen Steamboat Co.*, 889 F.2d at 601.

155. *Id.*

156. *Id.*

157. *Id.* at 604.

158. *See id.*

159. *See* Feller, *The FAA’s Labor Exemption*, *supra* note 138, at 281.

160. *Iowa Elec. Light & Power Co. v. Local Union 204 of the Int’l Bhd. of Elec. Workers*, 834 F.2d 1424, 1425–26 (8th Cir. 1987).

161. *Id.* at 1428.

162. *See* Malin, *supra* note 147, at 368.

163. 9 U.S.C. §§ 1–14 (2006).

revocation of any contract.”¹⁶⁴ Absent partiality, fraud, corruption, or misconduct, a court cannot set aside an arbitration award.¹⁶⁵

It would seem that the FAA’s stringent standard for vacating arbitration awards would prevent the lower courts from engaging in mischief through judicial review. But, despite the Supreme Court’s warning that public-policy exceptions should be used sparingly, the lower courts tend to apply these exceptions more broadly.¹⁶⁶ For instance, a panel of the Ninth Circuit applied public-policy reasoning to a straight-forward discharge case, only to be corrected by an en banc decision.¹⁶⁷

Today, the circuit courts are split on whether Congress has precluded judicial review of certain National Railroad Adjustment Board (NRAB) proceedings.¹⁶⁸ The NRAB is authorized by Congress to adjudicate grievances of railroad employees and their carriers if the parties are unable to resolve their disputes through the grievance procedures specified in their collective-bargaining agreements.¹⁶⁹ Congressional amendments in 1966 stated grounds on which parties could seek judicial review of NRAB orders.¹⁷⁰ But the courts of appeals are in disagreement about whether that provision precludes judicial review of NRAB proceedings for due process violations.¹⁷¹

This confusion seems to arise from a previous Supreme Court decision.¹⁷² Consequently, some circuits have held that review was precluded for due-process claims beyond those specifically articulated in the Railway Labor Act,¹⁷³ though other circuits have held that review was available.¹⁷⁴ The issue resurfaced in 2009, but the Supreme Court did not have the occasion to answer

164. *Id.* § 2.

165. *Id.* § 10; see Feller, *Taft and Hartley Vindicated*, *supra* note 153, at 301–02 (explaining that “under Section 10 of [the FAA] an award can be set aside only, in reality, if one can show corruption, bias, or fraud”).

166. See Charles J. Coleman & Gerald C. Coleman, *Toward a New Paradigm of Labor Arbitration in the Federal Courts*, 13 HOFSTRA LAB. L.J. 1, 50–51 (1995).

167. See Coleman & Coleman, *supra* note 166, at 51 (citing *Stead Motors v. Auto. Machinists*, Lodge No. 1173, 843 F.2d 357, 358 (9th Cir. 1988), *rev’d en banc*, 886 F.2d 1200, 1202 (9th Cir. 1989)).

168. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs*, 130 S. Ct. 584, 592–93 (2009).

169. 45 U.S.C. § 153 First (i) (2006).

170. Act of June 20, 1966, Pub. L. No. 89-456, § 2(e), 80 Stat. 208, 210 (codified as amended at 45 U.S.C. § 153 First (q)).

171. *Union Pac. R.R. Co.*, 130 S. Ct. at 592–93.

172. *Id.* at 593 n.4 (explaining that the disagreement stemmed from the Supreme Court’s opinion in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978)).

173. See, e.g., *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 662 (10th Cir. 2004); *Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 n.2 (6th Cir. 1986); *Henry v. Delta Air Lines*, 759 F.2d 870, 873 (11th Cir. 1985) (per curiam); *United Steelworkers, Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 911–12 (3d Cir. 1981); see also *Railway Labor Act of 1926*, ch. 347, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151–188 (2006)).

174. See *Shafii v. PLC British Airways*, 22 F.3d 59, 64 (2d Cir. 1994); *Edelman v. W. Airlines, Inc.*, 892 F.2d 839, 847 (9th Cir. 1989).

the question of whether a reviewing court may set aside an NRAB adjudication for incompatibility with due process; the case was decided on statutory grounds, leaving no “genuinely in controversy” issue.¹⁷⁵

In essence, a trend has emerged since the *Steelworkers Trilogy*, whereby lower courts continue to challenge labor-arbitration awards.

IV. THE TREND FOR JUDICIAL REVIEW OF ARBITRATION AWARDS: LABOR AND BEYOND

As some commentators have noticed, “circuit courts of appeal often appear reluctant to accept the guidelines offered by the Supreme Court. Their decisions are often inconsistent with one another, as is illustrated by the conflicting approaches that different appellate courts have taken”¹⁷⁶ The tendency of some courts to challenge arbitration awards is not limited to the labor-management context.

For example, the Supreme Court decided a number of cases involving the waiver of an employee’s right to seek relief in court. In 1991, the Supreme Court determined, in *Gilmer v. Interstate/Johnson-Lane Corp.*, that a nonunionized worker in the financial-services industry was bound by the terms of the mandatory arbitration clause to which he agreed when he was hired.¹⁷⁷ The decision barred the plaintiff in *Gilmer* from litigating his claim under the Age Discrimination in Employment Act of 1967.¹⁷⁸

The Court revisited the waiver issue in *14 Penn Plaza L.L.C. v. Pyett*.¹⁷⁹ The Supreme Court held that “a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.”¹⁸⁰

The circuit courts are not alone in the tendency to challenge and diverge from Supreme Court precedent. Although the circuit courts sometimes seem to rely on their own reasoning, often justifying their actions through distinguishing cases based on the facts,¹⁸¹ some critics would argue that the Court itself diverges unnecessarily from logic. For example, critics target *Pyett*, asserting that the majority operated under “an assumption that was both a *non sequitur* and erroneous,” and the decision was “rooted in so many errors and misconceptions that it is difficult to know where to begin.”¹⁸² Others are unsure of the impact the *Pyett* decision will have on employers, employees,

175. See *Union Pac. R.R. Co.*, 130 S. Ct. at 595–96.

176. See *Coleman & Coleman*, *supra* note 166, at 50.

177. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23, 35 (1991).

178. See *id.*

179. 129 S. Ct. 1456, 1469, 1474 (2009).

180. *Id.* at 1474.

181. See, e.g., *supra* Part II.A.

182. Gould, *Steelworkers Trilogy*, *supra* note 4, at 34, 36.

unions, and arbitrators.¹⁸³ One thing is certain: *Pyett* will pose a number of challenges in the grievance and arbitration arenas.¹⁸⁴

Justice William O. Douglas's *Steelworkers Trilogy* opinion in *Warrior & Gulf Navigation Co.* was entirely focused on section 301,¹⁸⁵ which is most likely a consequence of the fact that Professor Feller, who argued the *Trilogy*, limited his arguments to section 301 and did not involve the FAA.¹⁸⁶ In contrast, the *Pyett* Court relied on the FAA, "rais[ing] the question as to what, if any, meaningful difference there is in the route one takes to challenge or enforce an award."¹⁸⁷

Whereas labor arbitration operates to avoid industrial strife and litigation, commercial arbitration functions differently.¹⁸⁸ The laws surrounding commercial arbitration are inspired by contract law and principles of practicality.¹⁸⁹ Notwithstanding the differences between the two categories of arbitration, the lower courts—and, at times, the Supreme Court—cite interchangeably to labor and commercial cases arising under the FAA in their discussions of whether to order arbitration.¹⁹⁰ It appears that under the FAA, the hostility toward commercial arbitration that existed at the time of the *Trilogy* has faded almost entirely.¹⁹¹

On the other hand, the enforceability of arbitration awards has not undergone a drastic change in status over time. The traditional, common-law view pertaining to the enforceability of arbitration awards was that awards should be enforced, regardless of the court's inclinations.¹⁹² The FAA

183. Kramer, *supra* note 4, at 1–3 (noting his uncertainty regarding the impact of *Pyett* and discussing the implications the decision may have).

184. See David L. Gregory & Edward McNamara, *Mandatory Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J.L. & PUB. POL'Y 429, 454 (2010) ("*Pyett* poses many challenges and opportunities for the conventional grievance and arbitration procedure."); see also Gould, *Steelworkers Trilogy*, *supra* note 4, at 23 ("[S]urely the Court . . . as well as Congress will be called upon to revisit the errors with which the opinion is strewn."); Kramer, *supra* note 4, at 1 ("The decision in *Pyett* will require unions to consider how they can accommodate control of the grievance/arbitration process to employees in cases involving statutory claims.").

185. See generally *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

186. Gould, *Steelworkers Trilogy*, *supra* note 4, at 16.

187. Kramer, *supra* note 4, at 10.

188. See Mitchell H. Rubinstein, *Assignment of Labor Arbitration*, 81 ST. JOHN'S L. REV. 41, 73 (2007).

189. See *id.* at 70–72 ("If the law were otherwise, our modern economy . . . simply could not exist.").

190. Feller, *Taft and Hartley Vindicated*, *supra* note 153, at 303 (citing *First Options of Chi. v. Kaplan & M.K. Invs.*, 514 U.S. 938, 941–45 (1995)).

191. *Id.* at 301.

192. *Id.*

continued this tradition by maintaining a strict standard for vacating arbitration awards.¹⁹³

Professors Michael LeRoy and Peter Feuille advance a competing approach to the theory that courts today sometimes exercise an improper level of judicial deference.¹⁹⁴ They argue that statistical analysis of original cases, rather than textual analysis of appellate decisions, is a more accurate gauge of court behavior.¹⁹⁵ To support their thesis, LeRoy and Feuille cite to improved arbitration-award confirmation rates in their most recent measurement period.¹⁹⁶ Notwithstanding these improvements, it appears the federal courts either lack a clear consensus with regard to the limitations on review of arbitral awards, or recognize, but prefer to ignore, those limits.¹⁹⁷ Because neither scenario bodes particularly well for the future of arbitration, it matters not what “gauge” one uses; rather, the end result—that courts still continue to diverge from established principles—is the better indicator of courts’ levels of deference.

Since 2007, the Sixth Circuit has upheld eleven arbitration awards and vacated two.¹⁹⁸ Whether the Sixth Circuit truly has repudiated its activist ways may depend largely on what grounds the two awards were vacated. If the court’s rationale was merely judicial activism masquerading as deferential judicial review—a rationale the lower courts have been known to adopt—then the Sixth Circuit has not genuinely embraced the standard set forth in the *Steelworkers Trilog*y. The two cases in which arbitration awards were vacated are *Totes Isotoner Corp. v. International Chemical Workers Union Council/UFCW Local 664*¹⁹⁹ and *R.H. Cochran & Associates, Inc. v. Sheet Metal Workers International Ass’n Local Union No. 33*.²⁰⁰

In *Totes Isotoner Corp.*, the Sixth Circuit affirmed the district court’s order vacating a supplemental labor-arbitration award.²⁰¹ Following the *Michigan Family Resources, Inc.* “procedural aberration” review standard for vacating arbitration awards,²⁰² the Sixth Circuit asked “whether the [a]rbitrator had

193. 9 U.S.C. § 10 (2006) (providing the specific circumstances in which an arbitration award may be vacated).

194. See LeRoy & Feuille, *supra* note 4, at 193.

195. *Id.* at 193–94.

196. *Id.* at 219.

197. See *id.* at 193–94.

198. See *supra* notes 130–35 and accompanying text.

199. 532 F.3d 405 (6th Cir. 2008).

200. 335 F. App’x 516 (6th Cir. 2009).

201. *Totes Isotoner Corp.*, 532 F.3d at 406.

202. Under this standard, the key questions are:

Did the arbitrator act “outside his authority” by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator “arguably construing or applying the contract”?

Mich. Family Res., Inc. III, 475 F.3d 746, 753 (6th Cir. 2007).

authority to interpret [a subsequent collective-bargaining agreement] in enforcing the original award during the supplemental compliance proceedings.”²⁰³ The court held that the arbitrator acted outside of his authority by addressing a question not presented to him when he said that “if Management’s decision was violative of the 1998-2001 agreement it is violative of the 2002-2007 agreement;” the arbitrator was only supposed to decide what measures would appropriately remedy the violation.²⁰⁴ This conclusion was a natural extension of the *Trilogy* principle that arbitrators should not dispense their own brand of industrial justice. On the other hand, the same cannot be said for the court’s decision in *R.H. Cochran & Associates, Inc.*

In *R.H. Cochran & Associates*, the district court vacated the arbitration award because it found that the arbitrators acted outside the scope of their authority when they ruled on an untimely filed grievance.²⁰⁵ The Sixth Circuit majority held that, because the record provided sufficient evidence that Cochran, the employer, made a timeliness objection before the arbitration panel, and that the Union did not file a grievance within the required thirty-day period—a fact that the Union conceded—the arbitration panel lost its “authority to consider the merits of the grievance.”²⁰⁶ The majority stated that it was applying a deferential standard of review and, as such, could not say that the district court committed clear error.²⁰⁷

The dissent noted that arguments not raised before an arbitrator are waived in a motion to vacate the arbitration award; it disagreed, however, with the majority regarding whether Cochran had in fact presented its timeliness argument to the arbitration panel.²⁰⁸ If the dissent is correct in its assertion that the proverbial ball was in Cochran’s court to raise the timeliness issue in front of the arbitration panel, and Cochran failed to do so, then it would appear that the court should not have vacated the arbitration award. It could easily be said that, in the present case, the court failed to defer to the arbitrators, in contravention of the *Steelworkers Trilogy* principles.

203. *Totes Isotoner Corp.*, 532 F.3d at 414.

204. *Id.* at 416.

205. 335 F. App’x 516, 517 (6th Cir. 2009).

206. *Id.* at 518–20.

207. *Id.* at 520.

208. *Id.* at 522 (Clay, J., dissenting) (citing *Order of Ry. Conductors v. Clinchfield R. Co.*, 407 F.2d 985, 988 (6th Cir.1969) (“[D]efects in proceedings prior to or during arbitration may be waived by a party’s acquiescence in the arbitration with knowledge of the defect.”)); *see also* *Armco Emps. Indep. Fed’n, Inc. v. AK Steel Corp.*, 149 F. App’x 347, 352 (6th Cir. 2005) (“Generally, arguments not presented to an arbitrator are deemed waived and cannot be raised for the first time in an enforcement action in a district court.”).

V. CONCLUSION

The landmark *Steelworkers Trilogy* decisions were clear and explicit: a court ordinarily should defer to the arbitrator's decision and uphold the arbitrator's award.²⁰⁹ This deference to private labor arbitration, most immediately and with some frequency, honors what the parties contracted for through collective bargaining—a final and binding decision by a third-party arbitrator. More strategically, this application enhances the integrity of the very nature of arbitration, one of the genuine cornerstones of labor-management dispute resolution.

Various circuit courts have historically struggled to divorce themselves from their natural powerful and authoritative position as decision-makers in order to defer to arbitration awards.²¹⁰ On its face, the arbitration dynamic appears hierarchically chaotic. Yet, it properly occurs every day, as powerful, federal judges defer to labor arbitrators' decisions.²¹¹ Although an understandable, palpable sense of unease remains—and as difficult as it may be for some—courts must defer to potentially mediocre arbitral decisions. In light of the *Trilogy*'s precepts, “the requirement [is] that [judges] tolerate ‘serious’ legal errors in arbitration awards.”²¹²

It was common practice, and deeply problematic, that courts vacated awards with which they substantively disagreed. This approach not only sidestepped the rationale of the Supreme Court; it had the potential to substantially debilitate the stature of the labor-arbitration process as a whole by encouraging parties on the losing end of arbitration to challenge the decisions in federal court. This, on the whole, can perniciously foster floods of litigation by giving the discouraged party a “second bite at the apple,” a concept that undermines the ability of arbitration to be a final and binding resolution of labor-management disputes.

Until its en banc reaffirmation of judicial fealty to the unvarnished *Trilogy* principles, the maverick Court of Appeals for the Sixth Circuit was at the forefront of the activist judiciary predisposed to readily vacate arbitration awards.²¹³ It did so at an alarming and accelerating rate, while simultaneously invoking the *Trilogy* as little more than an inherently malleable, rhetorical policy instrument.²¹⁴ However, “decisions like the one at issue in *Michigan Family Resources, Inc.* are less the result of hostility than they are the court's

209. See *supra* Part I.

210. See COX ET AL., *supra* note 58.

211. *Id.*

212. *Mich. Family Res., Inc. II*, 438 F.3d 653, 662 (6th Cir. 2006), *rev'd en banc*, 475 F.3d 746 (6th Cir. 2007).

213. See *supra* text accompanying notes 58–62.

214. See *supra* note 60 and accompanying text.

reluctance to abandon their traditional responsibilities.”²¹⁵ The Sixth Circuit in its opinion

cited the right cases and made the appropriate observations about the limited scope of its review, but then it read the contract to admit of only one meaning and, because the arbitrator’s reading was different, it concluded he exceeded his authority by adding a term and that his award did not draw its essence from the contract.²¹⁶

But in fact, according to the *Trilogy*, the Sixth Circuit exceeded its authority.²¹⁷

Since *Michigan Family Resources, Inc. III*, the trend in the Sixth Circuit dramatically changed direction and the court finally embraced the importance of deferring to an arbitrator’s award despite disagreeing with the substance of the decision.²¹⁸ Ultimately, collective bargaining cannot be compromised by interventionist courts cavalierly intruding into labor-management alternate dispute resolution that the private parties reserved to arbitration by the express terms of their collective-bargaining agreements.

Michigan Family Resources, Inc. III has ramifications far beyond the crucible of labor-management relations. The future viability of much of commercial arbitration, for example, is calibrated, at least in part, via reference to developments in the law and practice of labor arbitration. The fundamental dynamic of each remains constant—that is, the resolution of disputes decided by a neutral third-party arbitrator, not the courts.²¹⁹ Accordingly, lower courts must respect the limitation on the review of arbitral awards to preserve the nature of arbitration. Without a consistent approach among lower courts that adheres to the Supreme Court precedent, the power of arbitrators in both labor and commercial aspects will suffer indefinitely, and the pillars of arbitration will ultimately erode.

In the fifty years since the *Steelworkers Trilogy*, arbitration has continued to provide a very effective mechanism for resolving labor-management disputes.²²⁰ However, the process has certainly not been uniformly smooth, and the efficacy of arbitration has been periodically jeopardized by many lower courts’ failure to adhere to the guidelines articulated by the Supreme Court in

215. Brief of National Academy of Arbitrators, *supra* note 7, at 7. The brief also noted that “the Supreme Court’s decisions require judicial restraint and compel enforcement of the award, even if the Court believes the arbitrator was wrong, or that the contract language is not susceptible to the arbitrator’s interpretation, or, indeed, even if the decision is wrong.” *Id.*

216. *Id.* at 10.

217. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 569 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

218. *See supra* Part II.B.

219. *See Feller, Taft and Hartley Vindicated*, *supra* note 153, at 30.

220. Brief of National Academy of Arbitrators, *supra* note 7, at 16 (explaining that arbitration is typically “faster and less costly than litigation and, most important, final”).

the *Trilogy*²²¹ and reiterated in *Misco*²²² and *Garvey*.²²³ *Michigan Family Resources, Inc. III* is a substantial bulwark against inappropriate activist judiciary intervention in the labor-arbitration process.

221. *Am. Mfg. Co.*, 363 U.S. at 567–69 (explaining that the courts should not weigh the merits of a case before them that have been addressed by arbitration provided for in an agreement); *Warrior & Gulf Navigation Co.*, 363 U.S. at 585 (noting that questions concerning the substance of a dispute covered by a collective-bargaining agreement that provides for arbitration are for the arbitrator to decide, not the courts); *Enter. Wheel & Car Corp.*, 363 U.S. at 596 (“The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.”).

222. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 46–47 (1987) (reiterating the deference courts should afford to arbitration awards made under a collective-bargaining agreement).

223. *Major League Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (“Judicial review of a labor-arbitration decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator’s decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties’ agreement.”)