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Arbitration: The Days of Its Glory are Numbered*

David E. Feller†

The author argues that current developments signal the beginning of the end of the virtual immunity of labor arbitration decisions from subsequent review, a status enjoyed since the STEELWORKERS TRILOGY in 1960. He describes the extent to which the National Labor Relations Board's COLLYER policy and the increasing statutory regulation of conditions of employment are currently resulting in such actual or potential review. He urges that arbitrators refuse to decide external law questions unless both parties agree that they should do so.

The prospective demise to which my title speaks is certainly not that of arbitrators, or indeed of the institution of arbitration, but that of its status. More precisely, I believe that the exalted position which grievance arbitration has achieved in the system of industrial relations in this country is bound to suffer a substantial diminution in the years to come. This prospective decline is not, I believe, the fault of the arbitrators, nor, indeed, is it anything they can do much about. It is the result of a variety of factors which can be influenced only slightly by the profession itself.

I

To avoid the advertiser's sin of describing a product as better or worse without stating what it is better or worse than, let me begin by specifying precisely what I mean by the current exalted position of grievance arbitration. It is not, though many arbitrators would perhaps like to think that it is, anything which arbitrators had much to do with creating. Nor, indeed, is it a result of any peculiar advantages in the arbitration process, as opposed to the judicial process, as an adjudicative mechanism. The familiar virtues of speed and informality which are said to distinguish arbitration favorably when compared with litigation have almost nothing to do with the matter. There are judicial proceedings (small claims court is a simple example) which are much more informal and much faster than arbitration, particularly the more rigidly formal varieties which sometimes exist in the very industries in which arbitration has assumed the greatest importance. I know of few arbitration systems which can approach the speed of a court with juris-

* Cf. S. CLEMENS (TWAIN), LIFE ON THE MISSISSIPPI 105 (Heritage ed. 1944).
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diction proceeding on a matter requiring injunctive action—and injunctive relief is, in essence, the only kind of relief that grievance arbitrators award. Arbitrators do not enter judgments: they direct the parties to do what they find the collective bargaining agreement requires, whether it be the payment of money or some other action, such as reinstatement or promotion.

Yet it is plainly true that grievance arbitrators have, especially since the Steelworkers Trilogy, occupied a very special place in our law. Unlike other adjudicators, all doubts are resolved in favor of their jurisdiction. And their decisions, unlike the decisions of those inferior fellows, the trial and intermediate appellate level judges, are subject to only the most limited form of review.

Recent developments in one industry provide a striking illustration. A judicial holding, of which there have been several, adverse to the reserve clause in football or to the Rozelle Rule, can be appealed, as they say, "all the way to the Supreme Court." And those rulings are being appealed. But Peter Seitz' decision in the Messersmith case, which achieved for the major league baseball players almost the same result they sought unsuccessfully to achieve in the Supreme Court in Flood v. Kuhn, is, as the owners have quickly discovered, virtually unreviewable.

The reason usually cited for this special deference to arbitrators is their special competence. They are able, it is said, to understand industrial relations problems as judges are not. They are familiar with "the common law of the shop." I suggest that these explanations are, in many cases, about as accurate as the statement that arbitration is an informal and expeditious procedure. There is a measure of truth in them, but not much. Arbitration can be, and sometimes is, informal and expeditious. At other times it is as formal and time-consuming as litigation. Similarly, some arbitrators do have some special insight into the ways of doing things in an industrial plant; but in many other cases they don't. Clearly an ad hoc arbitrator, who comes in to decide a grievance in a particular shop which he has never seen before and may never see again, has no special knowledge of the "common law" of that shop.

It is certainly not true that arbitrators have a competence in their special field which exceeds the competence of other specialized adjudicators in our legal system. We have many such specialized adjudicators. The National Labor Relations Board, the Tax Court, the Court of Customs and Patent Appeals, and workmen's and unemployment compensation appeals boards are just a few examples of the many specialized state and federal agencies established to adjudicate disputes arising under particular statutes. There are

4. See Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976).
enormous areas which, as Bernard Meltzer said ten years ago, are "at least as complex and specialized as labor arbitration," in which we presumably have judges with special expertise and competence. Sometimes the reviewing courts do give, or purport to give, deference to the specialized expertise of these tribunals. But in almost every case—the National Labor Relations Board is perhaps the classic example—the courts nevertheless insist on performing a reviewing function, insuring that the specialized adjudicators adhere to the letter and the spirit of the law which they are interpreting. The specialized adjudicators are respected as influential advisors, but they remain advisors. Whatever the terminology, only the real judges in the end do the real judging. But not so with arbitrators’ decisions. To put it in Meltzer’s words, "In no other area of adjudication are courts asked to exercise their powers while they are denied any responsibility for scrutinizing the results they are to enforce." Why this special reverence for arbitrators? There is only a hint of the reason in what the courts have said; they usually emphasize one or more of the factors which I have already discounted. We must look not so much to the expressed rationale but to the roots of the basic attitude of the Supreme Court and those other courts which have been rigorous in their adherence to the doctrine announced by that Court.

The basic attitude is premised on a sometimes unstated yet ever-present recognition that arbitration is not a substitute for judicial adjudication but a method of resolving disputes over matters which, except for the collective agreement and its grievance machinery, would be subject to no governing adjudicative principle at all. That is the true meaning of the famous, and not quite accurate, statement in the Warrior and Gulf opinion that arbitration is the quid pro quo for the agreement not to strike. A more accurate phrasing would be: arbitration is a substitute for the strike. That is, of course, not a startling statement, nor is it one which can reasonably be disputed either historically or institutionally. But its implications are, I think, not always fully realized.

It is plain, once you stop to think about it, that the statement implies that grievance arbitration is not quite the same thing as adjudication. The fact that, absent an agreement to the contrary, there would be a right to strike over an issue implies that there is no principle governing its resolution which can be made the basis of adjudication in any tribunal. Arbitration, if viewed as a substitute for the strike, without more, would imply decision without reference to agreed standards. But we know that is not the case with griev-
Grievance arbitration is precisely adjudication against standards: the standards set forth in the collective bargaining agreement. The accepted principle is that the arbitrator has neither power to add to nor detract from, nor to change any of the provisions of the agreement, but can only determine their proper interpretation and application. Sometimes this restriction is set forth in the agreement, sometimes not. But it makes virtually no difference: that is the accepted rule.9

There is a contradiction between this rule and the proposition that arbitration is the substitute for the strike. The contradiction can be resolved only if we make one critical distinction: grievance arbitration is an adjudication against standards, but the standards are not those which would be applied by a court charged with adjudicating a contractual dispute. In other words, the parties to the collective bargaining process, as a method of resolving differences between them as to the proper application and interpretation of their agreement, have substituted for the strike a system of adjudication against the standards set forth in that agreement. But that system of adjudication, since it is not a substitute for litigation, is not the same in principle, historical background, or effect, as the system of adjudication used by the courts to resolve controversies over the meaning and application of contracts.

This is another way of saying what I have written elsewhere at great length:10 the collective bargaining agreement is not a contract insofar as it establishes the rights of employers and employees but is, rather, a set of rules governing their relationship—rules which are integral with and cannot be separated from the machinery which the parties have established to resolve disputes as to their meaning. Consider, for example, the provision in the automobile agreements defining the principles governing the setting of production standards.11 That provision is substantively different, and intended to be so, from a provision in the same agreement governing seniority or specifying that discharge shall be only for just cause. The difference is that disputes as to the latter provisions are subject to arbitration while disputes as to the former are intended to be resolved only by the use or non-use of the strike. In neither case are the rules intended to be seen as contractual, that is, adjudicable by the courts.

It is important to emphasize this because in section 301 of the Taft-Hartley Act,12 Congress made the collective agreement enforceable as a contract. What Lincoln Mills,13 Republic Steel v. Maddox,14 and the Steel—

9. As the Court put it in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."
workers Trilogy did, in effect, was to establish that the only contractual responsibilities enforceable in the courts are that of the employer to comply with and abide by the results of the grievance and arbitration machinery and that of the union to abide by the no-strike clause. Both of those contractual obligations are enforceable in court; none of the rules governing the employer-employee relationship is or should be.\footnote{15}{I put aside for the moment the individual suit for breach of the duty of fair representation and its concomitant, the judicial adjudication of rights under a collective agreement. I have discussed it elsewhere. Feller, \textit{supra} note 10, at 771-856, and will add a few words below as to the threat posed by such suits to arbitrators' status. See text accompanying notes 110-121 \textit{infra}.}

All of this is simply a restatement in somewhat different terms of the views expressed by the late Harry Shulman in the 1955 Holmes Lecture which appeared in the \textit{Harvard Law Review}.\footnote{16}{Shulman, \textit{Reason, Contract, and Law in Labor Relations}, 68 \textit{Harv. L. Rev.} 999 (1955).} Shulman ended with a plea that the courts should stay out of the subject area entirely. They did not as indeed they could not, because Congress, by enacting section 301, had mandated their entrance. What they did, however, was essentially to adopt Shulman's view of the nature of the rules being applied in the collective agreement. What I have called the Golden Age of Arbitration is the period of the Shulman view.

The Golden Age was not created by the courts. The courts were regarded as a threat to the system. Recall not only Harry Shulman's plea that "the law stay out" but also Ben Aaron's devastating attack at the Twelfth Annual Meeting of the National Academy of Arbitrators, fifteen years ago, on the Supreme Court's decision in the \textit{Lincoln Mills} case.\footnote{17}{Aaron, \textit{On First Looking into the Lincoln Mills Decision}, in \textit{Arbitration and the Law: Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators} 1 (J. McKelvey ed. 1959).} He saw \textit{Lincoln Mills} as an open door to just the kind of judicial intervention Shulman feared. It turned out, of course, that federal judicial intervention based on \textit{Lincoln Mills} was protective. The state courts, which traditionally regarded arbitration as simply another method of adjudicating controversies subject to resolution under the general law of contracts, were intervening; the Supreme Court used federal jurisdiction to halt the inroads which the states had been making.

Essential to the Golden Age of Arbitration was the proposition that the rights of employees and employers with respect to the employment relationship are governed by an autonomous, self-contained system of private law. That system consists of a statute (the collective agreement) and an adjudicatory mechanism (the grievance and arbitration machinery), with remedial powers only as granted expressly or impliedly in the "statute." Within this system, the collective agreement is the sole source of the law; it governs by its silence as well as its words. The system is not less comprehensive because some issues, subject neither to arbitration nor to exemption from the no-strike provision, are simply left to the discretion of management. There still is not, nor should there be, any recourse to the exterior
law to obtain an adjudication of the substantive rights of employer and employee.

I emphasize the governmental nature of this arrangement because it is important to draw a sharp distinction between the role of an arbitrator in construing and applying the collective bargaining agreement and that of a court in enforcing a contract. The collective bargaining agreement is not a contract but an instrument of government, and when the Supreme Court says that courts should not review arbitrators' decisions, it is really saying that it is improper to judge an arbitrator's performance in adjudicating disputes arising within this system of government by the standards a court would use in judging a breach of contract suit.

For example, consider any discharge case and assume that what is involved is not a collective agreement but a contract of employment and that the employee is discharged for failing to perform properly or for violating one of the provisions of that contract. Standard learning about employment contracts leads to one set of results. If the employee brings suit for breach of the contract, the question is simply whether he has violated the contract or a rule properly made by the employer under the contract. If he has, he loses the suit. If not, he wins and is entitled to damages, but not reinstatement and not back pay. Included in those damages are the wages he would have earned during the term of the agreement, suitably discounted, plus compensation for any lost opportunities to learn the trade or acquire a valuable reputation, any expenses he might incur in seeking other employment, and any other losses caused by reasonable attempts to mitigate damages. Actual earnings up to the time of the trial, or those which would have been received if the employee had made reasonable efforts to obtain other employment, and such amounts as he may be expected with reasonable diligence to earn during the balance of the term of the contract may be subtracted. And the damages would, of course, be limited to the term of the contract. Indeed, there are some old cases which say that even if he offers reinstatement to the discharged employee, the employer is not relieved of the obligation of paying damages for the balance of the term of the contract, because it would be improper to require the wrongfully discharged plaintiff to go back to work for an employer who had treated him so badly.

The arbitration of a discharge case under a collective bargaining agreement is entirely different as to both the standards applied to determine the propriety of the discharge and the remedies available if it is found to be

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18. See text accompanying note 28 infra.
19. See cases collected in Annot., 91 A.L.R.2d 682 (1963). In a few jurisdictions damages are limited to those suffered up to the time of the trial. See, e.g., Van Winkle v. Satterfield, 58 Ark. 617, 25 S.W. 1113 (1894).
20. 5 A. CORBIN, CONTRACTS § 1095 (1964).
23. 11 S. WILISTON, supra note 21, § 1359. In more conventional terms, the new contract failed for lack of consideration; the employer had merely offered to pay money to which the employee was already entitled by virtue of the employer's breach.
improper. The applicable principles derive not from "the Law of Contracts but [from] modern concepts of enlightened personnel administration, sprinkled with elements of procedural due process in criminal cases." 24 Whether the employee has violated the agreement or a rule embodied in the agreement is only the first question and, in most cases, the least important one. The next and most frequently disputed question is whether the punishment is appropriate to the nature of the offense. 25 The basic issue is whether the discipline imposed was proper, not whether there has been a breach of contract. And if it is found that the discipline is inappropriate, the remedy is not damages calculated in the way in which a court would calculate them in a suit for breach of contract but something entirely different: reinstatement with, or without, back pay. 26 The amount of back pay, assuming it is payable, is not determined on the traditional contract basis but is specially limited by language with respect to a concept foreign to a damage litigation—the limit of retroactivity provided by the agreement. 27

The difference between the function a court performs in adjudicating a breach of contract and the function an arbitrator performs in deciding a grievance is best illustrated by the few cases in which judges using contractual standards have had to decide what would otherwise be grievances. An otherwise unimportant case from a lower court in Ohio serves as an example. It concerned a worker employed by a grocery chain in its warehouse. 28 He was over sixty years old and eligible to retire. He was caught stealing a sausage from one of the stores of the chain and fired. There was no allegation of misconduct in connection with his work, but the employer had a rule that there should be no stealing, and the employee was fired for violating that rule. There was no collective bargaining agreement, but there was a pension plan. The worker brought suit under the plan, claiming a breach of the employment contract and asking that the company allow him to retire on his pension. He lost. The court held that the anti-theft rule was part of the employment contract and asking that the company allow him to retire on his pension. He lost. The court held that the anti-theft rule was part of the employment contract.

25. Id. at 31.

In seventy percent of the cases reviewed by Ross, supra note 24, workers who were reinstated received partial or no back pay. See also Teele, "But No Back Pay is Awarded . . . .", 19 ARB. J. 103 (1964). Some agreements specify a deduction for actual earnings or unemployment compensation, and arbitrators sometimes find implied authority in the agreement to make such deductions, but unless the parties so specify, arbitrators do not provide for deduction of income which the employee might reasonably have earned, or add interest or compensation for expenses incurred in seeking other employment. See Continental Can Co. v. Local 3042, Steelworkers, 39 Lab. Arb. 821 (1962) (Sembower, Arb.); Caterpillar Tractor Co. v. UAW Local 145, 39 Lab. Arb. 910 (1962) (Larkin, Arb.).
do not hesitate to suggest that an arbitrator would be likely to reach a somewhat different result if the employee had been covered by a collective bargaining agreement and had filed a grievance. Passing the question of whether any discipline was appropriate for conduct totally unrelated to the employee's work, there would be the further problem of deciding whether discharge was appropriate discipline for a first-time minor offense by an employee with long and otherwise exemplary service. A suspension would perhaps have been sustained but not, as arbitrators say, "industrial capital punishment." The court, however, was trying a breach of contract action and such considerations were irrelevant.

Consider also *Gunther v. San Diego & Arizona Eastern Railway*, in which an employee was dismissed because the company claimed he was physically unable to perform his job. He filed a grievance and the matter went to the National Railroad Adjustment Board under the Railway Labor Act, which found the claimed disability to be nonexistent. When the railroad refused to comply with the Board's award, the lower court and then the court of appeals refused to enforce the award on the ground that there was nothing in the agreement dealing with terminations for disability. There was, indeed, a provision saying that no one should be discharged except for cause. But discharge was a disciplinary matter. Here, said the court, the employee was not discharged for disciplinary reasons. That being so, there was simply nothing in the contract about the question; the award was thus improper and should not be enforced. Eventually, the Supreme Court reversed on the ground that the lower court was "invoking old common law rules for the interpretation of employment contracts."

These examples show that an arbitrator, as the adjudicator of rights under the rules established by a collective bargaining agreement, performs quite a different function from that undertaken by a court in construing a contract of employment. There is a whole set of implicit relationships, not spelled out in the agreement and not confined to any particular employer, which an arbitrator assumes to exist. The arbitrator's so-called expertise is not so much expertise as it is knowledge of the fact that the parties have not called upon him to act like a court in adjudicating a breach of contract action, but rather to act as—perhaps there is no better word—an arbitrator.

It is this unique aspect of arbitration from which the deference of courts to arbitration decisions derives, and this derivation explains why such deference is exercised only when arbitrators remain within their particular area of concern, or jurisdiction, if you will: the interpretation and application of the collective agreement. An analogy can perhaps be drawn to another circumstance in which, contrary to Meltzer's statement as to the uniqueness of judicial deference to arbitration decisions, the courts are asked to exercise

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30. *Id.* at 261.
their enforcement powers while they are at the same time denied any responsibility for scrutinizing the results to be enforced.

If I get a judgment in a California action I can sue on that judgment in New York, for instance. Under the full faith and credit clause of the Constitution, the New York court must enforce the California judgment no matter how much it may disagree with it, no matter how much it might violate the public policy or laws of New York, and even if the California judgment was based on a misconstruction of New York law! The California judgment will be enforced, if it is a final judgment on the merits and if the California court had jurisdiction.

Analogously, courts seem to have sensed that labor arbitration is really the adjudicatory phase of a system of government. Indeed, you could say that what the courts have really done is to treat that system of government as another jurisdiction, to whose judgments they must give full faith and credit when there was jurisdiction to enter those judgments. There is jurisdiction in this sense when, as required by the Steelworkers trilogy, the judgments are derived from the collective agreements. It is irrelevant whether the court would have reached the same conclusion. It is irrelevant whether a particular arbitrator whose award has been questioned had expertise or is a dummy who never decided an arbitration case before and never will again. His award is just as enforceable under the standard law that has existed to this point as if he were an experienced arbitrator such as a member of the National Academy of Arbitrators.

Thus, the very special status which courts have accorded arbitration has little to do with speed or informality or, indeed, the special expertise of arbitrators. The status derives from a recognition, not always explicitly stated, that arbitration is not a substitute for judicial adjudication but a part of a system of industrial self-government.

It is this status which constitutes what I have called arbitration's Golden Age, and which I foresee coming to an end. Its essential premise is the existence of a system of industrial self-government. It is that period when the parties to the employment relationship look to their own machinery, including both arbitration and, where so provided, the strike, to resolve their problems. It is the period when a worker who believes he has been wronged because he has been denied a promotion or the wage he was entitled to, or because he was discharged improperly, will turn exclusively to that private

32. See, e.g., Roche v. McDonald, 275 U.S. 449, 455 (1927).
34. The assumed and therefore possibly fictional "expertise" sometimes relied upon to justify this freedom from review is to be contrasted with the genuine expertise, to be proved on a case-by-case basis, to which the Court referred in Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.61 (1974), in dealing with the effect to be given an arbitration decision in a subsequent Title VII proceeding.
machinery. Similarly, it is the period when an employer can assume that his actions with respect to the employment relationship are final unless rectifiable through the arbitration machinery or, when permitted, by the use of economic force. The law enforced by the courts—which I shall hereafter refer to as the external law to distinguish it from the negotiated rules governing the employment relationship—was irrelevant to such a system until 1947, when Congress passed section 301. Section 301, it turned out, served simply to enforce compliance with the system of self-government.

I have deliberately somewhat overstated the autonomous and self-sufficient nature of the arbitration system. It has never been entirely autonomous. There have always been both state and federal laws regulating the employment relationship. There was always the National Labor Relations Act. But the Act's essential role was mainly procedural and not substantive: to protect the process by which these governing mechanisms were developed and administered and to prohibit practices which would undermine or defeat it, or which—as in the case of closed shop agreements or hot cargo agreements—were regarded as socially undesirable. The Act did not and does not, except in a peripheral way, govern the substantive conditions of employment. Other laws did, but their importance was minimal because they were, and were intended to be, minimum standards. Such government regulation as the federal requirement that overtime be paid for work over forty hours in a week or state laws requiring that wages be paid in money at stated intervals had very little impact on relationships created by collective bargaining.

Hence it is substantially true that the sole source of law governing the employment relationship in industries in which the grievance and arbitration machinery was well established was the collective agreement. Within the area so governed, the arbitrator was treated, as the parties intended him to be, as the final and binding adjudicator. This was, truly, the Golden Age of Arbitration.

II

The Golden Age is still with us. But like the Pilots' Benevolent Association described in Life on the Mississippi, it gained recognition only a few years before the forces which will ultimately lead to its demise set in. The date of the Steelworkers Trilogy, in which the Supreme Court put its imprimatur on the Golden Age, is 1960. Within a few years thereafter there began an ever increasing quantity of substantive federal regulation of the terms and conditions of employment—regulation which portends the end of the Golden Age.

39. Supra note 8.
There are a number of reasons for the increase in regulation: failure of the private systems of regulation to cover a substantial portion of the work force; failure in the organized sector to deal satisfactorily with minority interests; inability of private ordering to deal with some issues of great complexity; and an increasing general tendency to rely on government action to protect interests heretofore left at the mercy of the marketplace. For whatever reason, regulation promulgated beginning in the early 60's was not primarily concerned with establishing minimum conditions, which could be largely ignored because exceeded, in the industrial sector in which the Golden Age prevailed. The principal thrust of this new regulation was to alter the terms and conditions of employment in much of this area. In 1963, there was the Equal Pay Act;\textsuperscript{40} in 1964, Title VII of the Civil Rights Act;\textsuperscript{41} in 1970, the Occupational Safety and Health Act\textsuperscript{42} and Title III of the Consumer Credit Protection Act\textsuperscript{43} limiting the right of an employer to discharge because of garnishment. In 1974, the Employee Retirement Income Security Act (ERISA),\textsuperscript{44} was passed—problems created by the interrelationships between that Act and collective bargaining agreements are just beginning to be felt. For a period there were wage controls under the Economic Stabilization Act,\textsuperscript{45} which may someday be reinstated. Other statutory regulation will undoubtedly be proposed. For example, the British, in the Industrial Relations Act of 1972, for the first time provided public law protection against unjust discharge; it has often been suggested, most recently by Clyde Summers,\textsuperscript{46} that this country should do the same.

These statutory developments signal the beginning of the end of arbitration's Golden Age. They must do so in the simplest sense because the introduction of public law as a significant source of individual employee rights, and the existence of public adjudicative mechanisms for the vindication of those rights, necessarily undermine the hegemony of the collective agreement and the private system of governance which are the sources of arbitration and of its special status. Arbitration is not an independent force but a dependent variable; to the extent that the collective agreement is diminished as a source of employee rights, arbitration is equally diminished.

Simple diminution of the scope of the rights subject to adjudication by arbitration is, however, the least of the problems. The real problem is the

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46. \text{Summers, Arbitration of Unjust Dismissal: A Preliminary Proposal, in The Future of Labor Arbitration in America 159 (1976).}\n\end{align*}
converse: the use of the arbitration process to adjudicate issues arising under the external law.

There are three inter-related sources for the push in that direction. The first is that questions arising under the public, external, law and questions arising under collective bargaining agreements cannot be separated into nicely segmented compartments. Sometimes they are the same; more often they are somewhat different but closely related. The second is that the parties, or one of them, anxious to maintain the hegemony of the collective agreement, may try to force into arbitration questions also adjudicable under the public law. The third is the tendency of some arbitrators to reach out, without agreement between the parties as to their right to do so, and incorporate the external law into the agreement.

This last factor was at the heart of the controversy generated at the 1967 meeting of the National Academy of Arbitrators by the separate papers of Bernard Meltzer47 and Robert Howlett48 and continued by them, and by a distinguished set of arbitrators and academicians, at subsequent meetings.49 The question to which they addressed themselves was the extent to which arbitrators in resolving grievances should implement or follow rules governing the employment relationship imposed by external law rather than by the agreement where the two conflict. The answers ranged from never (Meltzer) to always (Howlett). The others were somewhere in the middle and are best typified by Mittenthal and Sovern. Mittenthal, echoing Cox,50 took the position that an arbitrator should base his decision on the law rather than the agreement when the employer sought to justify action in violation of the agreement on the ground that it was required by law, but should base his decision on the agreement rather than the law when the employer complied with the agreement but the claim was that he should, rather, have complied with the law.51 Sovern occupied ground somewhat closer to Meltzer. He would permit arbitral decision based on the law only in some of the cases in

47. Meltzer, supra note 5, at 1.
48. Howlett, The Arbitrator, the NLRB and the Courts in The Arbitrator, the NLRB and the Courts, supra note 5, at 67.
which Mittenthal would: those in which the arbitrator was competent and in which the courts would not have primary jurisdiction.\footnote{Sovem, supra note 49, at 29. The kind of conflict discussed in general terms in this debate has occurred most frequently with respect to claims of discrimination based on race or sex in violation of Title VII of the Civil Rights Act of 1964. I have searched the reported arbitration cases in which the kind of conflict posited in the Meltzer-Howlett controversy has actually occurred, and in most of the cases the results correspond, as one might expect, to those called for by Mittenthal, at least where the law is clear. Arbitrators do not order employers to take action, even if required by the agreement, if that action would violate the law as they read it. See, e.g., Macy's New York v. Retail, Wholesale & Dept. Store Union Local 1-S, 57 Lab. Arb. 1115 (1975) (Stark, Arb.) (wage freeze legislation); Copolymer Rubber & Chem. Corp. v. Machinists Local 1366, 64 Lab. Arb. 310 (1975) (Dunn, Arb.) (affirmative action compliance program); Great Atl. & Pac. Tea Co. v. Retail Clerks Local 698, 49 Lab. Arb. 1186 (1975) (Duff, Arb.) (state maximum lifting loads for women). Nor, on the other hand, do they order employers to take action on the ground that it is required by law in the absence of something in the agreement. See, e.g., Western Airlines v. Air Line Pilots, 54 Lab. Arb. 600 (1970) (Wyckoff, Arb.) (discharge for pregnancy upheld despite EEOC letter); St. Regis Paper Co. v. Paperworkers Local 200, 65 Lab. Arb. 802 (1975) (Young, Arb.) (employee not entitled to sick leave for pregnancy); East Hartford Bd. v. East Hartford Educ. Ass'n, 57 Lab. Arb. 831 (1971) (Altrock, Arb.) (pregnancy leave requirement upheld). The arbitrators seem to make no distinction based upon whether the legal question is one over which the courts have primary jurisdiction.}

If, and I emphasize the if, the sole consideration is the maintenance of arbitration's special status Meltzer was clearly right. To the extent that the arbitrator decides disputed questions of external law he necessarily relinquishes his right to claim immunity from review by the bodies which the external law has established as its own ultimate mechanisms for the interpretation of that law and its application to particular fact situations. By applying the external law, the arbitrator ceases to be part of an autonomous adjudicatory system and instead becomes a part of another kind of adjudicatory system. In terms of my previous analogy, his judgments on the external law issues are no longer entitled to "full faith and credit" because, rather than acting as an adjudicator in a foreign jurisdiction, the arbitrator is more like a lower court whose decisions are subject to review by higher courts. And it seems probable that once undertaken, judicial review will not be limited to review of the arbitrator's resolution of the issues of external law.

Before the Trilogy, arbitrators were regarded as something in the nature of special masters appointed by a trial court: low-grade adjudicators helpful in resolving controversies who were allowed to function only on the premise that both their assumption of jurisdiction and their resulting decisions were subject to fairly strict scrutiny by the appointing court. Arbitrators were thus described by Mr. Justice Story, sitting on circuit, as "not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said that the judgment of arbitrators is but rusticum judicium."\footnote{Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065).} (Remnants of the view of arbitration as an initial determination in an essentially judicial process are still visible procedurally. Some parties claiming that a lawsuit is improper because the controversy is subject to arbitral determination will still move to stay proceedings pending arbitration, rather than to dismiss the suit.)
The Trilogy presumably changed the status of arbitration. It did so, I have argued, because of an implicit recognition that arbitration is not a substitute for judicial interpretation and application of contracts, but is the capstone of an entirely different process of industrial self-government. But, despite the somewhat extravagant words of the Supreme Court, it is and will continue to be enormously difficult to persuade the average court that a collective agreement is not simply another form of contract, a group of words which, like words in other contracts or in statutes, is the business of the courts to interpret and apply. Deference to the arbitration process was and is difficult to achieve; as Meltzer said ten years ago, "It runs against the grain of judicial tradition."\textsuperscript{54} It will be impossible to maintain if arbitrators extend themselves and regard arbitration as encompassing anything more than the interpretation and application of the rules which the parties have adopted to govern their particular relationship. It is simply expecting too much to ask a court to hold its hand in the face of what it regards as an erroneous interpretation of an agreement when it reviews the arbitrator's application of a statute. It follows that the preservation of the autonomy and freedom from review which arbitration has enjoyed requires the abjuration of any authority to decide any disputed questions of external law.

III

A. Arbitration under Collyer

Having laid down a principle which I think essential to the maintenance of the special status of arbitration, I must confess that the goal may not be achievable. This can best be illustrated by introducing a further element which I believe will ultimately lead to a decline in arbitration's status. Roughly coinciding with the increase in statutory regulation of the terms and conditions of employment there has been a new development under an old law: The Labor Board's \textit{Collyer} doctrine,\textsuperscript{55} under which what are essentially public law decisions are being referred to arbitrators. This may appear on the surface to enlarge rather than diminish the status of arbitration. But it must in the end have the same effect as the statutory developments. The difficulty can be illustrated by examining two recent Board cases: \textit{Illinois Bell Telephone Co.}\textsuperscript{56} and \textit{Trinity Trucking & Materials Corp.}\textsuperscript{57}

In the telephone case an employee was discharged because he refused to be interviewed, without the presence of a union representative, by the employer's security representative who was investigating thefts from the plant. He filed both a grievance and an unfair labor practice charge under section 8(a)(1).\textsuperscript{58} In arbitration the union argued first, that the National

\textsuperscript{54} Supra note 5.
\textsuperscript{55} Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).
\textsuperscript{56} 221 N.L.R.B. 989 (1975).
\textsuperscript{57} 221 N.L.R.B. 364 (1975).
\textsuperscript{58} The unfair labor practice charge was filed one day after the first hearing before the arbitration board, and was first brought to the attention of the neutral arbitrator in the union's post-hearing
Labor Relations Act protected the employee's right to union representation when he had reasonable cause to believe that discipline was contemplated and, second, that the discharge was in any event not for "just cause" because there was a right under the agreement to be accompanied by a union representative. The arbitrator rejected the first argument because the law was unclear. The Board had decided that the claimed protection did indeed exist under section 7 of the Act, but Courts of Appeals in three circuits had refused to enforce the Board's decisions. The Supreme Court had recently granted certiorari. The arbitrator expressly refused to decide the statutory issue in the face of such uncertainty. Turning to the second contention, the arbitrator found no express contractual language nor past practice obligating the employer to permit the employee to be accompanied by a union representative at an investigatory interview. In addition, he found that the employee had no reasonable grounds to believe that discipline was contemplated.

Since that forum failed to provide a remedy for the employee, relief was sought from the Board. By this time the Courts of Appeals decisions had been reversed by the Supreme Court, thus reinstating the Board's view that the National Labor Relations Act gave an employee the right to representation in an interview if he reasonably believed the investigation would result in disciplinary action. The Administrative Law Judge, who heard the unfair labor practice case on substantially the same record as had been presented in arbitration, concluded that on the evidence he would have found that the employee had reasonable grounds for believing that the disciplinary action might result from the interview and, therefore, that discharge violated the Act. But, the judge added, that factual question had been litigated and decided in the arbitration case, and the Board's policy of deferral to arbitration would be undermined if he now passed on the merits of the arbitral decision. The Board then reversed the judge, holding that the arbitrator was wrong on both the law and the facts. Looking at the record as a whole, the Board found that there was no basis for the arbitration finding on the question of reasonable cause, that the arbitration award was therefore

brief. The Board informed the company that it was willing to defer on the basis of Collyer if the company were willing to waive contractual limitations on the processing of grievances. The company replied that it was not, on the grounds that the Board and the courts should decide the issue. Of course the grievance had already proceeded to the arbitration stage, but it is worth noting that neither the union nor the employer sought final resolution of the external law issue by the arbitration panel. Illinois Bell Tel. Co. v. IBEW System Council T-4, 63 Lab. Arb. 968, 971 (1974) (Dolnick, Arb.).

59. Id. at 973-76.
repugnant to the policies of the Act, and that the employee should be
reinstated with back pay.

In *Trinity Trucking*, three employees brought suit against their em-
ployer, claiming that they had not been paid the wages specified in the
collective agreement for 6 years. They asked for $40,000 in compensatory
damages and $200,000 in punitive damages. The employer told them that
unless they withdrew the demand for punitive damages they would be fired.
They didn’t, and they were. They then filed both grievance and unfair labor
practice charges. The Regional Director, in accordance with *Collyer*, def-
ferred and the cases went to arbitration.

The arbitrator squarely decided, at least according to the Board, the
grievants’ rights under both the agreement and the Act, determining that
they had no rights under either. He held that the discharges were justified
because the employees had filed a lawsuit rather than a grievance and be-
cause they refused to withdraw their claim for punitive damages.

The matter then went to the Board, which refused to defer to the
arbitrator’s award. The test under the Act, the Board said, was whether the
employees acted in good faith. The arbitrator had used a different standard:
whether the employees’ actions constituted “disloyalty.” (Not an imper-
missible view, I should have thought, in light of the *Jefferson Standard
Broadcasting* case.) Since the arbitrator’s award was therefore “repug-
nant,” the case should go to hearing on the merits before an Administrative
Law Judge.

Both these cases involved discharge controversies arising under con-
tracts with the standard “just cause” provision. There was no way in which
the arbitrator in either case could avoid deciding the “just cause” question.
In each case the grievant or the union also sought to present a claim that the
discharge violated the National Labor Relations Act. In one case the arbit-
rator sought to avoid an express decision on the law, but decided a factual
issue relevant to the statutory decision. In the other, the arbitrator sought to
apply the statutory requirements but, in the view of the Board, did not
decide the factual issues necessary for resolution of the statutory issue. In
both cases the Board, after arbitration, decided the arbitrator was wrong on
the facts or on the law. The arbitrator in each case was converted into a

63. The arbitrator, according to the Board, should have relied upon the “good faith” test in
Leviton Mfg. Co., 203 N.L.R.B. 309 (1973), even though enforcement had been denied, 486 F.2d
686 (1st Cir. 1973), because “as we [the Board] read its decision, the court agreed with the Board
that the applicable principle of law was correctly stated in Leviton,” but had denied enforcement
because the Board was in error in its factual finding that the suit had been filed in good faith. 221
N.L.R.B. 364, at 365.
64. NLRB v. IBEW Local 1229, 346 U.S. 464 (1953).
65. It is worth noting that these two cases were decided by three-member panels which in-
cluded Members Fanning and Jenkins, the dissenters in *Collyer Insulated Wire*, 192 N.L.R.B. 87
(1971), and in *National Radio Co.*, 198 N.L.R.B. 527, 532-34 (1972). Arbitrators have become em-
broiled in what appears to be a basic policy disagreement among members of the Board over the
extent to which a collective agreement should establish a defense to a variety of unfair labor practice
charges. For example, while the explicit language of the majority in *National Radio*, supra at 530,
B. Arbitration Under Gardner-Denver

At first glance Collyer seemed to some, including the panel of arbitrators which discussed it at the 1974 National Academy of Arbitrators meeting,\(^6\) to be a desirable development.

As these illustrations show, to the extent that Collyer requires reference first to arbitrators over even the identical issues which are subject to Board adjudication it will, inevitably lead to re-adjudication of the arbitrators "final and binding" decision. In the area of external law regulation of the substantive conditions of employment, the inevitable diminution of the status of arbitration is much more evident, and the difference in the nature of the decision making process which is required when statutory rights are asserted is much more palpable. Arbitrators have decided some questions of external law for many years. Until recently, however, the decisions werefew in number and involved issues peripheral to the ongoing employment relationship. There are a substantial number of cases in which arbitrators mention and discuss both statutes and rules of decision by such agencies as the National Labor Relations Board, but they do so only by way of analogy as an aid in construing and applying the rules of the collective agreement. An often forgotten example is Milton Schmidt’s decision in Enterprise Wheel and Car,\(^6\) which eventually, after the employer refused to comply with his award, became the third case in the Steelworkers Trilogy. The question there was whether the arbitrator could order reinstatement with back pay to wrongfully discharged employees even though by the time the award was made the collective bargaining agreement had expired. Schmidt

disclaimed any intent of establishing "just cause," interpreted in traditional terms, as a defense to an 8(a)(3) violation, the refusal of the majority to review the award of the arbitrator, based explicitly upon the collective agreement and not upon the Act, indicated a major shift in that direction. National Radio Co., 205 N.L.R.B. 1179 (1973). This was confirmed by the Board majority in Electronic Reproduction Serv. Corp., 213 N.L.R.B. 758, 764 (1974), which announced a policy of deferring to arbitration awards in all discipline and discharge cases except in "unusual circumstances," because the "arbitral forum normally provides a full opportunity" to present evidence of an 8(a)(3) violation (members Fanning and Jenkins again dissenting in relevant part). In the meantime, the lack of a clear statement as to 8(a)(3) policy has left the arbitrator in a dilemma: either he must continue to interpret "just cause" provisions in traditional terms, and risk being overruled by members Fanning and Jenkins (see e.g., McKinley Transp., Ltd., 219 N.L.R.B. 1148 (1975); Versi Craft Corp., 221 N.L.R.B. 171 (1975); Cessna Aircraft Co., 220 N.L.R.B. 873 (1975)), or he must abandon the traditional role of the arbitrator by importing a standard external to the collective agreement, that of the N.L.R.A., and still risk being overruled by a Board which may disagree within itself or with the courts as to what that standard is (see, e.g., Hawaiian Hauling Serv., Ltd., 219 N.L.R.B. 765 (1975); Dreis v. Knup Mfg., Inc., 221 N.L.R.B. 309 (1975) (Penello, concurring)).


\(^67\) Appendix to Brief of Appellee at 17-24, Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327 (4th Cir. 1959).
decided that he had such authority, suggesting that the National Labor Relations Board provided such a remedy in similar situations. He did not purport, however, to base his award upon the National Labor Relations Act, and his decision was enforced on the theory that it was a permissible interpretation of the collective bargaining agreement and not of the National Labor Relations Act.\footnote{United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).}

The few early cases explicitly dealing with and deciding questions of the external law arose as a result of the introduction of external law questions into the arbitration process by agreement of the parties. The classic example is the provision found for many years in the basic steel agreements, and perhaps in others, specifying that "the Company shall accord to each employee who applies for reemployment after conclusion of his military service . . . such reemployment rights as he shall be entitled to under then existing statutes."\footnote{Agreement between United States Steel Co. and United Steelworkers of America, ¶ 15-A (exp. 1977).} An employee who claims he was not given such rights thus can choose his forum: he can file either a grievance or a lawsuit as provided in the applicable federal statute.\footnote{E.g., the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2026, § 2022 (1974).} In either case the question to be decided is the same: the proper interpretation and application of the statute to the particular facts. An arbitrator called upon to decide such a case would be performing the same function as a district judge.

An example of this type of decision is the opinion of Sylvester Garrett in United States Steel Corporation.\footnote{51 Lab. Arb. 1253 (Garrett, 1968).} An employee who had entered military service during his probationary period returned to work two years later and was reemployed as a "new hire." He filed a grievance requesting seniority as of his original hiring date and compensation. The arbitrator gave it to him. The opinion is a lengthy and able one. What is remarkable about it is that it contains nothing but an extensive analysis of the decisions of the federal courts dealing with the statutory exclusion from its benefits of employees who leave a "temporary position." The opinion concludes that the latest decisions of the federal courts "leave no doubt" that a probationary employee would not be treated as one occupying a temporary position.\footnote{Id. at 1258.} The decision exhibits none of the characteristics customarily associated with labor arbitration. Indeed, the one collective bargaining agreement question implicit in the case—whether upon reemployment the grievant would under the agreement resume his probationary status until completion of the period of "actual work" specified for the probationary period—was not decided, since by the time the decision was made those hours had in fact been worked.

Provisions which explicitly incorporate aspects of external law such as the military service provisions into collective agreements were essentially

\footnote{68. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).}
aberrations, seldom found before the middle sixties. But in recent years, particularly with the enactment of the Civil Rights Act of 1964, the situation has changed. It has become almost standard practice to insert into collective bargaining agreements a no-discrimination provision of one of three varieties. A first type provides that the employer shall not discriminate in the application of the provisions of the agreement on any of the forbidden bases. Such clauses add essentially nothing to the agreement because discriminatory application of a provision of the agreement would, in any case, be found to be a violation of the agreement. The question presented by a grievance is still whether the employer has fairly applied to the grievant the substantive provision of the agreement involved in the dispute. If he has not, the substantive provision has been violated, and perhaps the no-discrimination clause. If he has, neither the substantive provision nor the no-discrimination clause has been violated.

Of more significance is a second type: provisions which flatly provide that the employer shall not discriminate on any of the forbidden grounds on any matter involving wages, hours, or working conditions. Such a clause obviously does add substance because it is potentially applicable to questions within the scope of the employment relationship which are not dealt with specifically or impliedly in the agreement and which would otherwise be solely within management's discretion. An arbitrator faced with this type of no-discrimination provision may look to decisions or guidelines issued by agencies charged with administering antidiscrimination statutes in determining grievances which arise under such a provision and do not implicate any other provisions of the collective agreement. But in so doing an arbitrator would or could still be acting as the adjudicator of what the parties expressly or implicitly intended to be the rule governing their relationships with each other, rather than as an expounder of the meaning and application of external law.

This is not true in a third category, where the parties explicitly incorporate into the agreement the applicable sections of the external law governing the question of discrimination. An example, taken from a pending case, is the agreement between Southbridge Plastics Division, W. R. Grace & Company and the Rubber Workers. That agreement not only forbids race and sex discrimination by the company or the union, but also says that "both parties will abide by and comply with all applicable Federal laws banning discrimination in regard to hiring, promotion and job assignment." For good measure the same agreement contains what many arbitrators have relied on to enlarge their jurisdiction to decide external law questions, a typical "savings" clause: "In the event that any provision of this Agreement is found to be in conflict with any State or Federal Law now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting

provisions without affecting the remainder of these provisions.' The first provision clearly (and the second provision doubtfully) incorporate into the agreement the provisions of federal or state anti-discrimination statutes.

The cases involving no-discrimination provisions are numerous indeed, and to them has been added the increasing number of decisions by arbitrators of the Howlett or Mittenthal persuasion. For example, the volume of Labor Arbitration Reports covering the six months between March and September 1975 contains at least 17 decisions directly involving claims of violation of Title VII. Each week brings more. A great many of the cases involve questions of external law, pure and simple, and not questions of the kind which are supposed to be within the area of arbitrators' special competence. And the arbitrators have done poorly in interpreting and applying that external law, at least as measured by developments in the courts.

Few if any arbitrators anticipated, for example, that the courts would hold that Title VII of the Civil Rights Act of 1964 invalidated state protective laws limiting the jobs open to women as a class. The experience of one distinguished arbitrator, now deceased, with over 30 years of arbitration experience is illuminating. He first faced the question in 1968 under a contract containing both general anti-discrimination and savings provisions and a specific provision that seniority should not be affected by sex. The issue was whether a female employee was entitled to use her seniority to avoid layoff by bumping into a job requiring the lifting of more than 25 pounds. Ohio law prohibited the employment of women on jobs requiring the frequent or repeated lifting of more than 25 pounds. The arbitrator recited the then ambiguous statements of the EEOC on the subject, quoted two district court decisions (both later reversed on appeal) upholding similar limitations, and denied the grievance. In August 1969, the EEOC declared that it would no longer accept state laws of this kind as controlling. In September the Ohio Director of Industrial Relations issued a statement saying that the Ohio law would no longer be enforced. In December the employer issued an order directing that the restrictive practice cease. The aggrieved employees then sought retroactive pay. The arbitrator, in 1973, issued an opinion saying that the employer's December 1969 order was "illegal because its provisions ran counter to the dictates of the Ohio Law." That law, he declared, controlled until it was "repealed or voided

74. 64 Lab. Arb. (1975).
75. Goodyear Aerospace Corp. v. UAW Local 856, 68-2 LAB. ARB. AWARDS (CCH) § 8602 (1968) (Lehoczyk, Arb.).
76. OHIO REV. CODE ANN. § 4107.3 (Page).
79. Goodyear Aerospace Corp. v. UAW Local 856, 60 Lab. Arb. 1011, 1017 (1973) (Lehoczyk, Arb.).
by the courts’” and that did not occur until March 1972, when the Supreme Court of Ohio decided the issue.\(^8\)

The same kind of grappling with essentially legal issues is shown in arbitration opinions dealing with maternity leave. Before the Supreme Court’s decision in *La Fleur*,\(^8^1\) few arbitrators anticipated that the Court would hold provisions for mandatory unpaid maternity leave invalid. When court cases on that question were on the way to the Supreme Court, arbitrators resolved claims under the no-discrimination and savings provisions of collective agreements by looking at the conflicting lower court decisions and, in most cases, picking as more persuasive the view which ultimately proved to be wrong.\(^8^2\) After that issue was settled, grievances presenting the question of whether employers were required to provide sick leave or sickness and accident benefits in maternity cases arose. Again the arbitration decisions consist mostly of analyses of pending Title VII lower court cases, often attempting to decide whether those decisions had been overruled by the Supreme Court’s fourteenth amendment decision in *Geduldig v. Aiello*.\(^8^3\)

The dilemma faced by the arbitrator attempting to construe the meaning of “‘discrimination’” under Title VII is perhaps the least of the problems in this area. It is often resolved by simple yes or no answers to questions involving the employer’s prerogatives under the agreement to discharge an employee for becoming pregnant, to refuse to permit women to do heavy jobs or work involving overtime, or to refuse to pay sick leave in maternity cases. Other questions posed may require the arbitrator to fashion or rule upon affirmative remedies, a task far removed from his basic mandate to construe the collective bargaining agreement according to the intent of the parties and the “‘common law of the shop.’”

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82. *See, e.g.*, Clio Educ. Ass’n v. Clio Area School Dist., 61 Lab. Arb. 37 (1973) (McCor- mick, Arb.). *But see* Milwaukee Area Technical College v. Local 212, Am. Fed’n of Teachers, 40 AIS 8 (1973) (Seitz, Arb.), summarized in M. STONE, and E. BADERSCHNEIDER, *ARBITION OF DISCRIMINATION GRIEVANCES* 91 (1974). The arbitrator there was clearly of the Howlett persuasion. If the Seventh Circuit, in which the case arose, had ruled on the issue he would, he said, have sustained the grievance protesting the employer’s action in complying with the agreement’s provision requiring maternity leave. However, faced with a conflict among the other circuits and no ruling from the Seventh, he denied it, although expressing the view that the Sixth Circuit’s position (ultimately sustained by the Supreme Court) was the preferable one.
Let me again refer to the Southbridge Plastics case. The agreement there provided for plant-wide seniority in promotions and lay-offs and for shift preference based on seniority. The company had hired no women for bargaining unit jobs until 1974. Then during the course of an economic strike, it hired women as replacements for some of the strikers. When the strike was settled, the women were retained, but there were also jobs for the strikers. Later, however, there were layoffs and the company retained the women hired during the strike while laying off male strikers with greater seniority. In addition, the company refused to permit senior male employees to exercise their shift preferences if it would result in dislodging women from the shifts on which they were working. Both actions plainly violated specific provisions of the collective agreement and accomplished the same result as the super-seniority for strikebreakers gimmick that the Supreme Court held unlawful in Erie Resistor. Grievances were filed. How should an arbitrator dispose of those grievances if the company’s defense is that its actions, although in violation of the specific seniority provisions of the agreement, were required in order to remedy the effects of prior discrimination against women? Should the arbitrator order, as the later reversed trial court did in Watkins v. Steelworkers, that separate seniority lists for men and women be established so as to preserve the proportion of men and women in the work force and to approximate the distribution on shifts which would have occurred if women had been hired earlier than 1974?

In the actual Southridge Plastics case, the question was never put to an arbitrator. The company sued to enjoin arbitration and simultaneously entered into a conciliation agreement with the EEOC forbidding the removal of females from their jobs under the shift preference provision and providing for separate seniority lists from which layoffs would be made in such a manner as to preserve the existing proportion of male and female employees. The company then took the position that the grievances were not arbitrable since the collective agreement was superseded by the conciliation agreement. The district court sustained this position, holding that the conciliation agreement was necessary to cure the effect of the past hiring discrimination and that no useful purpose would be served by requiring arbitration of the union’s grievances because the seniority provisions of the collective bargaining agreement which conflicted with the conciliation agreement were now void.

This is not the place to argue the merits of the district court decision, which is pending on appeal in the Fifth Circuit. What is important here is that the union in its appeal does not argue solely that the remedy for the presumed past hiring discrimination was inappropriate under Title VII. That

is a nice question involving elements of both *Franks v. Bowman Transportation Co.* and *Watkins.* The union also argues that the question of discrimination and the appropriate remedy should be submitted to the arbitrator under the no-discrimination and savings provisions which incorporate Title VII law into the collective agreement. According to the union this result would not prejudice the rights of the women because they would "remain as free as before to seek the remedy provided by the conciliation agreement in a suit pursuant to Title VII." This particular contention would, if successful, refer to the arbitrator all the complicated questions of Title VII remedy and the difficult problems of restructuring seniority systems, subject always to the right of an individual plaintiff dissatisfied with the arbitrator's decision to have the question litigated anew in a federal district court under *Alexander v. Gardner-Denver Co.*

*Southbridge Plastics* would be an easy case for an arbitrator compared to others which might be put. Consider for example the complex seniority arrangements in the basic steel industry dealt with by the federal district court in *United States v. U.S. Steel Corporation.* The decree in that case illustrates the enormity of the task faced by the district court in fashioning a Title VII remedy. It includes a detailed revision of the seniority regulations and lines of progression, provision for red circle rights, requirements that locals be merged, and awards of back pay to be adjudicated on an individual basis. All of these provisions took literally years to formulate, a task complicated enormously by the propositions that a neutral seniority system violates the statute if it perpetuates past discrimination and that such effects must be remedied both prospectively and with damages. If the steel agreements contained a provision incorporating Title VII (which they do not) and individual grievants sought arbitration of their rights under that provision, presumably all of those problems would have to be resolved by an arbitrator.

Such awards would be totally beyond the competence, to say nothing of the inclination, of an arbitrator. The problem is not only that the procedures of arbitration, including the absence of any discovery procedures, are insufficient for such a purpose and that the remedial powers of an arbitrator are limited. It is also that arbitrators, trained and experienced in the practice of administering the rule of law established by the collective agreement, can hardly be expected to undertake a radical restructuring of the agreement itself, even if asked to do so by one of the parties in the name of a particular clause of the agreement.

Finally, no matter what remedial course an arbitrator decides to take, *Alexander v. Gardner-Denver* makes it clear that if the grievants remain dissatisfied they can begin again, with the arbitrator's decision as to the

88. 96 S. Ct. 1251 (1976).
90. 5 EMPL. PRAC. DEC. (CCH) ¶ 8619 (N.D. Ala. 1973), aff'd in part, vacated and remanded in part, 520 F.2d 1043 (5th Cir. 1975).
proper interpretation and application of the external law being given "only such weight as the court deems appropriate." 92

Thus, despite the apparent divergence of policy behind Collyer and Gardner-Denver, 93 the result for arbitrators' immunity from review is the same. If present tendencies continue, arbitrators will become junior adjudicators who should perhaps be given a first crack at difficult problems, but whose decisions must always be subject to correction and review by the authorities properly charged with interpreting and applying the law.

IV

If it is desirable to maintain the special status which arbitration has achieved as part of an autonomous adjudicatory system, arbitrators can try to arrest the trend toward incorporation into broader judicial processes. To do so they should, insofar as they can, adhere to the Meltzer view 94 and should certainly not volunteer to adjudicate questions of the external law on the Howlett theory 95 that such law is necessarily embodied in the collective agreement. They should not interpret simple savings clauses, most of which were inserted in collective bargaining agreements in light of the Taft-Hartley restriction on the union shop, 96 as vehicles giving them contractual authority to incorporate the external law. Those provisions, like the savings provisions in statutes subject to constitutional attack, are intended to preserve the balance of an agreement if part of it should prove unenforceable or void; they are not meant to be invitations for arbitral revision. Anti-discrimination clauses can be treated by arbitrators not as incorporating the provisions of Title VII, with all of its complex remedial apparatus and its implicit prohibition of present neutral provisions which perpetuate the effect of past discrimination, but as general principles subordinate to the specific provisions of the agreement, having substantive force only as to matters not covered by the specific provisions.

For example, an arbitrator faced with provisions specifying that sickness and accident benefits should not be paid in maternity cases and also containing a no-discrimination clause should not regard himself as being charged with the responsibility of determining whether the failure to provide benefits for maternity constitutes discrimination since the parties plainly did not think it did when they wrote the maternity leave provision. Nor, in this view, should an arbitrator in the Southbridge Plastics situation 97 consider that the anti-discrimination provision gives him authority to revise the agreement's simultaneously executed seniority provisions on the theory that they preserve the effect of prior discrimination in hiring.

92. Id. at 61.
95. Supra note 48.
Similarly, an arbitrator faced with a grievance implicating questions under the National Labor Relations Act which is being heard because the Board has deferred to the arbitrator can make it clear that he is not deciding any questions under the Act but simply determining whether, on the facts presented, it can be said that the employer violated the terms of the collective bargaining agreement.

Even this may not entirely relieve the problem, given current Board policies and practices.98 Consider, for example, the benefit not mentioned in the collective agreement which the employer eliminates during the term of the agreement without first bargaining with the union. The Board has traditionally held that a unilateral change in any condition of employment which is subject to the duty to bargain and is not covered by a collective agreement is a violation of section 8(a)(5) unless there has been a "clear and unmistakable" waiver of the duty to bargain on the matter. 99 If a benefit, though not mentioned in a collective agreement, is deemed to be an implicit term of the agreement based on past practice, the union's complaint is for violation of the agreement.100 If, on the other hand, the union takes the view that the matter is not covered expressly or implicitly in the agreement, then the only proper complaint is for violation of the National Labor Relations Act. But since the question to be resolved involves interpretation of the agreement, the Collyer doctrine requires the Board to defer the dispute to an arbitrator if the agreement contains an arbitration clause.

This is exactly what happened in Western Massachusetts Electric,101 a case which neatly illustrates the intractable nature of the difficulty. The union there first filed a grievance claiming that the cancelled benefit (a discount purchase plan) was a condition of employment which could not be removed except with the union's consent. The employer responded that the dispute was not arbitrable, presumably because the plan was not referred to in the agreement, but said it would be willing to submit the arbitrability issue to an arbitrator. The union then filed a charge with the Board. When it appeared that a Collyer deferral would take place, the union changed position, agreeing with the employer that the dispute was not arbitrable because

97. See text accompanying note 84.
98. See note 64 supra discussing parallel problems in section 8(a)(3) situations.
100. If the matter is covered by the agreement there may also be a violation of the section 8(a)(5) duty to bargain as defined by section 8(d). See California Blowpipe & Steel Co., 218 N.L.R.B. 736 (1975); C & S Indus., Inc., 158 N.L.R.B. 454 (1966). The practical difference between the two theories on which 8(a)(5) violations could be found is that if the subject is deemed not covered the employer may lawfully act as if it first bargains to impasse, while if the subject is covered, any modification, such as discontinuance of a past practice, may violate both the agreement and the Act even after bargaining.
101. 65 Lab. Arb. 816 (1975) (Summers, Arb.).
the subject was not covered by the agreement and asking that a section 8(a)(5) complaint issue. The Regional Director nevertheless deferred in light of the employer's willingness to arbitrate arbitrability.

The matter then came before arbitrator Clyde Summers. The parties agreed that he should decide the question of arbitrability of the underlying dispute but could not agree what the underlying dispute was. The employer said it was whether the discontinuance of the plan violated the agreement; the union said that it was whether doing so without first bargaining with the union violated both the recognition clause of the agreement and the National Labor Relations Act. The arbitrator decided that the dispute was not arbitrable!

This appears, at first glance, to be an astonishing result—as astonishing to an outside observer as the union's contention that the employer violated the agreement, not by discontinuing the plan per se, but only by failing to bargain to impasse before doing so. But both must be read in the light of the Board's application of Collyer in National Radio and Electronic Reproduction Services. The net effect of those two decisions, as confirmed by the Board's General Counsel, is to require a union that claims both a violation of contract and a violation of the Act to pursue both claims before an arbitrator. If the union presents only its contractual claim, seeking to reserve the Board question for the Board if it loses under the contract, the Board will wash its hands of the whole affair and refuse to issue a complaint. Its justification is that under Spielberg the dispute has been settled and the union has waived its statutory claim.

In Western Massachusetts Electric the union, deciding that it was more likely to succeed on the theory that the matter was not an implicit term of the agreement, apparently felt compelled by the Board's deferral in those circumstances to argue that the agreement's recognition clause imported into the agreement the statutory duty to bargain. Perhaps recognizing that if he rejected that argument he would be regarded by the Board as having resolved the statutory issues even if he said he did not, the arbitrator simply decided that he would not be a pawn in that game and refused to decide anything, even though the agreement clearly gave him authority to decide "any difference, dispute or grievance between the parties."

Given the union choice not to present the question of whether the agreement impliedly required continuance, and not merely pre-discontinuance bargaining, and the fact that each party at some stage of the proceeding had urged that the dispute was not arbitrable, this abdication by the arbitrator of a power clearly his is perhaps understandable. Suppose,

102. See supra note 64.
105. This is what happened to Archibald Cox in National Radio Co., 205 N.L.R.B. at 1180.
however, that the union had pressed its original grievance that under the agreement the employer had no right to eliminate this unmentioned benefit. If the arbitrator denied that claim, it is likely that the Board would then decide that his ruling disposed of the dispute, including the potential section 8(a)(5) claim. Alternatively, if the Board found his interpretation of the agreement contrary to Board precedent in section 8(a)(5) cases, it would reverse him and order reinstatement of the benefit. It may very well be, therefore, that today the only way an arbitrator can avoid decision and consequent review by the Board on the question of external law is by doing what Summers did: refuse to decide the dispute, even if both parties agree that it is arbitrable in some sense, where what the parties essentially seek is to have him decide a question of external law.

Even if, contrary to recent practice, the Board were to remain conscious of the distinction between the contractual and statutory issues and were to treat the award as resolving only the contractual issue, the terms used by the arbitrator in denying the grievance might very well determine the section 8(a)(5) question. If the arbitrator merely said that nothing in the agreement precluded the discontinuance of the benefit, the statutory question of whether pre-discontinuance bargaining was required would still presumably be alive. If, on the other hand, he mentioned the management rights clause or any other provision in the agreement as authorizing the discontinuance, the Board would find no violation of the duty to bargain. In either case there would have been no violation of the agreement by the employer. Thus, what is essentially dictum propounded by the arbitrator in view of the purposes for which the parties employed him—to determine whether the agreement was violated—would become determinative for the purpose of deciding the external law question.

My own preference in such a situation would be to decide the agreement question but at the same time make it quite clear that nothing else was being decided. In the actual Western Massachusetts Electric case, the arbitrator could have decided that the question of whether the agreement should be read as incorporating the duty to bargain imposed by the Act was arbitrable, as it plainly was, and then that it did not, expressly disclaiming any intention of deciding whether there was a waiver of the statutory duty. If the union had pressed its claim that the benefit was implicitly covered by the agreement he could have decided that question. If he found that it was so covered, he could have rested his conclusion on the agreement, not on the Act. He need not have emulated the arbitrator who in a decision reported at the same time as Western Massachusetts Electric decided in a “Collyerized” case that discontinuance of a $10 Christmas bonus “violated an established past practice as well as section 8(a)(5) of the National Labor

Relations Act.” If he found that it was not covered, he could be careful to make it clear that his only function was to decide whether the agreement prohibited the employer's action, not whether it affirmatively authorized it.

But even the strictest adherence by arbitrators to this narrow view of their function will not preserve the Golden Age. Obviously it will not in cases where the agreement, as is being argued to be the case in Southbridge Plastics, mandates a larger role. The parties can make it quite explicit that they want the arbitrator to decide the rights of the parties not only under the agreement but also under the applicable external law. An arbitrator is, after all, the servant of the parties. If they make it clear that they want what must inevitably be an advisory opinion in the hope that when rendered it will resolve the dispute, he must oblige.

Second, and probably more important, whichever way arbitrators respond when they have a choice, their status is necessarily impaired. That status derived from the existence of an autonomous system of government of the employment relationship. The statutory enactments of the past few years, in particular the enactment of Title VII, make it clear that society is not satisfied with the results of that autonomous system. It was not satisfied, to pick a minor but apt example, about the way in which the question of whether a garnishment should be the occasion for discharge was being handled through the collective bargaining process. As a result we have alternate standards to govern particular aspects of the employment relationship and alternate forums to adjudicate compliance with those standards. I suspect this trend will continue.

This would create few problems for the arbitration process if the questions posed under these publicly imposed standards were clearly separable and unrelated to questions arising under collective agreements. But it is abundantly clear that the questions are intimately related in a variety of ways. The questions may be duplicative, as in the Illinois Bell Telephone case discussed earlier. Or the collective agreement may arguably conflict with the standards of the external law, as in the unpaid maternity leave cases. Or the answer to the question under the collective agreement may provide the essential datum for resolution of the question under the external law, as in those cases where the finding of an unfair labor practice depends upon whether a question is covered or a right waived by the collective agreement. In all of these situations, the special finality of decision which is the hallmark of arbitration's days of glory must inevitably be substantially diminished.


109. E.g., Mastro Plastics v. NLRB, 350 U.S. 270 (1956), as well as cases cited in notes 91-100 supra.
V

There remains one other, and final, element. The system of industrial self-government of which arbitration is the capstone depends upon an assumption that the union, which serves both as co-legislator in enactment of the governing statute and as advocate in its adjudicatory phase, performs its function properly and with a fair regard to the interests of the polity it represents. The failures, or what are perceived to be failures, of both unions and employers as co-legislators provided the occasion for the enactment of the statutes which are, I believe, the source of the coming decline of the hegemony of the collective bargaining agreement, and consequently, in the status of arbitration. But it is the union’s failures, or alleged failures, as advocate which provide the occasion for a different threat to that hegemony and, ironically, to the pocketbooks of the employers. I refer, of course, to the developing doctrine that a final and binding grievance settlement, or even an arbitration award, is no bar to relitigation against an employer of an employee claim if it is found that the settlement, or the arbitration award, resulted from a union breach of the duty of fair representation.

There is again a rough simultaneity. *Vaca v. Sipes* was decided in 1967. Its primary holding—that an employee who claimed a right under a collective agreement which the union failed to press to arbitration must show a breach of the union’s duty of fair representation in order to be heard judicially—fortified the immunity from alternative adjudication essential to the maintenance of arbitration’s status. But there was a secondary holding, or more properly a dictum since the suit in the case was only against the union, which carried portents for that immunity. If a grievance was abandoned before arbitration and the threshold criterion of a breach of duty was shown, the remedy, the Court said, was not, as had been urged by the union, solely an order directing that the grievance be taken to arbitration with, if appropriate, safeguards for protection against union hostility or prejudice. It was also permissible to try the merits of the grievance in court.

Here, unlike the situations on which I have primarily focussed, there is no problem of accommodation between the rules of the collective agreement and the external law. The grievant’s claim presents only a question of interpretation and application of the agreement, a claim which I have argued is not the same thing as a claim of breach of contract and which should not be, in Mr. Justice Black’s words, decided under “old common law rules for the interpretation of employment contracts.” But, once a breach of union duty is shown, the claim is transformed, again using Mr. Justice Black’s words, this time in dissent, into “an ordinary, common, run-of-the-mill lawsuit for breach of contract.”

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111. *Id.* at 196.
What was held permissible in *Vaca* has become the rule in practice. Even in the clearest cases in which an order directing arbitration would have been appropriate the courts have almost unanimously assumed that once a breach of union duty has been shown—as in the case of a failure to pursue a grievance because of a gross but good faith miscalculation—the appropriate forum for resolution of the underlying question of interpretation and application of the agreement is the court room.\(^{114}\) When there is a breach of duty, and only then, the arbitration process is treated simply as an alternate form of adjudication of a contract claim also subject to judicial adjudication.

Although both undesirable and unnecessary, as I have elsewhere shown,\(^{115}\) the opening of an alternative forum as a consequence of *Vaca* posed only an indirect threat to arbitration’s status, a threat no larger than the labor Board’s pre-*Collyer* stance when the Board was faced with a statutory problem encompassing as one of the determinants of its decision an issue of agreement interpretation.\(^{116}\) It has recently been made plain, however, that at least some courts are prepared to apply the same reasoning and remedy where the judicial interpretation sought is not a substitute for arbitration but, in effect, a review of it. And that development does indeed threaten arbitration’s status.

The two most significant cases are *Holodnak v. Avco Corp.*\(^{117}\) and *Hines v. Anchor Motor Freight, Inc.*\(^{118}\) The particular facts of the two cases are interesting but irrelevant to the point I wish to make. What is relevant is that in *Holodnak* an arbitrator’s decision denying a discharge grievance was not regarded as a bar to litigation of the plaintiff’s claim for breach of contract because that the union’s attorney had failed to make a constitutional argument in support of the grievant which the Court found to be persuasive; in *Hines* the Supreme Court, erroneously treating a joint committee decision under the Teamster’s procedure as arbitration, held that the employer was not relieved of potential liability on an employee’s claim of breach of contract if the “arbitration decision” resulted from a union breach of the duty of fair representation in investigating the facts involved in the case.

For present purposes the important thing about both of these decisions is that they open the door to application of the same standard as to what constitutes a union breach of the duty of fair representation in cases in which there has been an arbitration decision as has heretofore been applied in cases

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in which the plaintiff’s complaint is that the union abandoned his grievance prior to arbitration. It is clear that in the latter situation the courts are broadening the definition of breach of duty to include not only cases of hostility or malice but also cases in which the union’s conduct can be said to be arbitrary, grossly negligent, or in Vaca’s words, “perfunctory.” This lowered threshold is not objectionable if the consequences, at least in the non-malicious cases, is that the union and the employer are directed to proceed to arbitration, waiving if necessary any bar created by the passing of time limits as a result of the union’s breach of duty. It is quite a different thing, however, to permit a judicial determination of the plaintiff’s claim under a collective agreement which has been arbitrated on the ground that the union’s presentation in arbitration fails to meet a court’s conception of adequacy.

Conceivably, judicial intrusion in the latter situation may, as in Holodnak’s case, result in the correction of what appears to be injustice. But the price to be paid for that correction may be too high. The system of industrial self government almost necessarily carries with it the possibility of injustice, not only to individual grievants but also to many groups of employees and, as well, employers. When our society decided that the terms and conditions of employment were not to be governmentally regulated, except at certain minimum levels, but were to be established through the free play of the marketplace and, where instituted, collective bargaining, it necessarily accepted the notion that the bargain eventually struck might, in individual cases, be regarded as unfair to one party or another. The price for eliminating that unfairness by precise government regulation of the terms and conditions of employment was thought to be too high to pay for the correction of the admitted cases of injustice that would otherwise result. No one would deny that there are collective bargaining agreements which contain provisions which any impartial judge would regard as unjust, in some cases to employees and in others to their employers. But as a society we have decided that, at least within limits, that injustice is more tolerable than would be a system which would provide for governmental imposition of the terms and conditions of employment.

Just so in the case of grievance arbitration. It is probable that many grievances are lost in arbitration because of the inadequacy of union presentation. It may well be true that there are many cases in which unions, many of whom do not use lawyers in arbitration, would have succeeded in obtaining favorable decisions if they exercised the care in investigation and in presentation which a court might later find to be necessary. And there is no doubt whatsoever that juries impaneled to decide breach of contract cases would find for individual plaintiffs in many cases in which an arbitrator would not. We need only look to Vaca itself for a demonstration. The jury

there found that the plaintiff was healthy enough to return to work and that
the union had arbitrarily refused to process his grievance that he should be
allowed to do so, even though the doctor chosen by him reported that his
physical condition made him totally unable to work without danger to him-
self, a diagnosis confirmed when shortly after the jury's verdict he died of
precisely the condition which both the employer's doctor and the union's
doctor had found.

The availability of subsequent judicial adjudication in cases in which
the grievant has lost in arbitration may satisfy the desire to insure that
individual employees are awarded a full measure of justice; but if the cases
in which that opportunity is made available are enlarged by use of the same
standard of fair representation as is applied where the grievance is aban-
donned short of arbitration, there can be no doubt that the system of self
government and, consequently, the status of arbitration, will be weakened.

In this sector, however, the result is not inevitable. Although the Su-
preme Court did not, in Hines, explicitly distinguish between pre- and
post-arbitration remedies, that issue was not squarely presented: the grant of
certiorari was limited to the question of whether the employer would be
relieved of liability if the union were to be found, in a trial not yet held, to be
guilty of a breach of the duty of fair representation in what the Court
assumed was arbitration. Holodnak was not a Supreme Court case and its
result can perhaps be explained as consistent not with the principles of the
Steelworkers' Trilogy as generally applied but with the Second Circuit's
singular view that the courts have a broader scope for review after arbitration
than they have in ordering it.120

It is still possible that the Supreme Court will eventually limit the
judicial remedy after arbitration to cases of dishonesty or deliberately pre-
judicial presentation while permitting the use of a lower threshold where the
complaint is that the union has abandoned a grievance without adjudication
of any kind. And it remains possible under Vaca for the lower courts to
provide the remedy of arbitration, rather than judicial decision on the merits,
in at least those cases where the union's breach is of the non-malicious
variety.121

VI

Unlike the threat implicit in the fair representation cases, that presented
by the increasing extent of external regulation of the terms and conditions of

120. For a forceful description, by a judge of that circuit, of the view that an arbitrator has
jurisdiction to be wrong, but he has no authority to do so, see Hayes, The Future of Labor Arbitra-
tion, 74 Yale L.J. 1019, 1020 (1965). It is no accident that the same judge who wrote Torrington
Co. v. Metal Prods. Workers, 362 F.2d 677 (2d Cir. 1966) decided Holodnak while sitting as a trial
judge.

121. Although, as noted earlier, the courts have uniformly assumed that once a breach of
union duty has been shown the merits of the plaintiff's grievance should be tried by the court, with a
jury if requested, this assumption has generally been made in the absence of a contention by either
employment cannot be dissipated by judicial decision. There is simply no satisfactory solution which will preserve the Golden Age of Arbitration. It is based on two premises: (1) that for most of the important substantive aspects of the employment relationship the sole source of authority was the collective bargaining agreement, and (2) that the Board would decide procedural National Labor Relations Act questions arising between contracting parties. Insofar as those premises cease to be correct, the institution of arbitration must suffer in one way or another.

Once that result is accepted as inevitable, it may very well be that the better course for the future of arbitration may not be the abjuration of decision on the external law which I have urged as desirable in the interest of preserving arbitration's freedom from review. After all, arbitration exists not to serve the interest of arbitrators but of the parties. And the fact that the parties sometimes use words in their agreements which require arbitrators to decide external law questions, as well as the fact that they almost never rewrite their agreements so as to withdraw issues which are subject to adjudication in other forums from the scope of arbitration, should tell us something. So, too, should apparent acceptance by some parties of *Collyer* arbitration results, including such arbitral statements as "I have authority to resolve the claim of unfair labor practice in spite of the pending Board proceeding."

When the parties make it unmistakably clear—through the express wording of their collective agreement or by stipulation, voluntarily or because external authority so requires—that they both want the arbitrator to apply the external law, he must do so. This is not to say that the arbitrator should reach out over the objection of one of the parties to decide external law questions on the basis of parallel language or savings clauses in collective agreements. Nor should the external law be construed or applied by the arbitrator on any basis other than the collective agreement unless both parties agree that he should do so. But it is becoming clear that, whether by choice or by force, parties are increasingly imposing on arbitrators the duty of deciding external law questions.

There may be, and on balance I think probably are, great advantages to both unions and employers in attempting to resolve their problems themselves, even those involving the external law, thereby keeping the grievance and arbitration procedures open to all sorts of claims, including those which may ultimately be subject to final adjudication elsewhere. The necessary result may be that arbitrators become primary but not necessarily final adjudicators. But it may also be that given the alternatives such a result is healthier for continuing relationships between employers and unions than increasing resort to external tribunals as primary adjudicators. After all, the parties accept many arbitration decisions, including ones that commentators party that the appropriate remedy is arbitration. I have found no reported decision rejecting such a contention.

or the courts might regard as erroneous. If they do, the parties’ problem is solved. This channeling of disputes through what Justice Brandeis, quoting Justice Story, referred to as “domestic forums”\footnote{123} may have advantages for the ongoing relationship of the parties even if the effect is in the end the loss of the insulation from review which arbitrators enjoyed in the Golden Age.

The issue can be crystallized by examining two methods of handling grievances involving the interpretation and application of seniority provisions inserted into a collective agreement as a result of a Title VII decree under which the court retains jurisdiction. One method of handling such grievances is to decide them, even though a court may later disagree. That is the method Harry Platt adopted in \textit{Mountain States Telephone & Telegraph Co. v. CWA}\footnote{124} and the one which I gather will be utilized under the basic steel consent decree.\footnote{125} The other is typified by William Murphy’s decision in \textit{Virginia Electric & Power Co. v. IBEW}.\footnote{126} The court, he said, has jurisdiction to interpret its own order, and the grievance should therefore go directly to the court. The choice between these two approaches, which is essentially the choice presented in any Title VII case, will and should ultimately be made by the parties. The arbitrator’s discretion exists only when they have not made that choice clear. If, as I suspect, the parties or the arbitrator opt for the Platt approach, there will be more work and more gold for arbitrators. Arbitrators will have an expanded role. They may even be used as assistants to the courts or to the EEOC as special masters.\footnote{127} But although the role of arbitrators will be expanded, their status will be diminished. And although the golden age for arbitrators may continue, the Golden Age of Arbitration which owes its existence to the autonomous nature of the governance system created by collective bargaining will be ending. We are a long way from that ending. There are still vast areas in which the terms and conditions of employment are untouched by public law. But I see no alternative to the conclusion that we are at the beginning of the end: arbitration’s days of glory are numbered.

\footnote{123}{Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 121 (1924) (quoting Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065).}

\footnote{124}{64 Lab. Arb. 316 (1974) (Platt, Arb.). A Colorado federal district court, to which the union applied for enforcement of Arbitrator Platt’s award, did disagree with the view (arguably taken by Platt) that an arbitrator’s decision on matters of federal law extrinsic to the agreement should have some weight. To the contrary, the court asserted, even where both parties agree, as they had in this case, that the arbitrator should interpret and apply the federal law, “substantive interpretation of the law and its impact upon this case is a matter which the court must undertake de novo.” The court concluded, on de novo examination, that the arbitrator had applied the law correctly and directed the employer to comply with the award sustaining the union’s grievance. Communication Workers of America v. Mountain States Telephone and Telegraph Co., Civil No. 75-4-245 (D. Colo., filed Jan. 14, 1977). (Under \textit{Gardner-Denver} it is not only the grievant that gets two bites, albeit unsuccessful ones’. Cf. Alexander v. Gardner-Denver Co., 519 F.2d 503 (10th Cir. 1975) cert. denied, 423 U.S. 1058 (1976)).}

\footnote{125}{United States v. Allegheny Ludlum Indus., Inc., No. 74-P339 (N.D. Ala. Apr. 12, 1974) (Consent Decree I), ¶ 12(c).}

\footnote{126}{61 Lab. Arb. 844 (1973) (Murphy, Arb.).}

\footnote{127}{This was recently suggested by W. Robinson and M. Neal, \textit{Arbitration of Employment Discrimination Cases: A Prospectus for the Future}, in \textit{Arbitration—1976: Proceedings of the Twenty-Ninth Annual Meeting, National Academy of Arbitrators} 20-33 (B. Dennis & G. Somers eds. 1976).}