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# Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits when a Typical Hourly Union Worker Cannot Obtain This Unusual Court Access?

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# CAN NFL PLAYERS OBTAIN JUDICIAL REVIEW OF ARBITRATION DECISIONS ON THE MERITS WHEN A TYPICAL HOURLY UNION WORKER CANNOT OBTAIN THIS UNUSUAL COURT ACCESS?

*Michael Z. Green\* and Kyle T. Carney\*\**

*Several recent court cases, brought on behalf of National Football League (NFL) players by their union, the NFL Players Association (NFLPA), have increased media and public attention to the challenges of labor arbitrator decisions in federal courts. The Supreme Court has established a body of federal common law that places a high premium on deferring to labor arbitrator decisions and counseling against judges deciding the merits of disputes covered by a collective bargaining agreement (CBA). A recent trend suggests federal judges have ignored this body of law and analyzed the merits of labor arbitration decisions in the NFL setting.*

*NFL employees, as millionaires, are able to use a significant war chest, given to their union, to hire very prominent attorneys to argue their cases in federal courts after the union has lost the dispute in final and binding arbitration. Unlike a typical hourly union worker, who has very limited legal options after an arbitration award has been rendered, millionaire professional football players and their union appear to be successfully challenging labor arbitrator decisions on the merits in federal district courts. Their prominent attorneys, from major corporate law firms that tend to represent employers in workplace disputes, appear to add value in resources and skills on behalf of their rich, professional football employee clients. Do these rich financial and legal resources suggest an unusual access to judges who may be more willing to hear their novel legal arguments outside of the typical standards established by the Supreme Court's federal arbitration jurisprudence?*

*This Article explores the recent access to court that NFL players have been able to obtain in challenging decisions made pursuant to a CBA. The Article argues that the financial resources of these unique union employees have led to the unusual access and consideration by federal trial judges in reviewing the merits of decisions that typically would not be considered under federal labor arbitration law. Overall, however, the record also suggests that the immediate appellate courts have responded to overturn this unusual consideration of the merits of labor arbitration decisions by reversing those initial court opinions. This Article concludes that, because of the*

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*strong public interest in labor arbitration decisions involving the NFLPA, the federal courts must normally defer to the arbitrator’s decision regardless of the merits. Otherwise, a typical union worker challenging a labor arbitrator’s decision will be left with the wrong perception about access to justice and believe that one must be rich to have a federal judge consider the merits of a labor dispute.*

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INTRODUCTION: ACCESS TO JUSTICE VIA JUDICIAL ENFORCEMENT OF  
LABOR ARBITRATION DECISIONS AND THE PROFESSIONAL  
SPORTS DILEMMA

Concerns about “access to justice” typically refer to the adequacy of a society’s legal system to provide all people with legal representation in a meaningful legal forum.<sup>1</sup> Inequities in access to justice undermine the rule of law because inherent unfairness encourages people to resort to self-help rather than rely on legal processes.<sup>2</sup> In many civil disputes, one of the key concerns about disparity in meting out justice correlates with the parties’ inability to afford legal representation.<sup>3</sup>

In 2016, Samuel Estreicher and Joy Radice explored whether Americans making under \$50,000 a year are compelled to navigate the legal system on their own because they cannot afford lawyers.<sup>4</sup> Estreicher and Radice optimistically argued that their efforts would help motivate “lawyers, young and old, to see service to non-elite populations as part of their professional identity.”<sup>5</sup> They noted that “labor unions . . . can also play a critical role supplementing representation

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1. Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1786–87 (2001).

2. See Christopher David Ruiz Cameron, *The Rule of Law Goes to Work: How Collective Bargaining May Promote Access to Justice in the United States, Canada, and the Rest of the World*, 20 *U.C. DAVIS J. INT’L L. & POL’Y* 211, 226 (2014).

3. See Lisa Needham, *Measuring the Access-to-Justice Gap: Nearly 70% of All Civil Defendants Aren’t Represented*, *LAWYERIST.COM* (Aug. 27, 2016), <https://lawyerist.com/126109/access-to-justice-gap-civil-defendants-arent-represented/>.

4. See *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* (Samuel Estreicher & Joy Radice eds., Cambridge Univ. Press 2016).

5. *Id.* at xi.

and self-representation” and “[f]orums other than traditional courts can help reduce the cost and formality of dispute resolution, enabling individuals to represent themselves or obtain limited-purpose representation from lawyers.”<sup>6</sup>

As a result, high levels of union representation correlate with better access to justice.<sup>7</sup> However, a little less than eleven percent of the U.S. workforce, and a little more than six percent of the private sector workforce, is unionized.<sup>8</sup> Despite low private sector union density overall, popular professional sports in the United States continue to represent one area where unionization thrives.<sup>9</sup> As fewer workers are exposed to collective bargaining in the workplace, a typical citizen’s understanding of labor dispute resolution might likely be viewed through the lens of professional sports encounters.

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6. *Id.*

7. See Cameron, *supra* note 2, at 226–27 (matching high union density rates with high levels of access to justice).

8. Press Release, Bureau of Labor Stat., U.S. Dep’t of Labor, Union Members—2016 (Jan. 26, 2017), <http://www.bls.gov/news.release/union2.nr0.htm> (finding 10.7% unionization in the U.S. and 6.4% in the private sector).

9. Each of the four major sports in the United States (baseball, basketball, football, and hockey) all have union representation and collective bargaining agreements between the players and the owners of the teams that have been in existence for many years. See NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT (2011), [https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011\\_Final\\_CBA\\_Searchable\\_Bookmarked.pdf](https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf) (providing a copy of the collective bargaining agreement between NFL owners and players in effect from 2011 to 2020); COLLECTIVE BARGAINING AGREEMENT BETWEEN NAT’L HOCKEY LEAGUE & NAT’L HOCKEY LEAGUE PLAYERS ASS’N (2012), [http://cdn.agilitycms.com/nhlpacom/PDF/NHL\\_NHLEPA\\_2013\\_CBA.pdf](http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLEPA_2013_CBA.pdf) (describing hockey players collective bargaining agreement in effect until 2022); Press Release, MLB Players Ass’n, MLB Announce Details of New Labor Agreement (Dec. 2, 2016), [http://www.mlbplayers.com/ViewArticle.dbml?SPSID=1113026+&SPID=181313&DB\\_LANG=C&ATCLID=211336404&DB\\_OEM\\_ID=34000](http://www.mlbplayers.com/ViewArticle.dbml?SPSID=1113026+&SPID=181313&DB_LANG=C&ATCLID=211336404&DB_OEM_ID=34000) (discussing major league baseball’s most recent collective bargaining agreement, which expires on December 1, 2021); Adrian Wojnarowski, *NBA, Players Association Agree to New Seven-Year CBA*, YAHOO! SPORTS (Dec. 14, 2016, 8:29 PM), <https://sports.yahoo.com/news/nba-players-association-agree-to-new-seven-year-cba-012903335.html> (describing current national basketball players association’s collective bargaining agreement which extends to 2022); see also Mathieu Fournier & Dominic Roux, *Labor Relations in the National Hockey League: A Model of Transnational Collective Bargaining*, 20 MARQ. SPORTS L. REV. 147, 153–54 (2009) (reviewing collective bargaining for national hockey league players and how union representation for hockey players began in 1967); Joshua A. Reece, Note, *Throwing the Red-Flag on the Commissioner: How Independent Arbitrators Can Fit into the NFL’s Off-Field Discipline Procedures Under the Collective Bargaining Agreement*, 45 VAL. U. L. REV. 359, 360, 402 (2010) (comparing use of outside arbitrators in professional baseball and professional basketball labor agreements with the NFL’s use of its Commissioner as the final arbitrator in its labor agreement).

Professional athletes face challenges in collective bargaining similar to those faced by public sector employees. Because the public suffers directly from harms occurring during a labor dispute, economic pressures placed on the employer by a union can lead to unpopular public sentiment. For government workers, the public becomes impatient and unhappy when a labor dispute disrupts its services. For professional athletes, any disruption of games risks a similar negative response from fans.

However, National Football League (NFL) athletes face unique additional pressures. A disruption of games due to a labor dispute can swallow up a significant portion of the average NFL athlete's career.<sup>10</sup> NFL athletes also must persuade the average working person, who can barely afford to take her family to a single game, that their collective effort is more than just a battle involving millionaires versus billionaires.<sup>11</sup>

The NFL Players Association (NFLPA) has been fairly successful in connecting its efforts to the collective bargaining efforts of the average worker.<sup>12</sup> Regardless of popularity, the interests of profes-

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10. See Rob Arther, *The Shrinking Shelf Life of NFL Players*, WALL ST. J. (Feb. 29, 2016, 12:42 AM), <http://www.wsj.com/articles/the-shrinking-shelf-life-of-nfl-players-1456694959> (stating that average career length of NFL players has decreased since 2008, "falling from 4.99 years to 2.66."); see also Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 403 (referring to the brief career for an average NFL player as a counter to any efforts to pursue protracted bargaining goals). A number of NFL players are calling it quits now even in their twenties due to concussions, which suggests an even shorter career. See, e.g., Doug Farrar, *Chris Borland Won't Be the Last to Retire Early Due to Safety Concerns*, SPORTS ILLUSTRATED (Mar. 17, 2015), <http://www.si.com/nfl/2015/03/16/> (describing the retirement of NFL star player, Chris Borland, at the age of twenty-four due to concerns about long-term neurological effects from head trauma due to concussions and mentioning other players who retired early).

11. See MICHAEL SCHIAVONE, SPORTS AND LABOR IN THE UNITED STATES 83 (2015) ("As Pittsburgh Steeler Troy Polamalu stated, '[i]t's unfortunate right now. I think what the players are fighting for is something bigger. Many people think it's millionaires versus billionaires, and that's the huge argument. The fact is, it's people fighting against big business. The big-business argument is, 'I got the money, and I got the power, therefore I can tell you what to do.' That's life everywhere. I think this is a time when the football players are standing up and saying, 'No, no, no, the people have the power.'"); see also Jen Wilson, *Here's What It Costs to Take a Family of Four to a Carolina Panthers Home Game*, CHARLOTTE BUS. J. (Sep. 10, 2014), <http://www.bizjournals.com/charlotte/news/2014/09/10/here-s-what-it-costs-to-take-a-family-of-four-to-a.html> (finding that the average cost for a family of four to attend an NFL game in Charlotte was \$404.78 in 2014 and the highest cost for a family of four to attend a game in the country was in San Francisco, for \$641.50).

12. See Stephen J. Dubner, "*Billionaires vs. Millionaires*": *Five Things You Don't Know About the NFL Labor Standoff*, FREAKONOMICS (Feb. 24, 2011, 11:00 AM), <http://freakonomics.com/podcast/freakonomics-radio-billionaires-vs-millionaires-five-things-you-dont-know-about-the-nfl-labor-standoff/> (providing multiple viewpoints

sional athletes do not always align with union employees in other industries. In particular, the NFLPA's challenges to enforcement of arbitration discipline in federal court risks undermining labor peace, a key policy of the National Labor Relations Act (NLRA).<sup>13</sup> Courts' actions on the merits of these disputes compromise labor peace, which is achieved by giving deference to arbitration as the forum the parties chose to be the final word in settling labor disputes under a collective bargaining agreement (CBA).<sup>14</sup>

If the NFLPA succeeds in gaining unique access to federal courts in challenging CBA decisions, the average union worker will not likely enjoy the same access to federal courts. Furthermore, if the NFLPA continues to successfully reverse arbitrator decisions in district court, employers in other industries may capitalize on the NFLPA's unique arguments. Employers may challenge decisions in industries where unions do not have the same resources, overturning employees' successful arbitration awards on the merits and harming the typical union worker. As a result, the NFLPA's quest to avoid enforcement of arbitration decisions made pursuant to a CBA may decrease access to justice for union employees in other industries.

Instead of challenging arbitrator decisions, the NFLPA should seek changes to the arbitration process at the collective bargaining table, not in federal courts. The NFLPA has begun high-profile efforts to circumvent final decisions by arbitrators made under the CBA by seeking judicial review of the merits. However, these efforts have ultimately been unsuccessful on appeal.

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on the 2011 NFL negotiations, including the head of the NFLPA explaining the players' perspective that the average length of an NFL player's career is less than four years and the money is needed to deal with injuries in post-football life); Mike Florio, *Union Claims Lockout Would Cost 150,000 Jobs*, NBC SPORTS (Feb. 12, 2011), <http://profootballtalk.nbcsports.com/2011/02/12/union-claims-lockout-would-cost-150000-jobs/> (explaining how an NFL-players lockout would eliminate 150,000 jobs).

13. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (2014). In particular, Section 1 of the NLRA identifies as a policy concern limiting “strikes and other forms of industrial strife or unrest” through the promotion of “the practice and procedure of collective bargaining and by protecting the exercise by workers of . . . designation of representatives of their own choosing . . . for the purpose of negotiating the terms and conditions of their employment.” *Id.* at § 151.

14. *See* *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). The Supreme Court has specifically referred to the importance of choosing arbitration to resolve disputes peacefully since the employer typically agrees to the grievance and final arbitration provision in exchange for the employees giving up their right to pursue industrial strife via a strike. *Id.* “Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the ‘quid pro quo’ for the agreement not to strike.” *Id.* at n.4 (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957)).

As a result, the NFLPA must now do the tough bargaining work of obtaining its desired changes at the negotiating table. Because a significant number of NFL fans seem to have embraced the NFLPA challenges, public sentiment may favor the NFLPA if it chooses to pursue drastic action at the bargaining table.<sup>15</sup> If the NFLPA strikes to resolve how final disciplinary decisions can be made in the future, the parties will be using a private bargaining system endorsed by the NLRA.

Part I provides a more detailed discussion of the federal common law that has developed under the NLRA. That law encourages the use of arbitration in resolving labor disputes and discourages judges from considering the merits whenever the matter could arguably be resolved by interpreting the CBA. In essence, the law upholds the parties' desire to leave the job of interpreting the CBA to the labor arbitrator under the terms of their agreement. Part II discusses the high-profile case involving New England Patriots player, Tom Brady, and his challenge to a four-game suspension issued by NFL Commissioner Roger Goodell, in which the district court seemed to embrace the NFLPA's arguments in considering the merits of a labor arbitration decision. Part III addresses the case of Minnesota Vikings player Adrian Peterson and how the NFLPA obtained unique judicial review of the merits of his labor arbitration decision. Part IV argues that the unusual access to the federal court system granted to the NFLPA in the *Brady* and *Peterson* cases has misled the public into believing that union workers can easily challenge labor arbitrator decisions made pursuant to a CBA. This result can lead the typical union worker to believe such challenges only resonate with the federal courts when the financial resources support it, an access to justice concern. The Article concludes that the NFLPA should alleviate this access to justice concern by focusing on achieving its desired changes to labor relations with the NFL through its negotiations over its CBA instead of challenging the merits of labor arbitration decisions in the courts.

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15. See Benjamin Horney, *Deflategate Could Alter NFL's Collective Bargaining*, LAW360 (July 13, 2016), <https://www.law360.com/articles/817000/deflategate-could-alter-nfl-s-collective-bargaining> (suggesting that the NFLPA's aggressive court challenges and the public interest in NFL cases may lead to changes in the NFL CBA in 2020, aimed at relieving the NFL Commissioner from his powers of disciplining players for conduct detrimental to the league while also being able to sit as the final arbitrator of any challenges to that discipline).



## I.

BACKGROUND: THE LAW OF ENFORCING ARBITRATION  
 DECISIONS AS A STRONG FEDERAL POLICY  
 NECESSARY TO ENCOURAGE  
 PEACEFUL RESOLUTION OF LABOR DISPUTES

Federal law has consistently prevented federal courts from reviewing the merits of an arbitration decision made pursuant to a CBA. Judicial review of the merits may only be appropriate on three narrow grounds:<sup>16</sup> (1) the arbitrator failed to construe and follow the terms of the CBA;<sup>17</sup> (2) the arbitrator's award violated public policy;<sup>18</sup> or (3) the arbitrator committed misconduct or other behavior exhibiting evident partiality, bias, or fraud.<sup>19</sup> To prove the arbitrator failed to accurately construe and follow the terms of the CBA, the challenger must show that the arbitrator was not even arguably interpreting the CBA and pursued "his own brand of industrial justice."<sup>20</sup> To establish that the award violated public policy, the challenger must show that compliance with the terms in the arbitrator's award would contravene some public policy, usually identified by positive law.<sup>21</sup> In proving expressed partiality, bias, or fraud, the party challenging arbitration must produce persuasive evidence.<sup>22</sup> Very few cases have met the

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16. See Jaime Dodge Byrnes & Allison Berkowitz Prout, Comment, *Major League Baseball Players Association v. Garvey: Revisiting the Standards for Arbitral Review*, 7 HARV. NEG. L. REV. 389, 393 (2002) (referring to "limited bases for appeal of arbitration decisions," including "public policy grounds when [an award] violates positive law," as well as when an arbitrator ignores the requirements of the CBA in an effort to "dispense his own brand of industrial justice" or has engaged in "fraud or dishonest conduct").

17. See, e.g., *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001).

18. See, e.g., *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987).

19. See Federal Arbitration Act (FAA), 9 U.S.C. § 10(a)(3) (1925). This form of challenge arises under the terms of the FAA, not the NLRA. The application of the FAA to § 301 of the NLRA, as amended, is discussed *infra* Section I.C.

20. *Garvey*, 532 U.S. at 509–510 (citing *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) ("It is only when the arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable.").

21. See *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 60–62 (2000). Such public policy must be "explicit, well-defined, and dominant." *W.R. Grace & Co v. Rubber Workers*, 461 U.S. 757, 766 (1983); see also *E. Assoc. Coal*, 531 U.S. at 68 (Scalia, J., concurring in judgment) (citation omitted) ("There is not a single decision. . . in which we have refused to enforce on 'public policy' grounds an agreement that did not violate, or provide for the violation of some positive law.").

22. See *Williams v. Nat'l Football League*, 582 F.3d 863, 886 (8th Cir. 2009) (NFLPA has the burden to demonstrate that the arbitrator's actions were based on

standard necessary to establish partiality, bias, or fraud by a labor arbitrator.<sup>23</sup>

### A. *The Steelworkers Trilogy*

The *Steelworkers Trilogy*,<sup>24</sup> three cases decided by the Supreme Court on the same day in 1960 involving the Steelworkers Union, addressed the enforcement of arbitration under a CBA pursuant to Section 301 of the 1947 Labor Management Relations Act (LMRA), which amended the NLRA.<sup>25</sup> Section 301 of the LMRA provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.<sup>26</sup>

Section 203(d) of the LMRA provides that “[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”<sup>27</sup>

The *Steelworkers Trilogy* established key foundational principles regarding the enforcement of labor arbitration pursuant to a CBA in federal courts.<sup>28</sup> Courts should not interfere with the bargain the parties made with respect to limiting strikes in exchange for agreeing to arbitration.<sup>29</sup> Honoring that balance preserves labor peace through arbitration by granting employees, in exchange for giving up their right

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improper motives and it failed to meet its “heavy burden” for “demonstrating . . . evident partiality”).

23. See Perry A. Zirkel & Peter D. Winebrake, *Legal Boundaries for Partiality and Misconduct for Labor Arbitrators*, 1992 DET. C. L. REV. 679, 708 (“[I]nstances of judicial vacatur of labor arbitration awards based on bias are rare; those based on misconduct are even more rare; and those based on fraud are virtually nonexistent.”).

24. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

25. In a case decided shortly before the *Steelworkers’ Trilogy* cases, the Supreme Court found that § 301 provided not just a jurisdictional requirement for enforcement of CBAs in federal court, but also established a mechanism to fashion federal common law regarding the standards to be applied in those CBA enforcement actions. See *Textile Workers of Am. v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

26. 29 U.S.C. § 185(a) (2014).

27. *Id.* § 173(d).

28. Mark E. Zelek, *Labor Grievance Arbitration in the United States*, 21 U. OF MIAMI INTER-AM. L. REV. 197, 200–01 (1989).

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

to strike, a forum in which they may bring a broader set of claims—even frivolous claims.<sup>30</sup> Thus, union employees have access to justice in arbitration, and upholding arbitration decisions reinforces these rights.

In *United Steelworkers of America v. American Manufacturing Co.*, the employer refused to arbitrate a claim under the CBA when an injured employee, who was deemed partially disabled due to the injury, received a workers' compensation settlement.<sup>31</sup> The union sued the employer to enforce the arbitration clause under the CBA, but the district court held that the settlement estopped the employee's claims under the CBA.<sup>32</sup> The appellate court agreed, but also held that the claim was not subject to arbitration because it was patently frivolous.<sup>33</sup>

Reversing the lower courts, the Supreme Court held the parties had to abide by the bargained-for arbitration provision in their CBA, regardless of how a court may view the merits of the claim.<sup>34</sup> The statutory policy<sup>35</sup> underlying collective bargaining favors resolving disputes according to the bargained-for method chosen by the parties.<sup>36</sup> The judiciary does not create exceptions for no-strike clauses because they are a product of the bargain, and an arbitration provision is a "quid" to the no-strike "quo."<sup>37</sup> Therefore, courts should not review the merits of labor arbitration decisions because unions bargain for them in order to adjudicate grievances that courts ordinarily would not entertain.<sup>38</sup> The parties bargained for the arbitrator's judgment and a court should not deprive either party of that benefit because the "processing of even frivolous claims may have therapeutic values."<sup>39</sup>

*United Steelworkers of America v. Warrior and Gulf Navigation Co.* held that arbitration of a claim is appropriate as long as "the claim is even arguably covered by the contract."<sup>40</sup> In that case, the employer was unable to avoid arbitrating its decision to contract out work when his contract failed to explicitly exclude this situation from the broad

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30. *Id.* at 568.

31. *Id.* at 564–65.

32. *Id.* at 566.

33. *Id.*

34. *Id.* at 569.

35. National Labor Relations Act (NLRA) § 1, 29 U.S.C. 151 (2014); Labor Management Relations Act (LMRA) § 203(d), 29 U.S.C. § 173(d) (2014).

36. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1960).

37. *Id.* at 567.

38. *Id.*

39. *Id.* at 568.

40. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583–84 (1960); see also Zelek, *supra* note 28, at 201.

arbitration provision to which it had agreed.<sup>41</sup> Strong evidence is required to show that the parties did not intend to submit a subject to arbitration.<sup>42</sup> Even the arbitrator's decision about whether a claim should be submitted to arbitration receives deference in the courts.

Critically, for understanding challenges to an arbitrator's disciplinary decision under the CBA, the Court in *United Steelworkers of America v. Enterprise Wheel and Car Corp.* explained the deference owed to arbitration—courts must enforce arbitration awards so long as the arbitrator even arguably construes the CBA in reaching a decision.<sup>43</sup> In *Enterprise Wheel*, the employer terminated employees for initiating a strike to protest the discharge of another employee. An arbitrator held that the employees should have been suspended for only ten days, which the employer disputed.<sup>44</sup> The CBA expired after the discharge and before the arbitrator issued the award.<sup>45</sup> As a result, the appellate court held that back pay and reinstatement could not be enforced after the CBA expired.<sup>46</sup>

According to the Supreme Court, because the appellate court based its decision on the ambiguity of the arbitrator's decision, that decision amounted to a disagreement with the arbitrator on the proper construction of the CBA.<sup>47</sup> The Court held that any review of the arbitrator's award should be limited to whether it "draws its essence from the collective bargaining agreement."<sup>48</sup> Thus, courts should not overrule an arbitrator based on the merits of a dispute because "[i]t is the arbitrator's construction which was bargained for."<sup>49</sup> In *Enterprise Wheel*, because the arbitrator construed the parties' actions within the authority of the CBA, even if ambiguous, the award was enforceable.<sup>50</sup>

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41. *Warrior & Gulf Nav. Co.*, 363 U.S. at 584–85.

42. *Id.*; see also Zelek, *supra* note 28, at 201.

43. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); see also Zelek, *supra* note 28, at 201 (citing *Enter. Wheel & Car Corp.*, 363 U.S. at 599) ("As long as the award 'draws its essence' from the collective bargaining agreement, it may not be overturned or modified in any way.")

44. *Enterprise Wheel & Car Corp.*, 363 U.S. at 594–95.

45. *Id.* at 595.

46. *Id.*

47. *Id.* at 598.

48. *Id.* at 597.

49. *Id.* at 599.

50. *Id.*

B. *Arbitrator Failure to Construe the CBA or Exceeding the Authority of the CBA*

Since *Enterprise Wheel*, the Supreme Court has further narrowed the grounds for overturning an arbitrator's decision.<sup>51</sup> In 2001, the Court held in *Major League Baseball Players Association v. Garvey* that an arbitrator's decision cannot be overturned even for serious errors in judgment in construing a CBA.<sup>52</sup> Additionally, even when the arbitrator goes beyond construing the CBA, the reviewing court's role is limited to remanding the case for arbitration consistent with the CBA.<sup>53</sup>

The arbitrator's decision in *Garvey* relied on the terms of a settlement agreement between the professional baseball league and the baseball players' union.<sup>54</sup> After several arbitrators in the 1980s found that the league had colluded to limit "the market for free-agent services after the 1985, 1986, and 1987 baseball seasons," in violation of the CBA, the league settled the overall claim of ownership collusion by offering a \$280 million fund to the baseball players' union to distribute to injured players.<sup>55</sup>

The baseball players' union then designed a plan called the "Framework" to evaluate claims by individual players and provide them with their entitled compensation as a result of the owners' collusion.<sup>56</sup> In particular, the Framework awarded compensation "only in those cases where evidence exists that a specific offer of an extension was made by a club prior to collusion only to thereafter be withdrawn when the collusion scheme was initiated."<sup>57</sup> *Garvey* made a claim for \$3 million based upon his assertion that his team, the San Diego Padres, failed to offer him a contract for the 1988 and 1989 seasons as a

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51. See Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 BERKELEY J. OF EMP. & LAB. L. 78, 88 (1991) [hereinafter LeRoy & Feuille, *The Steelworkers Trilogy*] (describing the results of a 1991 study showing that "the great majority of post-arbitration appeals have been based upon some variation of an *Enterprise [Wheel & Car Corp.]* challenge to an award—namely, that the arbitrator's ruling was not sufficiently based on the language of the contract"); see also Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadows of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RESOL. 19, 59 (2001) (describing empirical review of decisions challenging arbitration decisions from 1991–2001 and finding general deference to the arbitrators' decisions by federal courts).

52. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510–11 (2001).

53. *Id.*

54. *Id.* at 505–06.

55. *Id.*

56. *Id.* at 506.

57. *Id.*

result of the owners' collusion. The baseball players' union rejected Garvey's claim and the matter went to arbitration for resolution. As proof at the arbitration, Garvey presented a 1996 letter from the CEO of the Padres admitting that, as CEO, he made an offer to Garvey, but "the Padres refused to negotiate with Garvey thereafter due to collusion."<sup>58</sup> However, the arbitrator discredited this letter because it contradicted the CEO's statements in depositions predating the letter.<sup>59</sup>

The Ninth Circuit Court of Appeals held that the arbitrator's conclusion was irrational—even committing the reversible offense of "'dispens[ing] his own brand of industrial justice'"—because other arbitrators had already found that the CEO's earlier statements were false.<sup>60</sup> False statements by the baseball owners denying the existence of collusion, such as the one made by the Padres' CEO in the deposition, had led to the creation of the \$280 million settlement fund.<sup>61</sup> The Ninth Circuit acknowledged that, generally, courts should accept even clearly erroneous conclusions of an arbitrator.<sup>62</sup> However, the court concluded that it could not accept the arbitrator's irrational conclusion in Garvey's case because the CEO's deposition statements were determined to be false as a condition of the process that resulted in the arbitration proceeding under the Framework.<sup>63</sup>

The Ninth Circuit remanded the case to the district court to vacate the arbitrator's award.<sup>64</sup> However, the district court "remanded the case to the Arbitration Panel for de novo arbitration proceedings," which Garvey again appealed.<sup>65</sup> The Ninth Circuit responded to this second appeal by directing an award for Garvey and clarifying its intent that Garvey should prevail on the merits.<sup>66</sup>

The Supreme Court could have simply reversed on the ground that the Ninth Circuit overstepped its role by directing a specific outcome.<sup>67</sup> Indeed, that appears to be the Court's primary holding.<sup>68</sup> However, the Court went further and found the Ninth Circuit's appli-

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58. *Id.*

59. *Id.* at 507.

60. *Id.* (quoting *Garvey v. Roberts*, 203 F.3d 580, 589 (9th Cir. 2000)).

61. *Roberts*, 203 F.3d at 590.

62. *Id.* (citing *Sheet Metal Workers v. Ariz. Mech. & Stainless, Inc.*, 863 F.2d 647, 653 (9th Cir. 1988)).

63. *Id.* at 591–92.

64. *Id.* at 592.

65. *Garvey v. Major League Baseball Players Ass'n*, 243 F.3d 547 (9th Cir. 2000) (Table) (unpublished), 2000 WL 1801383 (9th Cir. Dec. 7, 2000), *rev'd*, 532 U.S. 504 (2001).

66. *Id.* at \*1.

67. *See Garvey*, 532 U.S. at 511.

68. *See id.*

cation of the Court's 1987 decision in *United Paperworkers International Union v. Misco, Inc.*<sup>69</sup> to be "nothing short of baffling."<sup>70</sup> The Court explained that *Misco* established that "silly[ ] factfinding" or "even 'serious error' on the arbitrator's part does not justify overturning [an arbitrator's] decision" so long as the arbitrator arguably construes the terms of the CBA.<sup>71</sup> The Court reasoned that the Ninth Circuit should not have searched the arbitrator's factual finding on credibility to define that distinction.<sup>72</sup> As a result, the Supreme Court forbids review of the facts underlying an arbitrator's reasoning, even if a court finds that the arbitrator relied on a false factual premise.<sup>73</sup>

### C. Arbitrator's Award Violates Public Policy

In *Misco*, the Supreme Court held that a federal court could not overturn on public policy grounds an arbitration decision reinstating an employee.<sup>74</sup> The weight of a general public policy against illegal drug use was insufficient for the employer to ignore the arbitration award and terminate the employee for allegedly smoking marijuana on company property.<sup>75</sup> The parties had collectively bargained for the arbitrator to resolve their disputes and the court must ensure enforcement of that bargain by not substituting its judgment for that rendered by the chosen arbitrator.<sup>76</sup> Therefore, courts may not use a disagreement with the arbitrator's assessment of the facts as a basis for overturning an arbitration decision on public policy grounds.<sup>77</sup>

In *Eastern Associated Coal*, the Court explored whether a court should defer to the arbitrator's finding that illegal drug use did not establish just cause for termination. The employee, a truck driver, had twice tested positive for marijuana use.<sup>78</sup> The employer twice failed to get an arbitrator to agree that there was just cause to terminate the employee.<sup>79</sup> The employer argued that complying with the arbitrator's

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69. 484 U.S. 29 (1987).

70. *Garvey*, 532 U.S. at 510. The *Misco* decision is described in more detail in Section I.C.

71. *Id.* at 509–10 (quoting *Misco*, 484 U.S. at 38–39). The line between serious error and dispensing one's own brand of justice could arguably benefit from clearer distinction. *See id.* at 512 (Stevens, J., dissenting).

72. *Id.* at 510 (majority opinion).

73. *Id.*

74. *Misco*, 484 U.S. at 45.

75. *Id.* (finding that the award of reinstatement did not clearly "pose a serious threat to the asserted public policy").

76. *Id.* at 39.

77. *Id.*

78. *E. Assoc. Coal Corp. v. Mine Workers of Am.*, 531 U.S. 57, 60 (2000).

79. *Id.*

award requiring reinstatement of the employee would violate the public policy against operating dangerous machinery under the influence of drugs.<sup>80</sup>

According to the Court, the proper question in addressing a public policy challenge is not whether the employee's drug use violated public policy but whether the reinstatement pursuant to the arbitrator's award violated public policy.<sup>81</sup> Even though the employee had failed multiple drug tests, the arbitration decision did "not condone [the employee's] conduct or ignore the risk to public safety that drug use by truck drivers may pose."<sup>82</sup> Instead, the Court found the award adequately punished the employee for his conduct.<sup>83</sup>

The Court also found the arbitrator's award consistent with rehabilitative concerns expressed by federal law regulating truck drivers.<sup>84</sup> Despite being a recidivist, the Court noted that there was no law mandating that a worker who has tested positive for drugs twice must be terminated.<sup>85</sup> As a result, the Court found that the lower courts had correctly rejected the employer's public policy challenge. Because the "public policy exception is narrow,"<sup>86</sup> an employer seeking to use this method will be limited to only those circumstances where the terms of the award violate a "specific provision of any law or regulation."<sup>87</sup>

#### D. *The Arbitrator Committed Misconduct Such as Bias or Fraud or Partiality*

Section 10 of the Federal Arbitration Act (FAA) provides specific requirements for vacating an arbitration award for arbitrator misconduct, evident partiality, bias, or fraud.<sup>88</sup> Many scholars and courts mix enforcement of arbitration analysis under the FAA with analysis under Section 301 of the LMRA, without explaining how the FAA

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80. *Id.*

81. *Id.* at 62–63.

82. *Id.*

83. *Id.* at 65–66. Specifically, the Court found the award punished the employee by depriving him of three months pay; by requiring that he pay the arbitration costs for both sides; by subjecting him to further random drug testing; and by mandating that he sign a resignation letter that would result in his termination if he fails another test. *Id.*

84. *Id.* at 66.

85. *Id.*

86. *E. Assoc. Coal*, 531 U.S. at 63; *see also* Byrnes & Berkowitz Prout, *supra* note 16, at 393 (referring to "limited bases for appeal of arbitration decisions," including invalidation of "an award . . . on public policy grounds when it violates positive law").

87. *E. Assoc. Coal*, 531 U.S. at 66.

88. *See* FAA, 9 U.S.C. § 10(a)(3) (2012). One narrow basis for challenging an arbitration award under the FAA is when the arbitrator commits misconduct by "refusing to hear evidence pertinent and material to the controversy." *Id.*



governs.<sup>89</sup> The analyses under both statutes share common elements.<sup>90</sup> The Supreme Court has explained that it may “discuss precedents applying the FAA because they employ the same rules of arbitrability that govern labor cases.”<sup>91</sup>

Provisions of the FAA have not been explicitly incorporated into federal common law under Section 301.<sup>92</sup> However, decisions challenging arbitration awards for fraud, bias, or other arbitrator misconduct under Section 10 of the FAA may be considered persuasive authority in a labor arbitration case if consistent with other Section 301 jurisprudence.<sup>93</sup> Nevertheless, if a labor arbitrator commits “affirmative misconduct,” the court’s role is not to consider “the merits”:

Even in the very rare instances when an arbitrator’s procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator’s decision that the parties bargained for in the collective-bargaining agreement.<sup>94</sup>

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89. See, e.g., Jay E. Grenig, *After the Arbitration Award: Not Always Final and Binding*, 25 MARQ. SPORTS L. REV. 65, 81–83 (2014) (focusing on post-award procedures provided under the FAA and applying those FAA provisions to many labor arbitration disputes under a CBA covered by Section 301 of the LMRA); Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What is Sufficient to Vacate Award*, 81 ST. JOHNS L. REV. 203, 252 (2007) (discussing proposed disclosure standards so that arbitrators may circumvent partiality and bias challenges under the FAA but also referring to the standards being applied to labor arbitrators). However, there is some debate whether the FAA may apply when a labor arbitration decision is challenged under Section 301 of the NLRA, as amended. See Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 851–852 (2010) (discussing the argument that the FAA applies to commercial contract arbitration and does not apply to a CBA arbitration which is covered by Section 301 of the LMRA).

90. See Michael Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 749–50 & n.101 (2012).

91. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 298 n.6 (2010).

92. See *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (questioning whether the FAA applies to labor arbitration but finding “the federal courts have often looked to the [FAA] for guidance in labor arbitration cases”); see also Yelnosky, *supra* note 90, at 749–50 & n.101 (asserting that the authorized application of the FAA to CBAs has never been completely addressed by the courts); Zirkel & Winebrake, *supra* note 23, at 684–708 & n.21 (acknowledging that the FAA may not apply to labor arbitrators but also recognizing that many concerns about arbitrator misconduct under the FAA are also addressed by ethics standards for labor arbitrators and by state laws).

93. See *Granite Rock Co.*, 561 U.S. at 298 n.6 (2010) (describing how “precedents applying the FAA . . . employ the same rules of arbitrability that govern labor cases”).

94. *Misco*, 484 U.S. at 40 n.10.

Instead, the court should vacate the award and remand for further proceedings.<sup>95</sup>

A typical labor arbitrator is a neutral outsider who realizes there is no advantage to currying favor with one party because each party operates as a repeat player in the labor arbitrator selection process.<sup>96</sup> The need to respond fairly to both parties, who can equally decide whether to use the arbitrator again, checks most concerns of arbitrator bias, misconduct, and overreaching.<sup>97</sup> The NFL CBA contains unique provisions in which the parties have agreed to allow the Commissioner, who represents the interests of the NFL employers, or his designee, to act as final arbitrator in labor disputes.<sup>98</sup> These provisions seemingly raise more questions of bias, evident partiality, fraud, and other forms of arbitrator misconduct for NFLPA arbitrations conducted by the Commissioner.<sup>99</sup>

However, arbitrator misconduct should not be actionable under Section 10 of the FAA merely because the NFL Commissioner acts as a final labor arbitrator. Both the NFLPA and the NFL have sufficient bargaining power such that outsiders should not question who they choose as the final labor arbitrator of their CBA disputes.<sup>100</sup> In other industry settings, parties have chosen a partisan labor arbitrator without their choice establishing any question of misconduct.<sup>101</sup> Typically, parties handle their concerns about an independent arbitrator's mis-

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95. *Id.* (finding “the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement” consistent with its “authority to remand for further proceedings when this step seems appropriate.”)

96. See Martin H. Malin, *Privatizing Justice—But by How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 603 (2001).

97. See Zirkel & Winebrake, *supra* note 23, at 680–81. Ethical provisions and neutral service provider rules also limit arbitrator misconduct. See *id.*

98. See *infra* Section II.B (describing Goodell's duties in more detail).

99. See Reece, *supra* note 9, at 360 & n.4 (describing how the NFL CBA does not provide for an independent arbitrator and empowers Commissioner Goodell to be the final person appealed to after Goodell has initially implemented a disciplinary punishment).

100. See *Williams v. Nat'l Football League*, 582 F.3d 863, 885–86 (8th Cir. 2009) (finding no legitimate claim of bias when NFLPA agreed in CBA to have Commissioner or his designee serve as the arbitrator; when the NFL General Counsel was assigned as the arbitrator, the NFLPA knew he was partial to the employer due to his position and still agreed to appoint him as the arbitrator).

101. See *JCI Commc'ns v. Int'l Bhd. of Elec. Workers Local 103*, 324 F.3d 42, 51 (2d Cir. 2003) (“That the arbitrators came from the same industry does not in itself approach evident partiality.”); *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001) (partisan arbitrators are generally permissible if that is what the parties’ “arbitration clause contemplated”).

conduct through the selection process.<sup>102</sup> When the parties feel an independent arbitrator acted unfairly, they will not use that arbitrator again.<sup>103</sup>

If the NFLPA does not want Commissioner Goodell or his designee to be the final arbitrator, then it should bargain to change the terms of the CBA to use independent arbitrators.<sup>104</sup> One might argue that a CEO who “plays the role of both prosecutor and judge” is inherently biased and evidently partial.<sup>105</sup> On the other hand, by agreeing to have the employer’s CEO act as the final labor arbitrator for disputes under a CBA, one might rightfully assume that the union obtained many benefits in the CBA in exchange for that provision; alternatively, the union could negotiate to remove this provision if it does not result in any benefits for union members.<sup>106</sup> The parties and federal judges should not consider arguments of bias, fraud, or misconduct simply because they do not like the Commissioner’s decision or they disagree with the Commissioner’s fact-finding. The Supreme Court strictly limits the grounds for overturning arbitration to those situations where the arbitrator clearly fails to apply the CBA, violates public policy, or directly exhibits partiality, fraud, or bias.

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102. See Malin, *supra* note 96, at 603 n.83; see also Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979) (discussing how labor arbitrators are regulated by the union and employer as repeat players).

103. Getman, *supra* note 102, at 916.

104. *E.g.*, Reece, *supra* note 9, at 402 (noting that, unlike the NFL, professional basketball and baseball use independent arbitrators when players face more severe punishments).

105. See *id.* at 391 (identifying the NFL Commissioner as final arbitrator, who is aligned with the owners and has broad authority to discipline players under a Personal Conduct Policy, without any independent appeal process, may suggest evident partiality or bias). *But see* Williams v. Nat’l Football League, 582 F.3d 863, 885–86 (8th Cir. 2009) (finding no legitimate claim of bias when the NFLPA agreed in the CBA to have the Commissioner or his designee serve as the arbitrator; when the General Counsel was assigned as the arbitrator, the union knew he was partial to the employer by the requirements of his position and still agreed to appoint him as the arbitrator).

106. *But see* Reece, *supra* note 9, at 396–97 (asserting that the implementation of the disciplinary policy that allows NFL Commissioner Goodell to take action against those who harm the best interests of the league and allow him to be the final arbitrator of any challenges to decisions made under that policy was not part of “any bona fide bargaining or quid pro quo for the NFLPA”). However that policy was implemented, it is now incumbent upon the NFLPA to “negotiate an independent arbitration process” that provides NFLPA members with a better opportunity to obtain fair results. *Id.* at 398.

## II.

DEFLATEGATE: TOM BRADY'S CHALLENGE TO THE NFL  
COMMISSIONER'S ARBITRAL DECISION AND  
APPLICATION OF DISCRETION  
REGARDING INTEGRITY OF THE GAMEA. *Why the NFL Determined Tom Brady Conspired to Deflate  
Game Balls Below the League Minimum Pressure*

During the 2015 American Football Conference Championship, the Indianapolis Colts became suspicious when a defensive player intercepted a pass from Tom Brady and felt that the football was a bit deflated. The Colts measured the ball pressure and found it below the 12.5–13.5 pounds per square inch required by the NFL. The investigation and subsequent litigation, sometimes referred to as “DeflateGate,” brought national attention to the case.<sup>107</sup>

The NFL appointed Theodore V. Wells, Jr. to conduct an investigation and prepare a report analyzing the incident.<sup>108</sup> The NFL's Executive Vice President and General Counsel, Jeff Pash, assisted Wells.<sup>109</sup> The report, known as the “Wells Report,” alleged that locker room attendants conspired with Brady to deflate the game balls to his preference.<sup>110</sup>

The Wells Report included the following findings: One of the attendants took two bags of game balls from the Officials Locker Room without permission.<sup>111</sup> A security camera showed the attendant taking the balls into the bathroom for just under two minutes.<sup>112</sup> At

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107. See, e.g., Staff, *The Case for Tom Brady: An Arbitrator's Take*, WASH. POST (June 10, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/06/10/the-case-for-tom-brady-an-arbitrators-take/>.

108. One of the NFLPA's issues is whether this investigation was truly independent and whether it should have been independent. Compare *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 531–32 (2d Cir. 2016) (calling the investigation independent), with *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 453 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016) (placing “independent” in quotes, indicating the district court's view that the investigation was tainted with partiality). However, as the Second Circuit pointed out, the CBA did not require the NFL to conduct an independent investigation. *Nat'l Football League Mgmt. Council*, 820 F.3d at 546.

109. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 458–59.

110. THEODORE V. WELLS, JR. ET AL., PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 (2015) [hereinafter WELLS REPORT], <http://static.nfl.com/static/content/public/photo/2015/05/06/0ap3000000491381.pdf>.

111. WELLS REPORT, *supra* note 110, at 4; NFL Staff, *Key Takeaways from Ted Wells Report*, NAT'L FOOTBALL LEAGUE (May 6, 2015), <http://www.nfl.com/news/story/0ap3000000491524/article/key-takeaways-from-ted-wells-report>.

112. WELLS REPORT, *supra* note 110, at 4.

half time, all eleven Patriots' game balls measured below the acceptable pressure range, whereas all four of the Colts' game balls measured within the appropriate range.<sup>113</sup> Moreover, in the weeks prior to the game, the attendants discussed Brady's dissatisfaction with the pressure of the game balls and how they would be deflating the balls in exchange for money and new shoes via text message.<sup>114</sup> One of the attendants texted the message: "let's make a deal . . . come on help the deflator."<sup>115</sup>

Despite acknowledging that some of the science and facts were uncertain,<sup>116</sup> the Wells Report concluded "it is more probable than not that Tom Brady (the quarterback for the Patriots) was at least generally aware of the inappropriate activities of [the attendants] involving the release of air from Patriots game balls."<sup>117</sup> After reviewing the Wells Report, NFL Executive Vice President Troy Vincent notified Tom Brady by letter that he would receive a four-game suspension.<sup>118</sup> As grounds for the disciplinary action, Vincent's letter cited the Wells Report "as well as [Brady's] 'failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.) despite being offered extraordinary safeguards by the investigators to protect unrelated personal information.'"<sup>119</sup>

### *B. The Unique Structure of Commissioner Goodell's Authority as Arbitrator Under the NFL-NFLPA CBA*

Before further discussing DeflateGate, a more-detailed explanation of the arbitration process under the 2011 NFL-NFLPA CBA may be helpful.<sup>120</sup> The CBA has a two-step disciplinary process for conduct considered detrimental to the integrity of the game under article 46 of the CBA. First, article 46, section 1(a) of the CBA, provides that the Commissioner will issue discipline and a written notice to the affected player.<sup>121</sup> Then, the player has three days to appeal the rul-

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113. *Id.* at 7.

114. *Id.* at 5–7.

115. *Id.* at 6.

116. *See* Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 454 (S.D.N.Y. 2015).

117. WELLS REPORT, *supra* note 110, at 2.

118. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 531–32 (2d Cir. 2016).

119. *Id.* at 534.

120. Some of Goodell's unique duties were described earlier. *See supra* notes 98–99 and accompanying text.

121. *Collective Bargaining Agreement*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, at 208 (2011) [hereinafter *NFLPA CBA*], <https://nflpaweb.blob.core.windows.net/me>

ing.<sup>122</sup> The letter Brady received from Vincent constituted the initial discipline from the Commissioner in Brady's case.<sup>123</sup>

Second, article 46, section 2(a), provides for an arbitral appellate hearing.<sup>124</sup> Commissioner Goodell has the discretion to "appoint one or more designees to serve as hearing officers" or to appoint himself to "serve as hearing officer in any appeal under Section 1(a)."<sup>125</sup> Brady used article 46 to appeal the initial Vincent letter to arbitration.<sup>126</sup> Goodell then exercised his discretion under the 2011 NFL-NFLPA CBA to allow him to be the one to hear the appeal.<sup>127</sup>

Notably, the CBA articulates selection criteria, delineates scope of authority, and includes discovery rules in articles 15 and 16 for system arbitrators.<sup>128</sup> However, the requirement to use system arbitrators and related procedural requirements expressly does not apply to disciplinary proceedings under article 46.<sup>129</sup> Disciplinary hearings under article 46, section 1(a), concerning "conduct detrimental to the integrity of, or public confidence in, the game of professional football," have separate requirements.<sup>130</sup>

The CBA does not limit the arbitrator's authority to decide procedural issues, such as the scope of discovery, or substantive issues, such as what constitutes conduct detrimental to the integrity of the

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dia/Default/PDFs/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf.

122. *Id.*

123. The NFLPA claimed, that by delegating this power to Vincent, Goodell exceeded his authority under section 1(a), because only section 1(b) expressly provides for such delegation. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 449, 534 (S.D.N.Y. 2015). However, as discussed below, the arbitrator's construction is permissible as long as it does not contradict his authority under the CBA, and the NFLPA's CBA does not expressly limit the Commissioner's power in such a manner. *See* discussion *infra* Section II.B (discussing arbitrator's authority).

124. *NFLPA CBA*, *supra* note 121, at 208–09.

125. *Id.*

126. *Id.*

127. *Id.* Article 46, section 2(a), of the CBA reserves to the Commissioner the right to serve as the arbitrator for any disciplinary appeal. *Id.*

128. *Id.* at 116–121.

129. *Id.* at 116 ("The parties agree that the System Arbitrator shall have exclusive jurisdiction to enforce the terms of Articles 1, 4, 6–19, 26–28, 31, or 68–70 of this Agreement (emphasis added) (except as provided in those Articles with respect to disputes determined by the Impartial Arbitrator, the Accountants, or another arbitrator).").

130. *Id.* at 208. For example, there are specific scheduling requirements for providing notice of appeal and the decision; all parties may have counsel present; such hearings are always transcribed; the parties must produce exhibits that they intend to rely upon three days before the hearing; and the parties have the right to produce relevant evidence. *Id.* at 208–209.

game.<sup>131</sup> Likewise, the CBA does not limit the length of a suspension or amount of a fine that the Commissioner may impose.<sup>132</sup> As a result, Goodell had broad authority under the CBA to act as the arbitrator and to determine procedural as well as substantive issues.<sup>133</sup>

*C. The Arbitration Appeal: Goodell Denied Brady's Discovery Motions and Upheld the Four-Game Suspension Based on the Wells Report Findings that Brady Likely Cheated and Based on Brady's Refusal to Cooperate with the Investigators*

Before the appeal hearing, Brady challenged Goodell and filed a motion seeking Goodell's recusal, arguing that Goodell could not serve as an arbitrator where his own conduct was challenged and he served as a central witness.<sup>134</sup> Goodell denied the motion, exercising his discretion to hear and arbitrate the appeal.<sup>135</sup>

At Brady's arbitration hearing, Goodell heard testimony from Brady, Vincent, and several experts.<sup>136</sup> Lorin L. Reisner, a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP and a co-author of the Wells Report, represented the NFL at the Brady hearing.<sup>137</sup> As a result, the same firm acted as both an investigator and attorney for the NFL.<sup>138</sup>

Jeffrey Kessler, from Winston Strawn, acted as counsel for the NFLPA and Brady.<sup>139</sup> Kessler argued that Brady had no notice of the

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131. *Id.* at 208–09.

132. *Id.* at 208.

133. *See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d at 534, 540–42, 545, 548; *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001) (holding that courts could not overturn arbitrators for seemingly illogical inferences from underlying facts, so long as the arbitrator arguably construed the CBA); *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 67 (2000) (holding that courts should enforce arbitration decisions as long as the arbitrator arguably construes the CBA, except in the narrowest circumstances on public policy grounds); Cole Renicker, *As the NFL Season Ends, Tom Brady and the NFL Resume 'Deflategate' Saga*, *FORDHAM SPORTS L.F.* (Apr. 4, 2016), <http://fordhamsportslawforum.com/lawsuit/as-the-nfl-season-ends-tom-brady-and-the-nfl-resume-deflategate-saga/>.

134. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 458.

135. *Id.*

136. *Id.* at 460.

137. *Id.*

138. *Id.*

139. *Id.* Kessler is a veteran antitrust lawyer who has litigated several high-profile sports lawsuits. *See Joseph Ax, From NFL to Women's Soccer, Lawyer Is Thorn in Side of Sports Leagues*, *REUTERS* (Mar. 31, 2016), <http://www.reuters.com/article/us-usa-soccer-women-attorney-idUSKCN0WX2RU> (citing examples of Kessler's high-profile cases against all four major U.S. professional sports leagues, the National Col-

possibility of suspension for tampering with equipment, because he did not receive the Competitive Integrity Policy that was distributed to team managers and coaches. Brady only received “the 2014 NFL League Policies for Players,” which threatened a fine of \$5512 for first-offenders of equipment violations. Thus, as Kessler argued, Brady had no notice that suspension was a possible consequence for such conduct.<sup>140</sup>

Goodell upheld the four-game suspension.<sup>141</sup> Goodell determined from the investigation that Brady likely knew about the locker room attendants deflating the game balls.<sup>142</sup> Goodell likened the equipment violation to steroid use, which is punishable under the same section of the CBA.<sup>143</sup> Additionally, Goodell found that Brady thwarted the NFL’s discovery requests by destroying his cell phone, knowing it contained relevant information.<sup>144</sup> Thus, in addition to the underlying charge of cheating, Goodell decided against Brady for conduct similar to spoliation in a court of law.<sup>145</sup>

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legiate Athletic Association, and the Olympic Games in “over three decades of litigation”). Legal News outlets deemed Kessler a “Sports MVP” in 2015 primarily because of his work in leading successful player challenges to NFL discipline. Zachary Zagger, *Sports MVP: Winston & Strawn’s Jeffrey Kessler*, LAW360 (Nov. 30, 2015), <http://www.law360.com/articles/732250/sports-mvp-winston-strawn-s-jeffrey-kessler>. Although Kessler is a partner with what would ordinarily be considered a management-side firm, Kessler represents the NFLPA in sports cases. *Id.* Commenting on his work, Kessler stated, “I have consistently been involved in representing athletes in their struggle against owners that don’t recognize their rights and economic worth.” *Id.*; see also *Winston & Strawn LLP Rankings, Best Law Firms*, U.S. NEWS & WORLD REPORT, <http://bestlawfirms.usnews.com/profile/winston-strawn-llp/rankings/3938> (last visited Nov 21, 2016) (ranking Winston & Strawn as a tier-one management-side national employment law firm).

140. Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 125 F. Supp.3d 449, 460 (S.D.N.Y. 2015).

141. *Id.*

142. *Id.* at 461.

143. *Id.*

144. *Id.*

145. *Id.* at 461–62; see also *NFL Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 544 (2d Cir. 2016) (“It is well established that the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence the party had an obligation to produce did so in order to conceal damaging information from the adjudicator. . . . These principles are sufficiently settled that there is no need for any specific mention of them in a collective agreement, and we are confident that their application came as no surprise to Brady or the Association.”); J. Noah Hagey et al., *NFL Learned From Its District Court Fumbles In Deflategate*, LAW360 (Mar. 3, 2016), <http://www.law360.com/articles/766772/nfl-learned-from-its-district-court-fumbles-in-deflategate> (“Nor, surprisingly, is the argument that Brady’s evidence spoliation is independently sanctionable in litigation. Ample case law in the Second Circuit supports the imposition of harsh sanctions for spoliation, including adverse inferences, attorneys’ fees, and even default judgment.”).



*D. The District Court—Out of Step with Most Federal Courts—  
Refused to Enforce Arbitration*

The district court vacated the arbitration decision, finding Goodell's conclusions deficient.<sup>146</sup> The court held that the notice to Brady was inadequate, and Goodell's refusal to allow Brady the opportunity to examine key witnesses and evidence was improper.<sup>147</sup> The court considered these errors to be violations of fundamental fairness under the requirements of the FAA.<sup>148</sup>

In reviewing the notice provided to Brady, the district court focused on the letters Vincent had sent to the Patriots' management and Brady informing them of the discipline.<sup>149</sup> In the letter, Vincent referred to the Patriots' violation of the NFL's "Competitive Integrity Policy," which is distributed to team management, not to players.<sup>150</sup> Vincent's letter to Brady stated in strong terms that the Wells Report demonstrated that Brady likely knew about the cheating, which "clearly constitute[d] conduct detrimental to the integrity of and public confidence in the game of professional football."<sup>151</sup> The NFL suspended Brady for four weeks without pay under paragraph 15 of the standard NFL Player Contract. That provision gives the Commissioner the ability to suspend players for engaging in gambling, taking performance-enhancing drugs, or, if the Commissioner determines, "any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football."<sup>152</sup> The letter informed Brady that he was also being punished because he failed to cooperate with the investigators.<sup>153</sup>

The district court reasoned from the opinions of past arbitrators that the NFL was required to provide Brady with specific notice of the grounds for discipline.<sup>154</sup> The court quoted another arbitration decision, referred to as the "Bounty Gate" case, in which former NFL Commissioner Paul Tagliabue, acting as the final arbitrator, overturned Goodell's discipline based on lack of "evidence of a record of past suspensions based purely on obstructing a League investigation."<sup>155</sup> Because past arbitrators overturned discipline when there was

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146. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 463.

147. *Id.*

148. *Id.* at 462; *see also* 9 U.S.C. § 10(a)(3) (2014).

149. 125 F. Supp. 3d at 463.

150. *Id.* at 460.

151. *Id.* at 457.

152. *Id.* at n.8.

153. *Id.* at 457.

154. *Id.* at 465–66.

155. *Id.*

no record of other players being disciplined on the same grounds, the court determined it was obligated to refuse to enforce Goodell's decision in the Brady arbitration.<sup>156</sup> Thus, the district court held that the arbitration was fundamentally unfair, because Brady had no notice that he could be punished for not cooperating with NFL investigators.<sup>157</sup> In effect, the court found that Goodell "dispensed his own brand of industrial justice."<sup>158</sup>

From the district court's perspective, Goodell's comparison of deflating game balls to anabolic steroid use stretched the relationship between Brady's notice and the four-game suspension.<sup>159</sup> Where Goodell reasoned that players in both cases sought to gain a competitive edge, the district court reasoned that the lack of precedent regarding other NFL discipline suggested that Goodell drew upon something outside of the requirements of the CBA.<sup>160</sup>

The district court also determined that Brady had no notice that he could be punished for the locker room attendants' activities.<sup>161</sup> With respect to the application of a suspension, the court likened Brady's four-game suspension to that of Adrian Peterson's, which a district court had overturned because the discipline applied a conduct policy retroactively.<sup>162</sup> In Peterson's case, the District Court of Minnesota relied upon other NFL arbitration decisions to require advance notice of grounds for discipline. The court found Brady's case analogous, because Brady did not receive the Competitive Integrity Policy prior to being disciplined.<sup>163</sup> The court reasoned that Brady only had notice that he could be fined for equipment violations, not suspended.<sup>164</sup>

The district court disputed Goodell's discovery rulings denying Brady's motion to compel testimony from the NFL General Counsel Jeff Pash about the Wells Report.<sup>165</sup> The district court reasoned that "in Article 46 arbitration appeals, players must be afforded the oppor-

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156. *Id.*

157. *Id.* at 466 (internal quotations and alterations omitted).

158. *Id.*

159. *Id.* at 464–65.

160. *Id.* at 465 (relying upon Tagliabue's opinion in Bounty Gate to imply that a "sharp change in sanctions or discipline"—in this case Goodell applying a four-game suspension without a prior similar case—could prove Goodell based the discipline on something outside the CBA).

161. *Id.* at 467.

162. *Id.* at 469.

163. *Id.*

164. *Id.* at 468–69.

165. *Id.* at 471.

tunity to confront their investigators.”<sup>166</sup> Because the arbitrator in an NFLPA case involving another player, Ray Rice, compelled Goodell to testify to provide a complete picture of the relevant evidence, the district court reasoned that Goodell was required to grant Brady’s motion to compel Pash to testify.<sup>167</sup>

Additionally, the court held that the arbitration was fundamentally unfair because Goodell denied Brady’s motion to compel discovery of the NFL’s investigation notes and the unedited version of the Wells Report, denying Brady the opportunity to present relevant evidence.<sup>168</sup> Goodell denied the motion because the discipline was based on the Wells Report alone, not the underlying notes.<sup>169</sup> The district court, however, was troubled by NFL General Counsel Pash’s connection to the investigation including his access to the unedited version of the Wells Report.<sup>170</sup> Because Brady did not have the same access to the NFL’s investigation as Pash, the court held that Brady was unable to effectively challenge the Wells Report.<sup>171</sup> In support, the court cited to cases dealing with arbitration outside the collective bargaining context and to Tagliabue’s arbitration decision in Bounty Gate to provide broader discovery access.<sup>172</sup>

The district court found that the Brady arbitration decision violated fundamental fairness on three grounds: the notice of punishment; the denial of testimony; and the denial of access to investigator notes. The district court reasoned that the arbitration failed to satisfy standards set forth in past NFL arbitrations or the arbitration violated fundamental fairness because of a denial of access to potentially relevant evidence.<sup>173</sup>

Framing these issues under procedural fundamental fairness allowed the district court to review the factual record Goodell relied on,

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166. *Id.*

167. *Id.*

168. *Id.* at 472.

169. *Id.*

170. *Id.* The district court repeatedly indicated its disagreement with the characterization of the investigation as “independent.” *Id.*

171. *Id.*

172. *Id.* at 472–73 (noting the fact that “Arbitrator Tagliabue ordered the production of NFL investigative reports and redacted witness memoranda”); *see also* Home Indem. Co. v. Affiliated Food Distribs., No. 96 Civ. 9707(RO), 1997 WL 773712 (S.D.N.Y. Dec. 10, 1997); *Paul Tagliabue’s Full Decision on Saints Bounty Gate Appeal*, NAT’L FOOTBALL LEAGUE (Dec. 11, 2012), <http://www.nfl.com/news/story/0ap1000000109668/article/paultagliabuesfulldecisiononsaintsbountyappeal> (“I convened several pre-hearing conferences with the parties’ counsel; . . . ordered, received and reviewed certain investigative memoranda to be produced to players’ counsel . . .”).

173. *Nat’l Football League Mgmt. Council*, 125 F. Supp. 3d at 466, 471, 473.

including the investigation report, letters recommending discipline, as well as the hearing and arbitration decision.<sup>174</sup> Ordinarily, reviewing the arbitrator's factual inferences would be outside a federal court's scope of review.<sup>175</sup> However, fundamental fairness became a gloss under which the court analyzed the issues under the NFL's arbitral precedents.<sup>176</sup> Arbitral precedents, however, do not constitute mandatory authority for an arbitrator, much less a district court.<sup>177</sup> The parties bargained for the arbitration process to decide their disputes, not for the district court to substitute its reasoning and procedural standards for those of the selected arbitrator.<sup>178</sup> The district court undermined the collective bargaining process by requiring specific notice of the ground for Brady's discipline, and by determining that Goodell's denial of Brady's discovery motions was fundamentally unfair.<sup>179</sup> The district court's rulings created standards for the arbitration process that neither party had bargained for, downplaying the central tenets and thrust of the NLRA in encouraging the enforcement of arbitration decisions. The U.S. Court of Appeals for the Second Circuit responded to these mistakes by reversing the district court on each ground.<sup>180</sup>

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174. *Id.* at 452–55.

175. *See, e.g.*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (“[E]ven ‘serious error’ on the arbitrator’s part does not justify overturning his decision.”); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 *HASTINGS L.J.* 1187, 1195 (1993) (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 39 (1987) (“Arbitral fact-finding is completely off limits to a reviewing court. ‘[I]mprovident, even silly, factfinding . . . is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.’”); *see also* LeRoy & Feuille, *The Steelworkers Trilogy*, *supra* note 51, at 112–20 (explaining that, even while arguing that tension exists in a federal court’s role in reviewing arbitration decisions, courts generally do not review factual findings of arbitrators in post-*Misco* cases where employers argue on public policy grounds to expand federal court review). The district court might have been able to conduct such a review if those facts indicated that Goodell exceeded his authority under the CBA, committed fraud, or expressed bias. *See* Grenig, *supra* note 89, at 81–83.

176. *See* Malin & Ladenson, *supra* note 175, at 1196–97 (explaining that “[a]rbitrators are not even legally bound to follow prior [arbitration] decisions interpreting the same contract language between the same parties”).

177. *Id.*; *see also* *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. at 510–11.

178. *NFLPA CBA*, *supra* note 121, at 208.

179. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 466, 471.

180. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 537–38 (2d Cir. 2016).

*E. The Second Circuit Reverses, Reaffirming Broad Arbitrator Deference in Review*

In the past, the Second Circuit had taken a less deferential posture toward arbitration than prevailing Supreme Court jurisprudence.<sup>181</sup> However, recently, the Second Circuit has fallen in line.<sup>182</sup> In Brady's appeal, the Second Circuit held that there was "simply no fundamental unfairness in affording the parties precisely what they agreed on."<sup>183</sup> The rationale underlying collective bargaining is to promote labor peace by encouraging private resolution of disputes by the bargained-for means.<sup>184</sup>

The appellate court found that Goodell gave sufficient notice under his broad authority under the CBA.<sup>185</sup> The NFLPA argued that other specific policies concerning equipment violations indicated lower suspensions or fines. However, the court responded that those policies did not set maximum penalties nor did they foreclose the Commissioner's broad authority under article 46 to determine conduct detrimental to the game and assign discipline.<sup>186</sup> Goodell plausibly determined that article 46 warranted the punishment, "which is all the law requires."<sup>187</sup>

Moreover, where the district court and dissenting appellate judge disagreed with Goodell's analogy of equipment tampering to steroid use, the majority pointed out that such reasoning does not comport with the substantial deference owed to arbitrators.<sup>188</sup> Unless the reasoning comes from outside of the CBA, the scope of a federal court's

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181. *See, e.g.*, Hagey et al., *supra* note 145 (describing how "the Second Circuit historically deviated to some extent from the nationwide norm of deference to arbitration awards" but "reversed course over the past decade").

182. *Id.*; *see also* Michael H. LeRoy, *Brady Ruling is Sports Fan's Opinion, Not Legal Reasoning*, LAW360 (Sept. 4, 2015), <https://www.law360.com/articles/699012/brady-ruling-is-sports-fan-s-opinion-not-legal-reasoning> (describing an empirical article showing that from 1991–2001, the Second Circuit confirmed a labor arbitration decision in all eight appeals it heard).

183. *Nat'l Football League Mgmt. Council*, 820 F.3d at 547.

184. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 577–78 (1960); LeRoy & Feuille, *The Steelworkers Trilogy*, *supra* note 51, at 112–20; Malin & Ladenson, *supra* note 175, at 1192.

185. *Nat'l Football League Mgmt. Council*, 820 F.3d at 539.

186. *Id.* at 538–39.

187. *Id.* at 539.

188. *Id.* at 540. Further, the court also noted that "determining the severity of a penalty is an archetypal example of a judgment committed to an arbitrator's discretion" and "[t]he severity of a penalty will depend on any number of considerations" with "[w]eighing . . . left not to the courts, but to the sound discretion of the arbitrator." *Id.* at 545 n.12.

review does not include the arbitrator's reasoning.<sup>189</sup> "If deference means anything, it means that the arbitrator is entitled to generous latitude in phrasing his conclusions."<sup>190</sup> There is no place in a federal court's review of arbitration to dispute the arbitrator's use of analogies.<sup>191</sup> However, even if permissible, it is hard to conclude that Goodell's comparison of the two types of cheating was patently unreasonable.

On the question of Brady's lack of notice of the Competitive Integrity Policy, the NFLPA did not bother to "defend the district court's analysis on appeal."<sup>192</sup> The district court's reasoning concerning what policies Vincent did or did not include in the letter he sent to Brady was inapposite where article 46 of the CBA placed Brady on notice that "that any action deemed by the Commissioner to be 'conduct detrimental' could lead to his suspension."<sup>193</sup>

The Second Circuit held that the denial of Pash's testimony did not violate fundamental fairness because Goodell had broad discretion on procedural matters under the CBA.<sup>194</sup> Although the district court emphasized its concern with the independence of the investigation, the CBA did not require an independent investigation.<sup>195</sup> The NFLPA and the NFL "bargained for and agreed in the CBA on a structure that lodged responsibility for both investigation and adjudication with the League and the Commissioner."<sup>196</sup> Thus, the NFLPA could not bargain for those procedures and then question their fairness.<sup>197</sup>

Regarding Goodell's denial of the motion to compel the investigation notes for the Wells Report, the court focused on overturning arbitration under the fundamental fairness section of the FAA, which "provides that an award may be vacated where 'the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy.'"<sup>198</sup> However, the Second Circuit noted

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189. *Id.* at 540; *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510–11 (2001); Grenig, *supra* note 89, at 98–99.

190. *Nat'l Football League Mgmt. Council*, 820 F.3d at 540.

191. *Id.*; *see also* *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 39 (1987); Malin & Ladenson, *supra* note 175, at 1195.

192. *Nat'l Football League Mgmt. Council*, 820 F.3d at 544.

193. *Id.* at 544–45.

194. *Id.* at 545–46.

195. *Id.* at 546.

196. *Id.*

197. *See id.*

198. *See id.* at 545 (alteration in original) (quoting 9 U.S.C. §10(a)(3) (2014)). Importantly, the court also noted that the issue of fundamental fairness under the FAA has not clearly been applied to decisions involving Section 301 of the LMRA. *Id.* at 545 n.13 ("The FAA does not apply to arbitrations, like this one, conducted pursuant to the LMRA . . . . [W]e have never held the requirement of 'fundamental fairness'

Goodell's discretion concerning discovery was not limited by the CBA.<sup>199</sup> Goodell arguably was reasonable in construing article 46 of the CBA to grant broad discretion in discovery motions.<sup>200</sup> Article 46 contained no limitations or mandatory language concerning discovery, while other CBA provisions covering arbitration in different contexts did provide express language.<sup>201</sup> The parties bargained for discovery rules in other provisions and could have incorporated those rules, or different rules, into article 46. According to the court, Goodell's decisions regarding discovery were reasonable and exercised within his authority under the CBA.<sup>202</sup>

A federal court's job in reviewing arbitration decisions under a CBA is to give the parties what they bargained for.<sup>203</sup> This limited review supports the NRLA's underlying rationale of promoting labor peace through encouraging parties to resolve their differences voluntarily.<sup>204</sup> By substituting its judgment for that of the arbitrator, the district court took away the arbitration process the parties had bargained for. Even when reviewing procedural issues that might appeal to the court's sympathies, a court should focus on whether the arbitrator acted within the scope of the CBA.<sup>205</sup> Although the district court entertained the NFLPA's fundamental fairness arguments concerning the arbitration procedure, the Second Circuit rejected those arguments and even questioned the consideration of fundamental fairness under the FAA as a viable challenge to a labor arbitration decision.<sup>206</sup> The court also noted that the NFLPA's claims rested on factual arguments that belong in arbitration rather than in federal court.<sup>207</sup>

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applies to arbitration awards under the LMRA . . . and we note that the circuits are divided on this question . . ."). Because the NFL did not challenge the application of the "free-floating procedural fairness standard of the FAA" and the court's "result is the same" whether the court rejected that standard or applied it, there was no need to decide whether this FAA standard should be applied in LMRA case analysis. *Id.*

199. *Nat'l Football League Mgmt. Council*, 820 F.3d at 547.

200. *Id.* at 546.

201. *Id.*

202. *Id.* at 546 (noting that, other than the final Wells Report, Goodell did not review any internal interview notes or other documents generated by the firm creating the Wells Report, there was no "material dispute" justifying the need for internal interview and investigation notes, and Goodell "reasonably concluded that he would not require the production of attorney work product he had not relied on or ever seen").

203. LeRoy & Feuille, *The Steelworkers Trilogy*, *supra* note 51, at 81–83.

204. *Id.*

205. *Id.*

206. *Nat'l Football League Mgmt. Council*, 820 F.3d at 545, 546–47, 548 & n.13.

207. *Id.* at 545, 546–47, 548.

## III.

NFLPA CHALLENGES COMMISSIONER GOODELL'S DISCIPLINE OF  
ADRIAN PETERSON: DEFERENCE TO ARBITRATION DOES NOT  
INCLUDE REVIEWING ARBITRAL PRECEDENT BETWEEN THE PARTIESA. *The NFLPA Challenges Goodell's Discipline in Federal Court  
in the Adrian Peterson Case*

After Adrian Peterson pled “no contest” to criminal assault charges related to physical violence he inflicted upon his son, Goodell suspended Peterson for the remainder of the season and ordered Peterson to see a particular therapist without giving him the opportunity to respond.<sup>208</sup> As in Brady’s case, Goodell suspended Peterson under article 46 of the CBA.<sup>209</sup> The NFLPA appealed the discipline through arbitration and argued, among other things, that Goodell exceeded his authority under the CBA by retroactively applying a new discipline policy when Peterson’s conduct occurred under an older policy.<sup>210</sup> The assigned arbitrator affirmed the discipline.<sup>211</sup> Although Goodell applied a new discipline policy retroactively in the initial discipline, the arbitrator considered whether the discipline would have been justified under the old discipline policy.<sup>212</sup>

The district court held that Goodell exceeded the terms of the CBA by retroactively applying a policy to discipline Peterson, when the Commissioner himself previously recognized in another arbitration case that new policies could not be applied retroactively.<sup>213</sup> Further, the court held that the arbitrator exceeded his authority under the CBA because the arbitrator had considered hypothetically whether the old policy might have justified the discipline even though that issue was not before the arbitrator.<sup>214</sup> Rather than address the case under the gloss of procedural fairness, similar to the district court in Brady’s case, the district court in Peterson’s case squarely questioned the scope of the arbitrator’s authority under the CBA.<sup>215</sup>

The Eighth Circuit reversed because the arbitrator had arguably construed the CBA by applying retroactive discipline.<sup>216</sup> Addressing

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208. Nat’l Football League Players Ass’n v. Nat’l Football League, 88 F. Supp. 3d 1084, 1086–88 (D. Minn. 2015).

209. *Id.* at 1088.

210. Nat’l Football League Players Ass’n *ex rel.* Peterson v. Nat’l Football League, 831 F.3d 985, 991 (8th Cir. 2016).

211. *Id.*

212. *Id.*

213. *Id.* at 992.

214. *Id.* at 992–93.

215. *See id.*

216. *Id.* at 997.



the NFLPA's argument that the Commissioner ignored arbitration precedents, the appellate court pointed out that the arbitrator relied on a precedent involving adjustment of discipline for the Miami Dolphins.<sup>217</sup> However, even if Goodell had not relied on precedent, the district court went beyond its scope of review because Goodell had broad discretion under the CBA to issue discipline without precedent.<sup>218</sup>

The Eight Circuit also held that the arbitrator had the authority to determine whether Peterson could have hypothetically been punished under the old discipline policy.<sup>219</sup> The arbitrator had "at least arguably acted within the scope of the issues submitted to him."<sup>220</sup> The arbitrator considered it unnecessary to determine which discipline policy applied because the NFL did not substantively alter the old policies.<sup>221</sup> Goodell therefore reasonably interpreted the issue under the applicable CBA and the arbitrator's decision to consider the old policy deserved deference.<sup>222</sup>

Additionally, the district court owed the arbitrator deference in interpreting the issues.<sup>223</sup> The NFLPA presented the issue of whether "it is fair and consistent for the League to retroactively apply the new policy" and argued the arbitrator went outside of his authority in considering issues not formally presented on appeal.<sup>224</sup> The NFL framed the issue differently: "Is the discipline appropriate?"<sup>225</sup> Arguably, the arbitrator considered the scope of issues presented on appeal.<sup>226</sup> The Eighth Circuit reviewed whether the arbitrator even arguably construed the CBA, the appropriate standard, not whether the arbitrator applied the arbitral precedent correctly.<sup>227</sup> Thus, the Eighth Circuit reversed the district court and reinstated the arbitrator's decision.<sup>228</sup>

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217. *Id.* at 991–92.

218. *Id.* at 997.

219. *Id.*

220. *Id.*

221. *Id.* at 991–92.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 998, 999.

228. *Id.*

*B. Peterson and Brady Compared: The District Courts in Both Cases Erroneously Wandered into the Arbitrator's Realm of Responsibility by Assessing Prior Arbitral Precedents*

The district court in Brady's case seemed to initially analyze the case under a procedural framework dealing with the arbitration's fundamental fairness.<sup>229</sup> However, the district court in Peterson's case directly tackled whether the arbitrator had exceeded his authority in construing the CBA.<sup>230</sup> Either of those analyses may have been appropriate. However, the focus in each shifted to analyzing what past arbitrators had done in similar cases.<sup>231</sup>

The district courts in Brady's and Peterson's cases seemed to accept the NFLPA's argument that a court may review the arbitral precedents.<sup>232</sup> Judge Berman in the Brady case repeatedly referred to prior arbitral decisions as the law of the shop. However, he provided no clear case law to support second-guessing the arbitrator's assessment of prior arbitral decisions.

Somewhat ironically, the district courts' assessments of prior arbitral precedents indicate that the courts went outside the appropriate scope of review. The district courts should have focused on the application of deference. Instead, the focus on past arbitrator decisions provided an opportunity for the district courts to articulate disagreement with Goodell's judgment.

The appellate courts in the *Brady* and *Peterson* cases corrected the missteps made by the district courts by applying deference to an

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229. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 470 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016) (finding that the arbitration failed to satisfy fundamental fairness).

230. *Nat'l Football League Players Ass'n v. Nat'l Football League*, 88 F. Supp. 3d 1084, 1092 (D. Minn. 2015), *rev'd and remanded sub nom. Nat'l Football League Players Ass'n ex rel. Peterson v. Nat'l Football League*, 831 F.3d 985, 997 (8th Cir. 2016) (noting that the district court "conclud[ed] that the arbitrator 'strayed beyond the issues submitted by the NFLPA and in doing so exceeded his authority.'")

231. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 467 (using the concept of the "law of the shop" to reason that Goodell was bound to apply prior arbitral precedents), *rev'd*, 820 F.3d 527 (2d Cir. 2016); *Nat'l Football League Players Ass'n*, 88 F. Supp. 3d at 1090–91 (referring to the law of the shop as prior arbitration awards and questioning the arbitrator's failure to consider a prior arbitration decision involving another player, Ray Rice, in the Adrian Peterson case).

232. *See Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 466 (using the concept of the law of the shop to reason that Goodell was bound to apply similar discipline from another NFLPA arbitration case); *Nat'l Football League Players Ass'n*, 88 F. Supp. 3d at 1090–91 (reasoning that the arbitrator failed to adhere to the law of the shop because he did not satisfactorily distinguish the facts of Peterson's case from another NFLPA arbitration case involving Ray Rice).

arbitrator's award and staying out of the merits of the arbitrator's decision.<sup>233</sup> However, the NFLPA seems determined to create new standards for reviewing arbitration decisions under due process and fundamental fairness arguments from the FAA that courts have not clearly found applicable in analyzing labor arbitration decisions.<sup>234</sup> The NFLPA appeared to be preparing for an appeal to the Supreme Court, as evidenced by its decision to hire former Solicitor General, Ted Olson.<sup>235</sup>

The willingness of district courts to entertain these arguments for professional football athletes does not necessarily translate into increased access to justice for the average employee. As a result, the appellate court in Brady's case took the step of clarifying that there was nothing different about the professional sports industry to suggest any unique analysis in giving a deferential court review of an arbitrator decision.<sup>236</sup>

An important question remains: Why did the district court grant Brady access to the federal court system when most federal courts would have dismissed such challenges in a typical labor arbitration dispute? In Brady's case, the NFLPA did not persuade a novice judge unfamiliar with the deference to arbitrators' decisions that federal law

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233. Nat'l Football League Players Ass'n *ex rel.* Peterson v. Nat'l Football League, 831 F.3d 985, 994 (8th Cir. 2016) ("The dispositive question is whether the arbitrator was at least arguably construing or applying the contract, including the law of the shop."); Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 547 (2d Cir. 2016).

234. See *Nat'l Football League Mgmt. Council*, 820 F.3d at 545–47, 545–46 n.13 (arguing that Goodell's arbitration under article 46 of the NFLPA CBA violated fundamental fairness under the FAA while acknowledging that the fundamental fairness challenge under the FAA is not clearly applicable in a labor arbitration case and circuit courts are divided on the question).

235. Olson served "as the Solicitor General of the United States from 2001–2004 . . . [and has] briefed and argued 62 cases before the Supreme Court and has prevailed in over 75% of those cases." Michael McCann, *Olson Addition to Brady's Team Means Deflategate Ruling Far from Over*, SPORTS ILLUSTRATED (Apr. 29, 2016), <http://www.si.com/nfl/2016/04/29/deflategate-tom-brady-ted-olson-hire>. Olson may be best known for successfully arguing before the Supreme Court on behalf of Texas governor George W. Bush in *George W. Bush v. Albert Gore, Id.* Olson works for a major law firm, Gibson Dunn, which typically represents employers and markets its "unsurpassed ability to help the world's most preeminent companies tackle their most challenging labor and employment problems." See *Labor and Employment*, GIBSON DUNN & CRUTCHER, <http://www.gibsondunn.com/practices/pages/LAE.aspx> (last visited Nov. 26, 2016).

236. 820 F.3d at 537 n.5 (citations omitted) ("This deferential standard is no less applicable where the industry is a sports association. We do not sit as referees of football any more than we sit as the 'umpires' of baseball or the 'super-scorer' for stock car racing. Otherwise, we would become mired down in the areas of a group's activity concerning which only the group can speak competently.").

requires.<sup>237</sup> To the contrary, “Judge Berman is only reversed about 8% of the time.”<sup>238</sup> Professor Michael H. LeRoy, a labor law professor at the University of Illinois College of Law, has argued that the high public profile of the case coupled with the fact that Judge Berman became personally involved in mediating it unsuccessfully first suggested that he acted more like a fan.<sup>239</sup> Judge Berman also received several pieces of fan mail about the case during his court proceedings, including letters originating from New England states which supported lifting Brady’s suspension.<sup>240</sup> Judge Berman did not refer to any of the fan mail as the source for his decision and there is no reason to believe it played any role. But at a minimum, it signaled how much the public cared about the result of that case.

The cases and commentaries reveal another important legal mistake—blending challenges in arbitration with challenges in federal court.<sup>241</sup> Labor arbitration does not replace litigation; rather, it replaces a strike.<sup>242</sup> When courts and commentators assessed the

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237. See LeRoy, *supra* note 1812 (describing how Judge Berman handled a “garden-variety labor arbitration case, District Council 1707 v. Hope Day Nursery Inc., 2006 WL 17791 (S.D.N.Y. 2006).” According to LeRoy, Judge Berman previously “did exactly what the [Trilogy] commanded: He confirmed a challenged arbitration award.” *Id.* LeRoy also described how Judge Berman “reasoned: ‘Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept.’” *Id.* After “[c]iting several precedents,” Judge Berman “also said [in that prior case], ‘The arbitrator’s factual findings and contractual interpretation are not subject to judicial challenge.’” *Id.*

238. Michael McCann, *Deflategate, One Year Later: The Anatomy of a Failed Controversy*, SPORTS ILLUSTRATED (Jan. 17, 2016), <http://www.si.com/nfl/2016/01/18/deflategate-one-year-later-tom-brady-bill-belichick>.

239. See LeRoy, *supra* note 1812.

240. Nick Klopsis, *Judge Richard Berman Releases Letters He Received During Tom Brady ‘DeflateGate’ Hearing*, NEWSDAY (Sep. 9, 2015), <http://www.newsday.com/sports/football/judge-richard-berman-releases-letters-he-received-during-tom-brady-deflategate-hearing-1.10825345>.

241. See Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 125 F. Supp. 3d 449, 465-66 (S.D.N.Y. 2015), *rev’d*, 820 F.3d 527 (2d Cir. 2016) (relying on prior arbitral decisions composed of past statements made by former NFL commissioner Tagliabue as the arbitrator in the Bountygate matter); Nat’l Football League Players Ass’n v. Nat’l Football League, 88 F. Supp. 3d 1084, 1090 (D. Minn. 2015), *rev’d and remanded sub nom.* Nat’l Football League Players Ass’n *ex rel.* Peterson v. Nat’l Football League, 831 F.3d 985 (8th Cir. 2016) (relying on rules announced in prior arbitration involving Ray Rice); Zachary Paiva, *Why the NFL Should Re-Consider Goodell’s Role as Judge, Jury, and Executioner*, FORDHAM SPORTS L.F. BLOG (Apr. 17, 2016), [http://fordhamsportslawforum.com/nfl/why-the-nfl-should-re-consider-goodells-role-as-judge-jury-and-executioner/#\\_edn31](http://fordhamsportslawforum.com/nfl/why-the-nfl-should-re-consider-goodells-role-as-judge-jury-and-executioner/#_edn31) (conflating reversal of initial discipline decision in arbitration, as in the Rice and Bountygate cases, with reversal in federal court review, as in Peterson’s case).

242. Malin & Ladenson, *supra* note 175, at 1192.

NFLPA arguments, they relied on arbitration precedents based on past NFL discipline, seemingly blending arbitration and federal court standards of review.<sup>243</sup> This conflation seems to be part of the reason why the district courts in the *Brady* and *Peterson* cases discussed prior arbitral precedents, contrary to Supreme Court precedent governing arbitration under the NLRA.<sup>244</sup> Although the district courts in these cases relied on reasoning from prior NFL arbitration decisions, the scope of review should have focused narrowly on whether the arbitrators' actions were limited by the CBA. Similarly, Adrian Peterson's initially successful court challenge sheds light on why the NFLPA also gained unusual access to the district court in Brady's case.

#### IV.

#### MATCHING PUBLIC VIEWS ON MILLIONAIRE CHALLENGES TO NFL LABOR ARBITRATION WITH LIMITED COURT REVIEW TO ACHIEVE EQUAL ACCESS TO JUSTICE

Most Americans surveyed about the Brady case tended to believe that the New England Patriots committed some form of misconduct.<sup>245</sup> Likewise, Patriots fans are more likely to have considered the Commissioner the enemy, abusing his power in an unfair manner against Brady.<sup>246</sup>

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243. See *Nat'l Football League Mgmt. Council*, 125 F. Supp. at 465–66 (relying on prior arbitral decisions based on past statements made by former NFL Commissioner Tagliabue as the arbitrator in the Bountygate matter); *Nat'l Football League Players Ass'n*, 88 F. Supp. 3d at 1090–91 (relying on rules announced in prior arbitration involving Ray Rice).

244. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 507 (2001) (lower court's finding that arbitrator's refusal to find that baseball owner had lied when another panel of arbitrators had already ruled that he had lied was not sufficient basis to overturn the arbitrator's award and the Court found it "baffling" that the lower court failed to apply Supreme Court precedent stating that even serious error does not justify overturning an arbitration award).

245. See *Deflate-Gate: More Americans Think Patriots Cheated, Poll Finds*, NBC NEWS (Jan. 29, 2015), <http://www.nbcnews.com/storyline/super-bowl-xlix/deflate-gate-more-americans-think-patriots-cheated-poll-finds-n295236>. However, some of those fans may just have a genuine dislike of the Patriots. *Id.* (finding that only the Dallas Cowboys were more hated than the Patriots among all NFL teams).

246. See John Berman, *John Berman: I'm a Patriots Fan — Shame on Me*, CNN.COM (Jan. 31, 2015), <http://www.cnn.com/2015/01/21/opinion/berman-patriots-deflate-gate> (CNN anchor acknowledging that he should consider not wearing Brady's jersey if Brady cheated, but also accepting that as a life-long Patriots fan, he cannot stop cheering for the Patriots or Brady because "[b]eing a sports fan is an irrational thing"); see also Dan Wetzel, *The Arrogance of Roger Goodell*, YAHOO! SPORTS (Sep. 3, 2015), <http://sports.yahoo.com/news/the-arrogance-of-roger-goodell-215731603.html>.

The Second Circuit in Brady's appeal and the Eight Circuit in Peterson's appeal each reversed the district courts based on traditional labor law principles—specifically, that federal courts owe labor arbitrators deference.<sup>247</sup> After all, most district courts, following the paradigm set forth in the *Steelworkers Trilogy* cases,<sup>248</sup> enforce arbitration so long as the arbitrator even arguably construed the underlying CBA.<sup>249</sup> Although some pundits may argue for a less deferential review of due process in arbitration,<sup>250</sup> most labor lawyers predicted the federal courts would respond with the rationale and outcome reached by the Second Circuit in Brady.

Before and after the district court's decision, labor lawyers pointed out that the NFLPA's argument would likely fail, or at least be very weak, under traditional labor law standards.<sup>251</sup> Before Brady ap-

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247. Nat'l Football League Players Ass'n *ex rel.* Peterson v. Nat'l Football League 831 F.3d 985, 996 (8th Cir. 2016) ("In any event, the question for a reviewing court is not whether the arbitrator's distinctions were correct, but whether the arbitrator was applying the contract . . ."); Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 537 (2d Cir. 2016) ("In short, it is not our task to decide how we would have conducted the arbitration proceedings, or how we would have resolved the dispute.").

248. See generally United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

249. See E. Assoc. Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 67 (2000) (holding that courts should enforce arbitration decisions as long as the arbitrator arguably construes the CBA); see also Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 510 (2001); Enter. Wheel & Car Corp., 363 U.S. at 599.

250. James M. Lynch, *Brady Federal Deflategate Appeal: A Lawyer's View*, LYNCH OWENS (Aug. 13, 2015), <https://lynchowens.com/brady-federal-deflategate-appeal-a-lawyers-view/> (rejecting arguments that a court should not overturn Goodell's decision against Brady based upon recent reading of labor law as being too deferential to an arbitration decision).

251. See, e.g., Erin Fowler & Mike Warner, *Deflategate for Labor Lawyers*, FRANCZEK RADELET P.C. (Sept. 11, 2015), [http://www.franczek.com/frontcenter-Deflategate\\_for\\_Labor\\_Lawyers.html](http://www.franczek.com/frontcenter-Deflategate_for_Labor_Lawyers.html) ("If this case involved a typical employee seeking to overturn an arbitration award, most labor lawyers would have said the odds of Brady winning the lawsuit were worse than the current Vegas odds of the Chicago Bears winning the Super Bowl this season (100 to 1 according to Vegasinsider.com)."); Erin Fowler & Mike Warner, *Deflategate for Labor Lawyers Revisited: 2nd Circuit Reinstates Brady Suspension and Reaffirms Judicial Deference to Arbitration*, FRANCZEK RADELET P.C. (Apr. 26, 2016), [http://www.franczek.com/frontcenter-Deflategate\\_2.html](http://www.franczek.com/frontcenter-Deflategate_2.html) ("As we previously commented, the district court's original ruling overturning the suspension was quite unusual, given the high degree of deference that courts typically give to labor arbitration awards. The Second Circuit obviously agreed, stressing that a 'federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, the most deferential in the law.'"); see also Tom Eron, *Monday Morning Quarterback: What Labor Practitioners Can Learn From "Deflategate"*, BOND SCHOENECK & KING, PLLC (Sept. 15, 2015), <http://www.nylaborandemploymentlawreport.com/2015/09/articles/arbitration/monday-morning-quarterback-what-labor-practitioners-can-learn-from-deflategate/> ("Employ-

pealed to the district court, Michael McCann, a sports law professor at the University of New Hampshire School of Law, outlined the potential claims and defenses.<sup>252</sup> Compared to the theories advanced by Adrian Peterson and Ray Rice, McCann characterized Brady's potential claims as structurally weaker and more amorphous.<sup>253</sup>

After the district court heard the case, Professor Michael H. LeRoy commented on the unusual nature of the NFLPA's arguments in labor law:

It really is exceptional how the federal courts have taken on the role of super-arbitrator of the N.F.L.'s disciplinary standards . . . Commissioners have traditionally been godlike authorities dating back to Judge Kenesaw Mountain Landis. The fact that you can go to court and get a judge to tell the commissioner what he can and can't do is extraordinary. It feels there are three parties at the bargaining table: the N.F.L., the union and the courts.<sup>254</sup>

Even lawyers and academics who gave credence to the NFLPA's unique due process argument admitted that federal courts would not be easily persuaded. In a 2015 article released prior to the district court's decision, Professor Marc Greenbaum stated:

Typically, the kinds of arguments that the union advanced in the pleading would not be considered by a federal district court judge. . . . But this is not a traditional labor arbitration. I know that they agreed that Goodell could hear the case, but that doesn't mean they waived any rights to some kind of fair and regular proceeding. . . . If the court accepts that argument, they might look at some of the other arguments with a little more scrutiny than they otherwise would.<sup>255</sup>

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ers must also recognize that even the best game plans cannot always anticipate the reaction of arbitrators, judges and juries – the ball can take an unexpected bounce.”); Michael Petitti, “Deflategate”: *Brady, the NFL, and a Primer in Labor Law*, AIKEN SCHENK (Aug. 2015), <http://www.ashrlaw.com/dox/petitti/deflategate.htm> (“Brady’s subsequent legal actions are limited, because the appeal was conducted pursuant to the CBA. His primary remedy is to convince a federal court to vacate his suspension on the grounds that the hearing process was improper.”).

252. Michael McCann, *What Will Happen if Brady, NFLPA Take Deflategate Suspensions to Court?*, SPORTS ILLUSTRATED (July 27, 2015), <http://www.si.com/nfl/2015/07/27/tom-brady-nflpa-deflategate-suspension-federal-court>.

253. *Id.*

254. Ken Belson, *Judge Erases Tom Brady’s Suspension; N.F.L. Says It Will Appeal*, N.Y. TIMES, Sept. 4, 2015, at A1 (quoting Professor LeRoy); see also LeRoy, *supra* note 1812 (criticizing Judge Berman’s decision in the Brady case as based on being a football fan, as Judge Berman ignored the *Trilogy* cases and *Garvey* while noting that Judge Berman had followed those cases in a previous and similar lawsuit not involving professional football players).

255. Ben Volin, *Legal Specialists Unwilling to Pick Winner in Brady Suit*, BOS. GLOBE (Aug. 1, 2015), <https://www.bostonglobe.com/sports/2015/08/01/tom-brady->

Greenbaum's statement acknowledged that, normally, federal courts reject outright the arguments made by the NFLPA.<sup>256</sup> However, he then predicted that the district court might engage with those arguments if it accepted the assertions about the arbitration's fundamental fairness.<sup>257</sup> This is precisely what happened—the district court concluded that portions of the arbitration were fundamentally unfair.<sup>258</sup> In reaching that conclusion, the court relied upon an impermissible analysis of precedent from past NFL arbitrations.<sup>259</sup>

Despite the wealth of opinions from experienced labor law attorneys and professors suggesting that Brady would lose on appeal, the *New York Times* reported that lawyers were split on what might happen.<sup>260</sup> However, the forcefulness of the opinions varied considerably. For example, Mark Conrad, sports law professor at Fordham University, argued that the appellate court might find a way to agree with the district court through the many procedural issues raised.<sup>261</sup> Tom Gies, a management-side labor lawyer, characterized the law as roughly supporting both sides.<sup>262</sup> However, he also stated that courts would likely reject arguments focused on the factual fairness of Brady's punishment, "even if the union's recitation adds additional color to its basic fairness argument."<sup>263</sup> Although newspapers were able to find lawyers to comment on arguments for both sides, the emphasis on the exceptional nature of the district court's decision resonated throughout many of the comments.

After the oral arguments, legal commentators continued to acknowledge that the rejection of the NFLPA's claims at the district court would have been the outcome most consistent with labor law.<sup>264</sup> The Second Circuit's decision treated the NFLPA's arguments more consistently with the expectations of labor lawyers based on precedent

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deflategate-challenge-won-easy-win-legal-specialists-say/FWP7jcyjRFYqphTTky2oTKN/story.html.

256. *See id.*

257. *See id.*

258. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 470 (S.D.N.Y. 2015) (finding that the arbitration failed to satisfy fundamental fairness), *rev'd*, 820 F.3d 527 (2d Cir. 2016).

259. *Nat'l Football League Mgmt. Council*, 820 F.3d at 547.

260. Belson, *supra* note 254.

261. *Id.*

262. Will Brinson, *Will Brady Win in Court? Labor Lawyer Outlines Each Side's Best Argument*, CBS SPORTS (Sept. 2, 2015), <http://www.cbssports.com/nfl/news/will-brady-win-in-court-labor-lawyer-outlines-each-sides-best-argument>.

263. *Id.*

264. *See, e.g.,* Hagey et al., *supra* note 145.



in *Steelworkers* and *Misco*.<sup>265</sup> One article cleverly noted that “[c]onfirmation of an arbitration award is like a conventional extra point after a touchdown—rarely missed.”<sup>266</sup>

A. *Collective Bargaining Supports the Rule of Law and Itself Provides Access to Justice*

The NFLPA has been somewhat successful in its approach to overcoming the characterization of merely being millionaires versus billionaires in its collective bargaining. Through its affiliation with the AFL-CIO, the NFLPA has tried to reframe its image as one of a powerful union that advances the goals of the average employee. However, the interests of the NFLPA and other unions do not always intersect; and the disciplinary challenges in the *Brady* and *Peterson* cases represent two such instances. By advocating for greater review of arbitration by federal courts, the NFLPA undermines arbitration as the preferred remedy under the NLRA.

Instead of fighting the results of the arbitration decision issued pursuant to the CBA, the NFLPA should seek to limit Goodell’s power through negotiating changes to its CBA.<sup>267</sup> Using arbitration as the final decision-making process pursuant to the CBA supports the rationale underlying the NLRA policy of promoting labor peace through voluntary resolution of labor disputes. Taking steps to support this NLRA rationale provides all employees equal access to justice in the workplace.

In a broad sense, “access to justice” refers to the concept that equal access to legal remedies for all people promotes peace through participation and confidence in the rule of law.<sup>268</sup> In other words, people will resolve conflicts through legal channels instead of through violence if they have confidence in those channels because access is

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265. *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 546 (2d Cir. 2016).

266. Hagey et al., *supra* note 145 (using the subheading “The Law in This Context Heavily Favors NFL Management”).

267. *See* Reece, *supra* note 9, at 408–12 (arguing that the NFLPA should have sought to change the Commissioner’s role in labor disputes when the CBA was subject to negotiations in 2010).

268. *See, e.g.,* Rhode, *supra* note 1, at 1785–1815 (discussing questions raised by the American ideal of having equal justice under law); *see also Necessary Condition: Access to Justice*, U.S. INST. OF PEACE, <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice> (last visited Nov. 3, 2016) (“Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.”).

equal to all members of society.<sup>269</sup> Various elements of a legal system—such as affordable legal representation, physical access to courthouses, capacity of judicial forums, public awareness of rights, or viability of alternative forums—serve as the criteria to measure a society’s access to justice.<sup>270</sup> When some members of society do not have equal access to those elements, the inequity can jeopardize peace by eroding confidence in the rule of law.<sup>271</sup>

Collective bargaining provides access to justice by giving employees a voice in the workplace.<sup>272</sup> By promoting industrial peace through collective bargaining and providing forums that honor that bargain, the NLRA instills confidence among workers in the fairness of their workplace.<sup>273</sup> Confidence in the legal structures that provides workplace fairness under the NLRA may then transfer to other aspects of workers’ lives, increasing confidence in the rule of law in society as a whole.<sup>274</sup> Collective bargaining therefore constitutes an important element of access to justice.<sup>275</sup>

Without collective bargaining for an arbitration process under the NLRA, most employees would be subject to the employment at-will doctrine.<sup>276</sup> The at-will doctrine constitutes the default rule in almost

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269. See *Necessary Condition: Access to Justice*, *supra* note 268 (“There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system.”).

270. *Id.*

271. *Id.*; see also *Access to Justice and Rule of Law*, UNITED NATIONS DEV. PROGRAMME, [http://www.undp.org/content/undp/en/home/ourwork/democratic-governance/focus\\_areas/focus\\_justice\\_law.html](http://www.undp.org/content/undp/en/home/ourwork/democratic-governance/focus_areas/focus_justice_law.html) (last visited Nov. 3, 2016) (emphasis omitted) (“The poor and marginalized are too often denied the ability to seek remedies in a fair justice system. UNDP promotes effective, responsive, accessible and fair justice systems as a pillar of democratic governance.”).

272. Cameron, *supra* note 2, at 227.

273. See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960) (“The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.”).

274. See Cameron, *supra* note 2, at 226–27 (suggesting that collective bargaining supports the rule of law, based on a strong correlation between countries with high rule-of-law indicators and high union density).

275. See *id.* at 217, 219, 231 (explaining that collective bargaining in a country strongly correlates with the indicators of access to justice, including respect of fundamental labor rights and accessible and impartial alternative dispute resolution systems).

276. Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 95–97 (2003) (describing how employer bargaining power prevents individual employees from changing their at-will status but having a union negotiate a CBA with an arbitration clause could level the bargaining playing field); see also Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV.

every jurisdiction in the United States.<sup>277</sup> Bargaining for an arbitration procedure provides union employees with the means to obtain just-cause standards for termination and due process.<sup>278</sup> Because the union and the employer operate on a relatively level playing field, the parties are able to obtain labor peace through mutually agreed upon terms.<sup>279</sup> Although employees are unable to bring successful claims that challenge an employer's actions in an at-will setting, the NLRA empowers employees to assert such claims as viable under a CBA.<sup>280</sup> Arbitration procedures therefore serve as a valuable benefit that employees stand to gain in exchange for giving up their right to strike.<sup>281</sup>

Labor arbitration, thus, is different from so-called "mandatory arbitration" in the employment context.<sup>282</sup> In the labor context, the classic *quid pro quo* is the arbitration clause for the right to strike.<sup>283</sup> In the employment context, mandatory arbitration is compulsory and provides an alternative to litigation.<sup>284</sup> Mandatory arbitrations have been the subject of much criticism regarding their effect on access to justice.<sup>285</sup> Many critics of mandatory arbitration in the employment con-

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947, 951–69 (1984) (arguing for the merits of the at-will doctrine); Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 459–63 (1995) (explaining that, although the United States is one of the few industrialized countries to provide no just-cause or due process protections to employees, the NLRA acts as one of the specific statutory exceptions to the at-will doctrine).

277. Hayford & Evers, *supra* note 276, at 459 (referring to Montana as the only state that has repudiated the at-will doctrine).

278. *See id.* at 459–63 (explaining that, although the United States is one of the few industrialized countries to provide no just-cause or due process protections to employees because of the at-will doctrine, the NLRA acts as one of the specific statutory exceptions to the at-will doctrine); *see also* Rachel Arnow-Richman, *Just Notice: Reforming Employment at Will*, 58 UCLA L. REV. 1, 10 n.23 (2010) (describing how "unions almost always seek and achieve just cause protection for workers" because individual employees do not have bargaining power to negotiate around the at-will system); Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 69 (2008) (referring to how collective bargaining under the NLRA allowing just-cause provisions to be negotiated has "restricted an employer's discretion to fire at-will").

279. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 14–15 (2015), <http://www.epi.org/publication/the-arbitration-epidemic>.

280. *See* Arnow-Richman, *supra* note 278, at 30; Porter, *supra* note 278, at 69.

281. Malin & Ladenson, *supra* note 175, at 1192, 1195.

282. STONE & COLVIN, *supra* note 279, at 14–15.

283. Malin & Ladenson, *supra* note 175, at 1192.

284. *Id.* at 1189 n.11, 1239.

285. *See* STONE & COLVIN, *supra* note 279 (discussing the lower win rate for employees in mandatory arbitration than in federal or state court and explaining that this

text point to the loss of procedural protections and less opportunity for legal representation as harms to access to justice in the workplace.<sup>286</sup>

By contrast, most employees and employers agree that labor arbitration works well for all parties.<sup>287</sup> Arbitration processes established by CBAs are the result of negotiations between roughly equal parties.<sup>288</sup> Each party has similar access to legal representation and the economic tools of strikes or lockouts under the NLRA.<sup>289</sup> Thus, the parties are able to engage in a negotiation to arrive at mutually agreeable terms, including the desired procedures and substantive rules.<sup>290</sup> Courts conduct a narrow review of arbitration to honor and promote these bargained-for terms.<sup>291</sup>

However, other scholars, along with the NFLPA, are pressing for new standards of fundamental fairness and due process within labor arbitration despite the fact that the parties have already bargained over terms.<sup>292</sup> For them, concerns about arbitrary actions by an arbitrator, without the opportunity to challenge those actions, threaten the entire

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gap in success leads to lower access to means to pursue any claims at all). *But see* Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1069 (1996) (distinguishing between the need for legal representation in court versus arbitration, especially given the difficulty of finding an attorney); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (describing difficulties for most plaintiffs in obtaining counsel in the court system).

286. STONE & COLVIN, *supra* note 2799, at 22 (explaining that lawyers are less likely to represent employees for claims in mandatory arbitration than for claims in litigation).

287. *Id.*; Zelek, *supra* note 28, at 207 (“grievance arbitration works well in the United States”).

288. Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 73 (2014).

289. *See* Malin & Ladenson, *supra* note 175, at 1191–92 (discussing ability to strike under the NLRA); Zachary Palva, *Why the NFL Should Re-Consider Goodell's Role as Judge, Jury, and Executioner*, FORDHAM SPORTS L.F. (Apr. 17, 2016), [http://fordhamsportslawforum.com/nfl/why-the-nfl-should-re-consider-goodells-role-as-judge-jury-and-executioner/#\\_edn31](http://fordhamsportslawforum.com/nfl/why-the-nfl-should-re-consider-goodells-role-as-judge-jury-and-executioner/#_edn31) (discussing the bargaining between the NFL and NFLPA as the NFLPA negotiated concessions to end the NFL's 2011 lockout that included giving the Commissioner “unlimited powers or adjudication” in exchange for “health and safety goals including limiting two-a-day practices”).

290. Colvin, *supra* note 288, at 75.

291. Malin & Ladenson, *supra* note 175, at 1192; *see also* Michael H. LeRoy, *The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining*, 86 TULANE L. REV. 859, 898–99 (2012) (discussing Congress's intent under the NLRA to uphold the bargain of the parties).

292. *See, e.g.*, Robert Boland, *Stop Digging: The Pitfalls of the NFL's Investigatory Procedures*, 39 AM. J. TRIAL ADVOC. 595, 606 (2016) (arguing the role of the Commissioner as arbitrator, when also acting as investigator and prosecutor, should be delegated to neutral third parties because of “numerous egregious violations of process and procedure”); *see also* Reece, *supra* note 9, at 306 (suggesting that process protec-

fabric of labor relations by not having a fair process.<sup>293</sup> According to their position, inherently biased arbitrators must not be allowed to ignore the parties' arguments and parties should not be "denie[d] recourse [when they] have suffered . . . the most egregious violations of due process."<sup>294</sup> These concerns may exist, as well as other worries, about "the utter weakness of American labor law" that operates within a "regime that has been ineffectual for 'ordinary' working people since at least the 1970s" and "has now become ineffectual for professional athletes."<sup>295</sup> However, these concerns do not justify making distinctions in how legal arguments about enforcing labor arbitrator decisions may be processed by the courts for professional athletes versus a typical worker.

Contrary to this position, questions of fundamental fairness and due process that are not based upon terms in the CBA raise concerns about violating the parties' chosen dispute resolution process of having the arbitrator make the final determination.<sup>296</sup> Additionally, in the

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tions should be negotiated into the NFL CBA by the NFLPA to protect arbitrary and biased decisions and to allow for outside arbitrators).

293. See Brief for U.S. Labor Law & Industrial Relations Professors as Amicus Curiae Supporting Petition for Panel Rehearing and Rehearing *En Banc* at 7, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (No. 15-2801) (asking "[w]hen parties agree to arbitrate, do they also agree to an arbitrary process where that arbitrator may . . . ignore generally accepted principles of industrial due process" and arguing that "parties will no longer be able to trust arbitration as a fundamentally fair process, thereby discouraging its use as a dispute resolution method that protects industrial peace"); see also Brief for Appellees National Football League Players Association and Tom Brady at \*1-8, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (No. 15-2801), 2015 WL 8464802, at \*60-61 (advocating for approval of district court decision in favor of Brady and asserting Goodell's decisions were fundamentally unfair and violated due process).

294. See *Group of 11 Law Professors File Latest Amicus Brief Supporting Tom Brady*, CBS Bos. (June 3, 2016), <http://boston.cbslocal.com/2016/06/03/group-of-11-law-professors-file-latest-amicus-brief-supporting-tom-brady> (describing law professors' amicus brief filed in support of Brady arguing that Goodell's decisions violated due process).

295. See Michael C. Duff, *What Brady v. N.F.L. Teaches About the Devolution of Labor Law*, 52 WASHBURN L.J. 429, 432-433 nn. 16 & 18 (2013).

296. Lippert Tile Co. v. Int'l Union of Bricklayers, 724 F.3d 939, 948 (7th Cir. 2013) (finding that review of arbitration decisions under a CBA and the LMRA is different than review under the FAA as "Section 301 review simply does not include a free-floating procedural fairness standard absent a showing that some provision of the CBA was violated"). In *Lippert*, the party who filed the grievance also sat on the arbitration board that heard the grievance. *Id.* at 948. In rejecting the argument of fundamental unfairness raised by the employer, the Seventh Circuit Court of Appeals stated: "We acknowledge it might seem unusual (at least to those outside the world of labor arbitration) to allow the filer of the grievance to sit on the panel that adjudicates it. If so, it is up to the parties to make sure the CBA prohibits it." *Id.* at 949.

case of the NFL CBA, the NFLPA negotiated safety measures for the players in exchange for allowing Goodell to retain broad discretion to sit as arbiter over certain cases.<sup>297</sup> If the NFLPA now desires to limit Goodell's power to serve as the final arbitrator, that issue can be addressed in the next CBA.<sup>298</sup> Instead of seeking to litigate around the process agreed to by the terms of the parties' current CBA, the NFLPA should seek to change the arbitration procedures that it does not approve of through collective bargaining and maintain the integrity of the NLRA—in other words, uphold the rule of law.

*B. The NFLPA's Unequal Access to Federal Court Creates an Equal Access to Justice Problem and Threatens the Rule of Law Under the NLRA*

While the NFLPA may have been seeking to support Tom Brady's best interest in challenging Goodell's authority under the CBA, the NFLPA's ability to obtain federal court review, where other unions cannot, represents a gap in access to justice. Additionally, if the NFLPA's challenges had been successful, those successes may have actually worked to the detriment of union members in ordinary-wage industries. Although the NFLPA has succeeded in some respects in getting away from the millionaire-versus-billionaire badge, this disparity in access to federal court harkens back to that divisive description.

The NFLPA obtained federal court review of the merits of arbitration-imposed discipline in the cases of *Brady* and *Peterson*.<sup>299</sup> Al-

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297. See Mark Heisler, *How NFL Players Gave Roger Goodell All That Power and Created a Monster*, FORBES (Sep. 3, 2015), <https://www.forbes.com/sites/markheisler/2015/09/03/how-nfl-players-gave-roger-goodell-all-that-power-and-created-a-monster/#71105e1c5682> (quoting former NFL player Jeff Saturday, who was part of the NFLPA executive board during the 2011 CBA negotiations with the NFL, stating that the NFLPA gave Goodell his unlimited power in exchange for broader safety concessions, including limiting two-a-day practices and hitting in practice, with the realization that only about "10 to 20 players are going to go [before] [Goodell] anyway . . . when you're talking about 2,000 guys voting on this and they're going to be in the league three or four years, they don't care . . . and they are not worried about the guys who do meet him").

298. See Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process, and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 53–54 (2012) (describing how many thought the NFLPA would take a stand on limiting Goodell's power as an arbitrator of discipline decisions under the personal conduct policy but realizing that the newest CBA beginning in 2011 made very little change to Goodell's powers, which he insisted upon retaining).

299. See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016); Nat'l Football League Players Ass'n v. Nat'l Football League, 88 F. Supp. 3d 1084

though typical unions are unable or unwilling to fund legal actions in federal courts, professional football players, represented by the NFLPA, have enjoyed greater access. There are several reasons that likely factored into the NFLPA's greater access to federal court—most of which are based on the NFLPA's greater financial resources. Whereas the median weekly earnings for union members in 2016 were \$1004,<sup>300</sup> the average NFL player makes approximately \$38,460 per week.<sup>301</sup> As a result, the NFLPA has employees with greater incomes than employees in other industries. Consequently, the NFLPA can charge significantly higher dues than unions in other industries.<sup>302</sup>

The NFLPA's treasury also benefits from “the union's enormous income from royalties paid to it for NFL paraphernalia under the collective bargaining agreement.”<sup>303</sup> In 2015, for example, the union's royalties were worth \$138 million.<sup>304</sup> Moreover, the NFLPA operates a business entity that creates profits from the licenses it owns.<sup>305</sup> These financial resources give the NFLPA a strong financial advantage over unions in traditional workplaces, which must rely on dues checkoff provisions as their primary source of funding.<sup>306</sup>

The NFLPA's excellent financial condition allows it to take on more legal challenges. The NFLPA spent over \$3.5 million on legal

(D. Minn. 2015), *rev'd and remanded sub nom.* Nat'l Football League Players Ass'n *ex rel.* Peterson v. Nat'l Football League, 831 F.3d 985 (8th Cir. 2016).

300. Press Release, Bureau of Labor Stat., U.S. Dep't of Labor, *supra* note 8.

301. See Kurt Badenhausen, *Average MLB Player Salary Nearly Double NFL's, But Still Trails NBA's*, FORBES (Jan. 23, 2015), <http://www.forbes.com/sites/kurtbadenhausen/2015/01/23/average-mlb-salary-nearly-double-nfls-but-trails-nba-players/#5653d8fb269e>. NFL players make the lowest average salary compared with athletes in other major professional sports leagues. *Id.*

302. See Joe Saraceno, *NFLPA Building Lockout War Chest by Increasing Player Dues by 50%*, USA TODAY (Sept. 22, 2009), <http://content.usatoday.com/communities/thehuddle/post/2009/09/nflpa-building-lockout-war-chest-by-increasing-player-dues-by-50/1#.WDlgi-ErJZ0> (reporting that the NFLPA increased dues from \$10,000 to \$15,000); see also Lester Munson, *NFLPA has Spent More than \$3.5 Million on Deflategate Legal Fees*, ESPN (July 28, 2016), [http://espn.go.com/nfl/story/\\_/id/17164081/nflpa-spent-more-35-million-deflategate-legal-fees](http://espn.go.com/nfl/story/_/id/17164081/nflpa-spent-more-35-million-deflategate-legal-fees).

303. Munson, *supra* note 302.

304. *Id.*

305. Maury Brown, *NFL Players, Inc. Could Be NFLPA's War Chest to Take On Goodell and Owners*, FORBES (Sept. 10, 2016), <http://www.forbes.com/sites/maurybrown/2016/09/09/business-of-nfl-players-inc-key-to-strengthening-players-weathering-strike-or-lockout/#5f4c257f62a8>.

306. See *Conducting Audits in Small Unions—A Guide for Trustees*, OFFICE OF LABOR-MGMT. STANDARDS, U.S. DEP'T OF LABOR, ch. 4, <https://www.dol.gov/olms/reg/compliance/smunion/smunions.htm#fig4> (last updated Apr. 22, 2014) (“Local unions receive most of their money from their members in the form of dues payments. A common method of paying union dues is through dues checkoff.”). See also *id.* at fig. 4.

fees in Brady's case, including around \$700,000 for Kessler's appeal.<sup>307</sup> This bigger war chest, in turn, allows the NFLPA to hire exceptional lawyers, from major firms that tend to represent employers. These lawyers make challenges to arbitration enforcement, which in an ordinary context might prevail only on the narrowest grounds. Due to its significant financial standing, the NFLPA seems to have a greater capacity to hire legal counsel who can pursue claims in federal court that most judges would never entertain.

CONCLUSION: TO ACHIEVE ACCESS TO JUSTICE, THE NFLPA  
SHOULD EFFECTUATE CHANGE OF GOODELL'S DECISIONS  
ON THE MERITS AT THE BARGAINING TABLE,  
NOT IN COURT

After viewing recent NFL cases, a typical citizen might believe that a union can easily question a labor arbitration's outcome on the merits. This result represents an access to justice issue as to how federal courts will consistently address initial challenges to individual disciplinary actions regardless of the affordable legal resources a particular union employee may be able to obtain. This Article concludes that it is in the best interest of both unions and employers for federal district courts to refrain from weighing in on the merits of disputes arising under a CBA. Further, courts should only look to see if the dispute cannot be resolved by interpreting the CBA and using the final dispute resolution process provided for in that agreement. Federal courts must also employ this narrow judicial review in high-profile sports labor disputes that could otherwise mislead the public and create a lack of justice perception for those union workers who cannot afford the legal resources that NFL players may obtain to challenge disciplinary actions in court.

By undermining the rationale for collective bargaining through overturning arbitration enforcement and giving judges the ability to assess the merits of a labor dispute, some courts have eroded the rule of law under the NLRA through giving the NFLPA unequal access to federal court. Typical hourly union members cannot obtain review of similar issues in federal court. Judges undermine the parties' good faith negotiations by ignoring bargained-for terms when they engage in substantive review of labor disputes. As a result, the rule of law under the NLRA is diminished. Further, the increased access to federal court obtained by wealthy professional athletes is more likely to be mimicked by wealthy employers in other contexts to the detriment

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307. Munson, *supra* note 302.



of typical low wage workers.<sup>308</sup> Thus, the NFLPA's unique ability to challenge arbitration enforcement creates a perception of an access to justice concern while also limiting the protection of the NLRA for ordinary employees in other industries who want to have their favorable arbitration awards enforced.

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308. *See, e.g.,* Lippert Tile Co. v. Int'l Union of Bricklayers, 724 F.3d 939, 948 (7th Cir. 2013) (dismissing employer's claim of fundamental unfairness even though union member who filed grievance was also on arbitration panel, given that the parties had agreed to these terms).