

JUDICIAL REVIEW OF THE PROMISE TO ARBITRATE

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JUNE 20, 1960 was an important day in the history of labor and the law. On that day the Supreme Court handed down three interrelated decisions clarifying the role of the judiciary in labor arbitration.¹ Written opinions were filed indicating that, where a collective bargaining agreement contains a general promise to arbitrate future disputes, a court is to order arbitration or enforce an arbitration award without serious inquiry into whether the parties agreed to submit the particular dispute to an arbitrator.² These opinions are likely to have significant impact on the institution of labor arbitration.

The proper role of courts in the arbitration process is an old and much rehearsed issue. An examination of labor arbitration cases in the courts would reveal that lower courts, by and large, have taken a quite different approach from this one espoused by the Supreme Court.³ Careful and full inquiry into whether a dispute is within the ambit of a general promise to arbitrate has been the judicial standard.⁴

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1. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

2. Mr. Justice Douglas wrote the opinion of the Court in each of the three cases. Mr. Justice Brennan wrote a concurring opinion in *American* and *Warrior*. Only Mr. Justice Whittaker was in dissent, and he only in *Warrior* and *Enterprise*. In both cases he articulated his reasons for dissenting.

3. See, e.g., *Local 201, Int'l Union of Elec. Workers v. General Elec. Co.*, 262 F.2d 265 (1st Cir. 1959); *Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467 (5th Cir.), cert. denied, 358 U.S. 880 (1958).

4. "[W]hen one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise." *Local 149, Am. Fed'n of Technical Eng'rs v. General Elec. Co.*, 250 F.2d 922, 927 (1st Cir. 1957), cert. denied, 356 U.S. 938 (1958). At a purely verbal level the Supreme Court might be able to endorse this statement by the court of appeals. In *Warrior*, the Court said:

It is clear that under both the agreement in this case and that involved in *American Manufacturing Co.* . . . the question of arbitrability is for the courts to decide. . . . Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.

363 U.S. at 583 n.7. By arbitrability the Court means whether "the defendant has contracted to refer [a dispute] to arbitration, and has broken this promise." The Supreme Court, however, would decide this question on the basis of a powerful presumption in favor of arbitration. The court of appeals—and most courts—would have decided this question as it would any question of contract interpretation. This is what that court did in the *Local 149* case. There can be no doubt that an application of the Supreme Court's approach there would have resulted in a different holding.

A similar examination of the law journals would show, on the other hand, that the Supreme Court has moved the law a long way in the general direction advocated by many close students of labor relations.⁵

In two of the Supreme Court cases, a union requested a district court to compel an employer to submit a dispute to arbitration. The employer insisted that he had never promised to do so.⁶ In the third case, a union sought court assistance in forcing an employer to obey an arbitrator's award. The employer's position was that the arbitrator had exceeded his power.⁷ As these cases show, judicial intervention in arbitration can come either prior or subsequent to an arbitrator's award. What the Court did is best evaluated by considering the two types of intervention separately.⁸

JUDICIAL INTERVENTION PRIOR TO ARBITRATION

I

Consider as a model for the problem of judicial intervention prior to arbitration the case of *United Steelworkers v. Warrior & Gulf Navigation Co.*⁹ This was one of the three cases with which the Supreme Court was concerned, and it is the case in which the Court produced its major opinion. The underlying dispute was over Warrior's subcontracting to other employers the maintenance work on its barges.

5. See, e.g., Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247 (1958); Summers, Judicial Review of Labor Arbitration or Alice Through the Looking Glass, 2 Buffalo L. Rev. 1 (1952).

6. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). In the American Mfg. case, the employer also raised other defenses. The case involved the reinstatement of an injured employee who had received compensation benefits. The employee's physician had expressed the opinion that the employee was 25% "permanently partially disabled." In resisting arbitration, the employer argued that this estopped the employee, and also that he was not physically able to do the work.

In the lower courts the employer prevailed, the court of appeals asserting that the employee's claim was "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement." *United Steelworkers v. American Mfg. Co.*, 264 F.2d 624, 628 (6th Cir. 1959). The Supreme Court addressed itself to this. "[T]he agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious." 363 U.S. at 567. In connection with this problem, compare *Matter of Arbitration between International Ass'n of Machinists and Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S.2d 317 (1st Dep't) (mem.), *aff'd mem.*, 297 N.Y. 519, 74 N.E.2d 464 (1947), with *New Bedford Defense Prod. Div. v. Local 1113, UAW*, 258 F.2d 522 (1st Cir. 1958).

7. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

8. For earlier evaluations of these three cases see Hays, *The Supreme Court and Labor Law*, October Term, 1959, 60 Colum. L. Rev. 901, 919-34 (1960); Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. Chi. L. Rev. 464 (1961); Note, "Arbitrability" of Labor Disputes, 47 Va. L. Rev. 1182 (1961).

9. 363 U.S. 574 (1960).

This subcontracting allegedly precipitated the layoff of several Warrior employees who were represented by the Steelworkers Union. The union charged that the subcontracting was a violation of its collective bargaining agreement with Warrior. It asserted that the layoffs resulting from the subcontracting were tantamount to a partial lockout, an employer weapon specifically prohibited by the agreement.

The parties were unable to resolve this dispute through negotiation, and when Warrior declined to arbitrate the union filed a bill in equity.¹⁰ Once again the union charged that Warrior had broken the bargaining agreement, this time claiming a violation of the arbitration clause. The clause provided:

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

. . . .

. . . [I]f agreement [by negotiation channeled through the grievance procedure] has not been reached the matter shall be referred to an impartial umpire for decision.¹¹

The Steelworkers wanted the court to compel arbitration of the underlying dispute involving the subcontracting, by ordering specific performance of the promise to arbitrate.

Warrior resisted such an order. It insisted that the arbitration promise did not extend to a dispute over subcontracting, since subcontracting was strictly a management function. The provision of the bargaining agreement relied on by the union also provided that " 'matters which are strictly a function of management shall not be subject to arbitration' "¹² Thus was the issue joined. It is important to observe that here, as is generally the case, the question which the court was invited to decide as a preliminary matter was clearly related to the question the arbitrator would have to decide

10. The suit was brought in the United States District Court for the Southern District of Alabama under § 301 of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), which provides: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), § 301 was held to empower a district court to grant—as a matter of federal law—specific performance of the promise to arbitrate. *Lincoln Mills* left open the question decided in *Warrior*, namely, how a court is to go about deciding whether a promise to arbitrate has been broken.

11. 363 U.S. at 576.

12. *Ibid.*

if allowed to reach the merits. Central to whether Warrior had promised to arbitrate a dispute over subcontracting was the question whether subcontracting is in fact "strictly a function of management." Central to whether Warrior had broken its promise when it subcontracted work was again the question whether subcontracting is "strictly a function of management."¹³

A lawyer who is not a specialist in labor relations would probably conclude that a judge faced with a case of this nature should decide it as he would any contract question. Summoning all of the skills that training and experience have given him, the judge should carefully consider all information properly presented to him that bears upon the meaning of the contract. Only then would it be legitimate for him to place the weight of government behind the claim of the union or the employer. But this approach has difficulties which are rooted in the nature of a collective bargaining agreement and in the relationship between law and the collective bargaining process.

The figure of speech likening a collective bargaining agreement to a broad regulatory statute is familiar. There is indeed much similarity between the two; there are also differences. Some of the similarities and some of the differences are worth noting.¹⁴ They help explain why the question in *Warrior* should not be approached in the way the nonspecialist lawyer would assume proper.

First, broad regulatory statutes and collective bargaining agreements frequently cover a large variety of technical and specialized problems. Nevertheless, they are usually drafted in purposefully vague terms. Not only must the language be general enough to encompass a variety of unforeseen and unforeseeable events, but it must also fail to resolve some present controversies. For the price of present resolution may be no legislation on the one hand, and a prolonged strike on the other. Second, and closely related, neither statute nor agreement necessarily exhausts the field it regulates. The common law of the jurisdiction, whether that jurisdiction be government or industrial enterprise, still has a direct role to play; although after the enactment of the statute or the formation of the agreement the common law itself must frequently be modified. Third, and largely as a consequence of the first two points, a broad regulatory statute not only must be interpreted in terms of its specific purpose, but

13. On this question of the overlap between the merits and the scope of the promise to arbitrate, see generally Wellington, Judge Magruder and the Labor Contract, 72 Harv. L. Rev. 1268, 1281-1300 (1959).

14. See, e.g., Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955); Summers, *supra* note 5, at 13-20.

it must also be fitted into the general body of law and interpreted in a fashion harmonious with the received traditions and principles of that body of law. So too a collective bargaining agreement. The traditions and principles relevant to the interpretation of a bargaining agreement, however, derive in large part from the history of the particular enterprise covered by the agreement.

Specialized agencies are frequently created by broad regulatory statutes. The characteristics of such statutes, noted above, explain in part the differentiation of function between these agencies and the courts. Often the agency stands between the statute and the court, and often this is a wise interposition. A court may not be able to do as good a job, in the first instance, as a specialized tribunal.¹⁵

Collective bargaining agreements frequently provide for arbitration. The characteristics of such agreements, noted above, suggest that in at least one area the differentiation of function between arbitrator and court might appropriately resemble that between judiciary and specialized agency. Perhaps the arbitrator should stand between the agreement and the courts.¹⁶ Indeed, there is a strong reason not present in the agency-court situation for placing the arbitrator in this front line position. Courts are experts in relating a specific statute to a general body of law. They have, however, no expertise in relating a collective bargaining agreement to the differing laws of differing enterprises.

Thus, when judges, in deciding whether to order arbitration, marshal their resources and approach the question before them as they would any other question of contract interpretation, the consequences are likely to be unhappy, both for the institution of collective bargaining and for the courts themselves. Chances are good that the judiciary will make bad law. This is the lesson of experience as well as the insight of analysis. It is, for example, the history of labor arbitration in the State of New York.¹⁷ Moreover, it is all too probable that courts will tend to read collective bargaining agreements as if they were all the same. The judicial process in a busy world can hardly escape this. But the consequences are unhappy.

15. This is of course true of many aspects of labor law. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). See generally Wellington, *Labor and the Federal System*, 26 U. Chi. L. Rev. 542 (1959).

16. "Except where the parties have agreed with explicitness beyond plausible controversy that a subject shall not be arbitrated, a court will incline to require the parties to a collective bargaining agreement with arbitration provisions to take their dispute to the arbitrator for his exercise of primary jurisdiction." *Matter of Jacobson*, 161 F. Supp. 222, 226 (D. Mass.), rev'd sub nom. *Boston Mut. Life Ins. Co. v. Insurance Agents' Union*, 258 F.2d 516 (1st Cir. 1958).

17. The story is told in *Summers*, supra note 5, at 1.

Collective bargaining works as well as it does because it is adaptable to the diverse needs of enterprises.

All of this leads one to the same conclusion reached by the Supreme Court:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

. . . .

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.¹⁸

II

The question remains whether this conclusion really constitutes an abandonment of the fundamental theory of judicial intervention in a pre-arbitration case. I take that theory to be that when a court orders arbitration it is enforcing a consensual obligation; it is granting specific performance of a contract.

Mr. Justice Whittaker, in dissent, seems to suggest that the Court has departed from this principle, and he seems surprised by the departure.¹⁹ But I would suggest that one can be surprised only if one has too limited a view of the law of contract. What the court has done, in effect, is erect a canon of construction that strongly favors arbitration. This canon rests upon public policy: the relative competence of court and arbitrator, and the relation of this to the institution of collective bargaining and the integrity of the judicial process. This public policy is unrelated, in any direct way at least, to the intention of the parties. But surely there are few who would maintain that this is a unique approach to contracts.²⁰ Today, there can be no question that "not everything is contractual in a contract."²¹

18. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-85, (1960).

19. *Id.* at 585.

20. See, e.g., 3A Corbin, *Contracts* §§ 653-86 (rev. ed. 1960).

21. Durkheim, quoted in Kessler & Sharp, *Cases on Contracts* 80 (1953).

While this is not a unique approach, it is an approach for which a price must be paid. Labor arbitration plainly has become less voluntary than it was. But some cost is inevitable if there is to be judicial intervention at the pre-arbitration stage. In my judgment, the Supreme Court's method of judicial intervention is the least expensive in terms of the cost to the institutions involved. It saves courts from the disrepute that inevitably follows the assumption of tasks that cannot be performed well; and it places most of the initial responsibility for decision on the arbitrator who, though imperfect, is the more qualified interpreter of the collective bargaining agreement.²²

JUDICIAL INTERVENTION AFTER ARBITRATION

I

Suppose that in a case like *Warrior*, an arbitrator were to decide that subcontracting was not strictly a "function of management," and that the employer had indeed violated the collective bargaining agreement when he subcontracted maintenance work to other employers. Should the employer now be able to get serious judicial review of whether he had ever promised to arbitrate a dispute over subcontracting? The Supreme Court, it would appear, suggests a negative answer to this question.

In the post-arbitration case decided by the Court, *United Steelworkers v. Enterprise Wheel & Car Corp.*,²³ the question was not raised directly. The employer's principal contention was that the arbitrator had acted without power in ordering reinstatement of employees after the collective bargaining agreement had expired. The Court's reasoning, however, leads one to conclude that after an award, judicial examination of the scope of the promise to arbitrate often is to be as limited as it is in a suit to compel arbitration. While noting that "an arbitrator is confined to interpretation and application of the collective bargaining agreement,"²⁴ and that "his award is legitimate only so long as it draws its essence from the . . . agreement,"²⁵ the majority asserts:

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agree-

22. In an action for damages for breach of a collective bargaining agreement, a court may have to assume initial—indeed sole—responsibility for decision. And if the action is for breach of an implied no-strike clause, the question for the court may be whether the grievance that precipitated the strike was an arbitrable dispute. See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

23. 363 U.S. 593 (1960).

24. *Id.* at 597.

25. *Ibid.*

ments. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.* . . . the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem.²⁶

Of course, as the Court recognized in *Warrior*, the central issue involved in a decision on the merits of the underlying dispute and the central issue involved in a decision on the scope of the arbitration promise usually are the same.²⁷ In *Warrior* that issue was whether subcontracting is “strictly a function of management.” One would suppose, therefore, that the spirit of the *Enterprise* case would preclude a court from making too close an examination of whether subcontracting was “strictly a function of management,” no matter how the issue was raised in a suit to enforce an award.

The nagging question posed by this conclusion is whether such an allocation of function between arbitrator and court—a wise allocation at the pre-arbitration stage—makes sense in a post-arbitration proceeding. The Court’s explanation is not wholly satisfactory. It rests principally upon the same argument advanced for judicial abnegation in a pre-arbitration suit; namely, the relatively greater competence of the arbitrator.²⁸ But surely this argument loses force after an arbitrator has brought his informed judgment to bear upon the problem. With that judgment available to it, the court, I should think, is in a vastly improved position to undertake a meaningful review. The analogy to administrative law again is obvious. Indeed, the majority at one point tells us that: “When the arbitrator’s words manifest an infidelity to . . . [his obligation to make an award that ‘draws its essence from the collective bargaining agreement,’] courts have no choice but to refuse enforcement of the award.”²⁹ The Court’s opinion goes on to say, however, that “arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned

26. *Id.* at 596-97.

27. 363 U.S. at 584-85.

28. See text accompanying note 26 *supra*.

29. 363 U.S. at 597.

opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.³⁰

It is not clear why a court could not insist that an arbitrator produce an unambiguous and reasoned opinion. True, no such requirement existed prior to *Warrior*; but *Warrior* changed the relationship between court and arbitrator in an effort to create a more viable system of labor arbitration. Surely *Warrior* did not exhaust the Court's creative power. With or without a well-reasoned arbitrator's opinion, the question still must be whether it is wise policy for a court to place the weight of government behind an award without giving serious attention to the objecting party's claim that it had never promised to submit the dispute to arbitration in the first place. The factors that might lead one towards an affirmative answer to this question are perhaps best exposed by contrasting the judicial process with arbitration.

II

The declaration of law through reasoned elaboration of rules and principles is perhaps the hallmark of the judicial process. These rules and principles embody experience which, of course, must be constantly re-evaluated by all law-declaring institutions, particularly the courts themselves. Nevertheless, judicial law declaration relies substantially less on the exercise of discretion by the decision maker than does law declaration by institutions which, as a result of tradition and structure, are not called upon to act in a consistent fashion or to justify their actions in reasoned opinions. The executive and legislative branches of government are plainly institutions of this latter stripe. Administrative tribunals partake of some of the same characteristics in their rule-making activities. Arbitration tribunals, however, particularly in the labor field, are much harder to classify in terms of the degree to which the decision maker may properly use discretion.

We are told by the majority in the *Enterprise* case, on the one hand, that the arbitrator "does not sit to dispense his own brand of industrial justice."³¹ His power, Mr. Justice Whittaker assumes in dissent, is strictly limited by contract; his task, much the same as that of the judge.³² On the other hand, the majority tells us—this time in the *Warrior* case—that

the labor arbitrator is usually chosen because of the parties' confidence

30. *Id.* at 598. (Footnote omitted.)

31. *Id.* at 597.

32. "Until today, I had understood it to be the unquestioned law, as this Court has consistently held, that arbitrators are private judges chosen by the parties to

in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.³³

One private dispute settlement tribunal, established by the International Brotherhood of Electrical Workers and the National Electrical Contractors Association, announced the difference between the arbitration and judicial processes in the following terms:

The Council differs from so-called arbitration boards in that it professes to be a court of justice and not merely a court of arbitration. It proceeds on the theory that arbitration involves compromise, which seems to mean in some minds adding up the claims of both sides of a dispute and dividing the sum by two; while judicial settlement involves the application of definite and certain principles without any accommodation between the parties.³⁴

From a cluster of factors that might account for the divergent views about the role of discretion in arbitration, two, to my mind, are particularly compelling. First, insufficient study has been devoted to the role of discretion in labor arbitration. Accordingly, one can be free and easy with one's speculations. Second, there is no unitary system of labor arbitration. The nature of arbitration under any collective bargaining agreement depends upon how several factors interact. What, for example, does the collective agreement say? What do the parties want? What does the arbitrator conceive to be the needs of the parties, and how does he perceive his role and the restraints imposed upon him?

Different combinations of answers to these questions result in arbitrations that differ markedly as to the place of discretion in the process. To the extent, however, that the parties themselves control the scope of the arbitrator's discretion, this difference may be de-

decide particular matters specifically submitted; that the contract under which matters are submitted to arbitrators is at once the source and limit of their authority and power" *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585-86 (1960) (dissenting opinion).

33. *Id.* at 582.

34. *Local 28, Int'l Bhd. of Elec. Workers v. Maryland Chapter, Nat'l Elec. Contractors Ass'n*, 194 F. Supp. 494, 497 (D. Md. 1961).

sirable. Indeed it may be an important reason for the success of arbitration in labor relations.

Surely there is wisdom in the attitude which places a high value upon privately formulated regulation, be it substantive or procedural, primary or remedial. The dominance of this attitude in American law is reflected, for example, in our federal labor policy. By and large, labor laws do not attempt to control directly; they rely rather upon private formulation of primary, substantive obligations (for example, terms and conditions of employment).³⁵ Of course, this is everywhere characteristic of our society. The private contract may not have the importance it once had, but still it is at or very close to the center of legal relationships.

The private settlement or compromise agreement, on the remedial level, is a pervasive and legally encouraged way of resolving disputes. In labor relations it has become highly systematized. Most collective bargaining agreements provide multi-step grievance procedures, and it is fair to say that without such procedures collective bargaining agreements could not be successfully administered.

The whole movement towards arbitration as a means of dispute settlement stems in part from an acceptance of the proposition that it is a wise policy to encourage regulation that is formulated by the subjects of the regulation. In arbitration the parties draft the submission agreement and pick the decision maker. These two factors probably go a long way in shaping the results of the arbitration. The latter factor is perhaps of particular importance where the submission agreement is drafted prior to any dispute and is general enough in its terms to cover the vast range of controversy that may arise during the contract time. Submission agreements in collective bargaining contracts are of this type. Therefore the philosophy of the

35. Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit hours of work, or to effect or govern any working conditions in any establishment or place of employment. . . . There is nothing in this bill that compels any employer to make any agreement about wages, hours of employment, or working conditions with his employees. . . . The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded.

79 Cong. Rec. 7659 (1935). This famous statement by Senator Walsh, then chairman of the Committee on Education and Labor, about the Wagner Act, overdid it a bit. The Government's role was more than the Senator made out, and has become a good deal more since Taft-Hartley. Nevertheless, the Senator did express what has remained the basic mood of our federal labor policy.

arbitrator may be as important as any factor in predicting the extent to which discretion will shape the award. And this in turn may be an important consideration of the parties when they come to choose their arbitrator.

To put this another, and perhaps more direct way, labor arbitration may not always be a dispute settlement technique that relies solely on pre-existing standards and norms found in a collective bargaining agreement and in the common law of an enterprise. Sometimes arbitration may be a technique that relies upon considerations of expediency for preserving industrial peace and keeping everyone as happy as possible. This may mean that the arbitrator will give less than full attention to the terms of the agreement or the common law of the enterprise. This may be what the parties expect when they choose their arbitrator. But how can a court tell on review?

Thus, the Supreme Court's apparent instructions to the lower courts, not to review seriously the scope of the promise to arbitrate after an award has been made, may reflect the Court's unwillingness to have the judiciary tamper with what the Court takes to be a satisfactory, and frequently highly discretionary, process.³⁶

While one may understand this motivation, and in part sympathize with it, I do not think that what the Court seems to be doing can be approved. The Supreme Court has not taken the judiciary out of arbitration. It has not said that the courts will not interfere. It has announced that the entire weight of government is almost always to be placed on one side of a controversy. This, it seems, is to be done on the basis of the Supreme Court's general faith in arbitration. It is to be done by a court often without any serious attention to the particular controversy before it.

Should courts be used this way? The major function of courts in the labor arbitration area no longer is to resolve particular disputes through the application of general and reasoned principles. It is, rather, blindly to approve and make official the actions of private decision-makers whose authority to decide is frequently itself the issue in dispute.

Consider again what the Court has done. Apparently out of the belief that arbitration works well, that arbitrators rely heavily in some cases on prudential considerations, and further that sometimes this is what the parties want, the Court has made it possible for arbitrators to exercise enormous discretion without regard to the

36. It is again important to remember that, in most cases, serious review of the scope of the promise to arbitrate is tantamount to serious review of at least some of the issues central to the merits of the underlying dispute.

desires of the parties. Indeed, the exercise of such discretion may frequently be directly contrary to what the parties desire. Because of this, one cannot help but wonder whether the consequences of the Court's *Enterprise* decision are not likely to change the nature of labor arbitration as much or more than it would have been changed if the Supreme Court had instructed the lower courts to engage in serious review before enforcing an arbitration award.

I think the Court cannot have it both ways. If courts are to be brought into the arbitration process—and in the federal sphere, this was a decision made in part by Congress³⁷ and in part by the Supreme Court in its *Lincoln Mills* decision³⁸—it is inevitable that they will have an effect on the nature of that process. The Supreme Court tried to avoid this, but it was bound to fail. Moreover, it failed in a way that does discredit to the judicial process, for the Court instructed the judges that at no point need they accept any responsibility. At no point is the judge to make certain that the parties did agree to arbitrate the particular dispute.

I would suggest that a happier solution is to have serious judicial review of whether the parties agreed to arbitrate the particular dispute in a post-arbitration proceeding. This does not mean, of course, that the court will examine the question de novo. It does mean that the arbitrator must be required to write a reasoned and unambiguous opinion. It does mean that the court will review the arbitrator's award to determine whether it is reasonable in light of the language and purpose of the collective bargaining agreement and the common law of the enterprise as revealed in the opinion of the arbitrator.

CONCLUSION

The Supreme Court's approach to judicial review of the promise to arbitrate reflects its understandable desire to give governmental support to labor arbitration, and to do so without changing the nature of arbitration and without bringing into disrepute the judicial process. The approach, however, is less than fully successful. The Court in *Warrior* was perceptive in recognizing that the arbitrator is better suited to the task of initial, serious decision than is the court. In *Enterprise*, however, the Court was not persuasive in supporting its apparent position that arbitration will be helped and the courts unharmed by having no serious judicial review after an award.

37. See 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

38. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). But see Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1 (1957).

One can hope that the Supreme Court will re-examine and modify the extreme position it seems to have advanced in *Enterprise*. Perhaps arbitrators ultimately will be required to write reasoned opinions. If so, language in *Enterprise* itself may serve as the guiding principle for lower courts:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.³⁹

39. 363 U.S. at 597.