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The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration

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I.
INTRODUCTION

Labor arbitration became a central feature of labor-management relations in the United States some forty years before the widespread emergence of commercial arbitration during the 1980s. When the Supreme Court was setting the baseline for labor arbitration law *circa* 1960, the common law rule that executory agreements to arbitrate are not enforceable held sway. The Federal Arbitration Act ("FAA"),[1] which on its face rejects the common law rule by making agreements to arbitrate future controversies specifically enforceable, had been in effect for more than thirty years by the mid-1950s. However, the statute was moribund, so much so that it was not even mentioned in the majority opinions of the Supreme Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*[2] and the Steelworkers Trilogy.[3]

1. 9 U.S.C. §§ 1-307 (1994).
2. 353 U.S. 448, 456-57 (1957).
3. *See* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United

The dormancy of the FAA, along with the widespread hostility of the judiciary toward commercial arbitration at the time, propelled the Supreme Court to quarantine the law of labor arbitration from the remainder of arbitration law. The Court's search for a legal doctrine that would preserve the central role labor arbitration had assumed in the labor-management relations sphere led it to §301(a) of the Labor Management Relations Act.[4] ("LMRA"). Therein the Court perceived congressional sanction for the invention of a new body of federal common law to govern the labor arbitration process. The Supreme Court's decision to forsake the FAA and the traditional law of commercial arbitration resulted in the traditional belief that labor arbitration is special—a process apart—that merits legal treatment separate from commercial arbitration.

In the last sixteen years, the circumstances underpinning the Supreme Court's decision to segregate the law of labor arbitration from the law of commercial arbitration have largely evaporated. The FAA has been rediscovered and used by the Supreme Court as the touchstone for its enthusiastic embrace of commercial arbitration.[5] The Court's resounding rejection of the traditional judicial animus toward commercial arbitration, in tandem with clogged civil court dockets, has brought the process to the forefront of modern civil litigation.

The current judicial embrace of commercial arbitration under the imprimatur of the FAA and the widespread use of the process contrast starkly with the state of affairs extant at the genesis of the bifurcated legal regime for arbitration. Those changed circumstances are the catalyst for this inquiry. The analysis that follows attempts to ascertain if the long standing conventional wisdom that labor arbitration must be accorded legal treatment separate and apart from commercial arbitration and the FAA is still viable.

II.
THE FRAMEWORK FOR ANALYSIS

The determination of whether joinder of the law of labor arbitration and commercial arbitration makes sense turns on three primary inquiries. First, the labor arbitration process itself and the institutional role it serves in the contemporary world of labor-management relations must be carefully re-examined, with an eye toward the changed legal climate just described. The key question here is whether the "holy writ" set down by Justice

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Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); see also Edwin S. Hopson, *The Impact (Influence) of the Federal Arbitration Act on Litigation Over Arbitration*, 13 LAB. L.J. 359, 360 (1997).

4. 29 U.S.C. §301 (1988).

5. For a full analysis and discussion of this phenomenon see Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1-39 (1995).

Douglas in *Lincoln Mills* and the Steelworkers Trilogy—that labor arbitration is a process so distinct and unique that it must be accorded separate legal treatment[6]—was anything more than a convenient fiction made necessary by the legal environment of the late 1950s. The analysis below prompts the conclusion that the recent drastic change in the legal environment for commercial arbitration has effectively mooted the rationale for separating it from labor law.

Second, now that the law of commercial arbitration has matured to a state of relative equilibrium, it and the federal common law of labor arbitration must be described and juxtaposed. The goal here will be to ascertain whether there is enough similarity in the existing, distinct law of labor arbitration and commercial arbitration to provide the foundation for a cohesive, unitary body of "arbitration" law, centering on the FAA. This portion of the analysis reveals that in large part the contemporary law of labor and commercial arbitration—pertaining to federal preemption, enforceability of the arbitration agreement, and substantive arbitrability—have achieved sufficient symmetry to produce a *de facto* unification of American arbitration law. The analysis further shows that the remaining dimension of both bodies of law—that pertaining to the standards for vacatur of challenged arbitration awards—while not identical in their current configuration, do sound in very similar tones.

Third, because the two components of modern arbitration law are in substantial harmony, the primary issue becomes whether a model can be devised that both melds those elements of arbitration law and serves the best interests of both labor and commercial arbitration. Relying on §10(a) of the FAA, the article articulates a paradigm that, if implemented by the federal courts, would bring the current *de facto* unification of American arbitration law full circle by stabilizing the law of vacatur in both the labor and commercial venues.

The three threshold inquiries described above warrant the conclusion that merger of the law of labor arbitration and commercial arbitration into a single body of law under the FAA is feasible and advisable. Consequently, a final question arises. That question concerns the effect of the §1 FAA exemption from the Act's coverage for "contracts of employment."[7] The focus here will be whether collective bargaining agreements, and the labor arbitration mechanisms they establish, are excluded from the coverage of the FAA in a manner that bars unification of the law of labor arbitration and commercial arbitration under the FAA. This final inquiry leads to the

6. *See* Clyde W. Summers, *The Trilogy and Its Offspring Revisited: It's a Contract, Stupid*, 71 WASH. U.L.Q. 1021, 1024 (1993).

7. 9 U.S.C. § 1 (1994) (providing in relevant part that nothing in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce").

finding that, in the end, §1 of the FAA is unlikely to be interpreted to bar the courts from relying on the FAA in further fashioning and refining the law of labor arbitration.

III.
DISPELLING THE MYSTIQUE OF LABOR ARBITRATION

The romantic view of labor arbitration that arises from the words of Justice Douglas must be reconciled with the current legal reality. The perspective advocated here acknowledges that the changing legal milieu in which labor arbitration now resides demands that the judiciary and those committed to the process not cling to outdated, unnecessary fictions that may have outlived their usefulness.

A. The Supreme Court's Response to The Legal Environment at Mid-Century

By the mid-1950s, binding arbitration provisions were included in 90-95% of collective bargaining agreements in the United States.[8] Building on the National War Labor Board experience, during the post-World War II years labor arbitration proved itself so competent a mechanism for resolving the contract-based disputes between unions and employers that it was viewed as the cornerstone of the national labor policy under the LMRA.

Because labor arbitration had assumed such a central role in the national labor policy, a way had to be devised to preserve that well-functioning mechanism in the face of a very antagonistic, anti-arbitration attitude among the federal and state judiciaries. This is the essential thread running through *Lincoln Mills* and the Steelworkers Trilogy—the belief that it was necessary to elevate labor arbitration and labor arbitrators to an "exalted status" that justified treating the process as a thing apart from commercial arbitration, which the courts so strongly disfavored.[9]

Thus, in *Lincoln Mills* the Supreme Court focused on §301(a) of the LMRA and divined therein an implied rejection of the rule of *Red Cross Lines v. Atlantic Fruit Co.*,[10] which established that executory agreements to

8. *See* ARCHIBALD COX, LAW AND THE NATIONAL LABOR POLICY 64-65 (1960) (citing Robert Howard, *Labor-Management Arbitration*, 21 MO. L. REV. 1, 4 (1956)). *See also* Charles O. Gregory, *Enforcement of Collective Agreements by Arbitration*, 48 VA. L. REV. 883, 886 (1962).

9. *See* David E. Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 BERKELEY J. EMP. & LAB. L. 296, 300-01 (1998).

10. 264 U.S. 109, 120-21, (1924), *cited in* Lincoln Mills of Ala. v. Textile Workers Union of Am., 230 F.2d 81, 84 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1956) ("In the absence of statute [sic] it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced. . . . If there be a right to specific performance of an arbitration provision in a collective bargaining agreement we must find it in an act of Congress.").

arbitrate are unenforceable as a matter of law.[11] Four years later, in *United Steelworkers of America v. American Manufacturing Co.*,[12] the Court distanced labor arbitration from the "crippling" rule of the *Cutler-Hammer* doctrine—that only contractual claims deemed meritorious by a court are embraced within the contractual agreement to arbitrate future disputes.[13] It did so by describing that rule and similar anti-arbitration pronouncements by the judiciary as based on a "preoccupation with ordinary contract law" and emphasizing its belief that because of the binding arbitration-no strike promise *quid pro quo* inherent in labor-management arbitration agreements, "[t]he collective agreement requires arbitration of claims that courts might be unwilling to entertain."[14]

United Steelworkers of America v. Warrior & Gulf Navigation Co.[15] drew a similar but more emphatic distinction between the proper rules for deciding enforceability and substantive arbitrability matters under the new federal common law of labor arbitration authorized by §301(a) of the LMRA and "the run of [commercial] arbitration cases, illustrated by *Wilko v. Swan*."[16] The Court deemed the strong anti-arbitration principles and the judicial suspicion and mistrust of arbitrators in the commercial sphere that characterized *Wilko* "irrelevant" to the federal common law of labor arbitration.[17]

In explaining its view of labor arbitration and commercial arbitration as distinct and separate processes the Supreme Court described the disparate functions served by each alternative dispute resolution device:

> [In commercial arbitration] the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here [in the labor-management sphere] arbitration is the substitute for industrial strife.[18]

Because of the "quite different functions" served by labor arbitration vis-à-vis commercial arbitration, the Court concluded, "the hostility evinced by courts toward arbitration of commercial agreements has no place [with regard to labor arbitration]."[19]

This analysis need not delve much further into Justice Douglas's

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11. *See Lincoln Mills*, 353 U.S. at 456-57.
12. 363 U.S. 564 (1960).
13. This doctrine was first articulated in IAM v. Cutler-Hammer, 74 N.E.2d 464 (N.Y. 1947).
14. *Id.* at 567 (rejecting the *Cutler-Hammer* rule).
15. 363 U.S. 574, 578 (1960).
16. *Id.* at 578 (citing Wilko v. Swan, 346 U.S. 427 (1953)).
17. *Id.*
18. *Id.*
19. *Id.*

rhetoric in *Warrior & Gulf*. In short, that opinion reflected the Supreme Court's belief that the "inclusion of a provision for arbitration of grievances in the collective bargaining agreement" had become a "major factor" in the federal policy "to promote industrial stabilization through the collective bargaining agreement."[20] For that reason, in *Warrior & Gulf* the Supreme Court was propelled to draw a bright line of demarcation between labor arbitration and commercial arbitration in order to preserve and nurture the former process and insulate it from the destructive doctrines that dominated commercial arbitration law at the mid-twentieth century mark.

The third piece of the Steelworkers Trilogy—*United Steelworkers of America v. Enterprise Wheel & Car Corp.*[21]—says little about the distinction between labor arbitration and commercial arbitration. In setting the baseline for judicial review of challenged awards, the *Enterprise Wheel* opinion paid considerable homage to the "indispensable" role played by labor arbitrators in the resolution of disputes as to the interpretation and application of collective bargaining agreements.[22] However, in articulating the "no review on the merits/essence from the agreement" principles of labor arbitration vacatur law that would become the core principle of labor arbitration vacatur law, the Court drew no distinction between arbitration in the labor and commercial sectors.[23]

B. Institutionalization of the Bifurcated View of Arbitration

In the Steelworkers Trilogy the Supreme Court sent the federal and state judiciaries a very strong message that the anti-arbitration principles which had hobbled commercial arbitration for decades had no application in the labor arbitration sphere. The post-Steelworkers Trilogy line of cases added nothing to the premises upon which the isolation of labor arbitration law is founded.[24] Instead the Supreme Court continued to build upon the presumption that the law of labor arbitration was to be constructed out of whole cloth, under the vague directive of §301(a) of the LMRA and without

20. *Id.* at 577-78, 1350.

21. 363 U.S. 593 (1960).

22. *Id.* at 596-97.

23. *Id.* at 596-99.

24. The remaining five Supreme Court opinions that constitute the core of the federal common law of labor arbitration make no explicit reference to commercial arbitration law. In turn, those opinions addressed the issues of the preemptive effect of the federal common law of arbitration sanctioned by §301(a) of the LMRA (Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)); the criteria for judicial decision of substantive arbitrability matters (AT&T Technologies v. Communication Workers of America, 475 U.S. 643 (1986)); and the standards for vacatur of labor arbitration awards under the "essence from the agreement" and the "public policy" constructs (W.R. Grace & Co. v. Local Union No. 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983); United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987)).

substantial reliance on the FAA.

Over the years, labor arbitrators and legal scholars became very comfortable with the fiction created by the Supreme Court in *Lincoln Mills* and the Steelworkers Trilogy. It was believed that labor arbitration and labor arbitrators are unique, imbued with a special kind of "right stuff" that could be preserved only if both were accorded special, separate treatment under the law. The FAA was presumed to be inapposite to labor arbitration.

Until the early 1980s there was no good reason to question the Supreme Court's decision to ignore the FAA and divide arbitration law into two separate and distinct houses. In fact, because of the generally antagonistic attitude of the federal and state judiciaries toward arbitration outside the labor-management venue, that bifurcation was the only viable means for securing labor arbitration's essential role under the national labor policy. Consequently, even if the process and the neutrals who made it work did not deserve the exalted status to which they were both elevated by the Supreme Court, the goal that rhetoric was meant to achieve was a worthy and necessary one.

C. The Legal Legitimization of Commercial Arbitration

The recent sea change in the Supreme Court's attitude regarding commercial arbitration drastically altered the playing field of arbitration law in the United States. In a remarkable series of fourteen opinions handed down since 1983 the Court stood the law of commercial arbitration on its ear, throwing out the long-standing common law rule that executory agreements to arbitrate are not enforceable and emphatically rejecting the run of anti-arbitration cases exemplified by its 1953 opinion in *Wilko v. Swan*.[25]

In place of that old doctrine, the Supreme Court has substituted a body of commercial arbitration law centered on the strong pro-arbitration policy it now believes to be embodied in the FAA. The Court's robust embrace of the commercial arbitration process and the concomitant determination to build a legal framework that encourages its use has produced pro-arbitration pronouncements no less forceful than the homilies spoken in praise of labor arbitration by Justice Douglas four decades ago.

By removing the legal impediments to the enforcement of commercial arbitration agreements and consistently interpreting the FAA in a manner that encourages use of that alternative dispute resolution device, the Supreme Court has effectively eliminated the original justification for walling off the law of labor arbitration. This new dynamic, the changed context in which labor arbitration law now resides, raises an important

25. 346 U.S. 427 (1953).

question. Do the process of labor arbitration and the parties it serves still benefit by their isolation from the developing body of substantive arbitration law now emerging under the sanction of the strong pro-arbitration public policy of the FAA? I would argue that the answer is "No."

A very important point must be made here. Dispensing with the fiction relied upon by Justice Douglas to rationalize the creation of a new, distinct body of pro-arbitration law does not imply rejection of all of the good things he said about the process and the labor arbitration profession. The exercise suggested here need not detract from or diminish the essential role labor arbitration plays in the maintenance of labor peace. All that is required is acknowledgement of the fact that the legal environment that propelled the Supreme Court to wax so eloquent regarding labor arbitration in the course of quarantining it from commercial arbitration law no longer exists. If engaging reality in that manner dispels the mystique that for so long has surrounded the process without destroying the essence, effectiveness, and standing of labor arbitration, a door will be opened to a new era of labor arbitration law. The remainder of this analysis explains why and how that result is achievable.

IV.

THE CONTEMPORARY LEGAL PLAYING FIELD: A JUXTAPOSITION OF LABOR AND COMMERCIAL ARBITRATION LAW

The preceding commentary serves to frame the question at the core of this inquiry—whether the recently developed strong pro-arbitration posture of the Supreme Court outside the labor arbitration sphere has eliminated the need for two separate bodies of arbitration law. The answer to the question lies largely in a juxtaposition of the current law of labor arbitration and commercial arbitration.

Careful evaluation of modern arbitration law in both the labor and commercial spheres reveals its primary focuses:

- the preemptive effect of relevant federal law;
- the enforceability of agreements to arbitrate;
- substantive arbitrability—the criteria for decision and identity of the decisionmaker; and
- the standards for vacatur of arbitration awards.[26]

26. Three dimensions of the law pertaining to labor arbitration are not analyzed here because they do not raise issues pertinent to the question of whether unification of the law of commercial arbitration and labor arbitration is advisable and feasible. The first is the National Labor Relations Board's policy of deferring to arbitration in certain contract-based disputes that also touch upon unfair labor practice matters arising under the LMRA. *See* Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); Speilberg Mfg. Co., 112 N.L.R.B. 1080 (1955). The second concerns the duty of fair representation accruing to

In both the labor and commercial fields, identification of a strong pro-arbitration federal public policy that preempted contrary state law and co-opted anti-arbitration state and federal judges was the essential predicate to the fashioning of a coherent, viable body of arbitration law. The issues of enforceability of the agreement to arbitrate and substantive arbitrability arise at the front end of the arbitration process. Thus, they are labeled "front-end" issues. The issue of vacatur arises at the terminus of the arbitration process. Accordingly, it is labeled as the "back-end" issue in the law of arbitration.

Set forth below is a description and comparison of the key elements of modern labor and commercial arbitration law. The goal is to determine whether there is sufficient symmetry between the two upon which to found a unitary, singular body of law governing both processes.

A. The Essential Predicate—Federal Preemption

The paths followed by the Supreme Court in concluding that federal law preempts contrary state law in both the labor arbitration and the commercial arbitration venues had very different origins.

1. Labor Arbitration Law

Having chosen to distance labor arbitration from the existing law of commercial arbitration and at the same time ignore the FAA, the Supreme Court was left with no concrete statutory rules or definitive common law statements of a pro-arbitration public policy. Consequently, it was obliged to authorize the manufacture of a body of "federal common law" of labor arbitration. That was the Court's mission in *Lincoln Mills*.

The focus of *Lincoln Mills* was on §301(a) of the LMRA, which on its

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exclusive representative unions to advocate the interests of their constituent bargaining unit members without regard to their race, color or other protected group status. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). The third subset of the law of labor arbitration not addressed in depth here speaks to the question of whether employees who claim their statutory fair employment practice rights have been violated can assert those claims in federal or state court, even though they have been previously decided under the binding arbitration provisions of the collective bargaining agreements that cover those employees. *See* McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co, 415 U.S. 36 (1974).

None of these three components of the law of labor arbitration speaks in any manner to the core issues of federal preemption, enforceability of the agreement to arbitrate, substantive arbitrability, and vacatur. Of the three, only the last is of even tangential significance to this analysis. That limited significance is found in a comparison of this body of labor arbitration law with the parallel strains of commercial arbitration law addressing the enforceability of agreements to arbitrate, claimed violations of fair employment practices law, and the competence of the arbitral forum to decide such matters. *See* Gilmer v. Interstate /Lane Johnson, 500 U.S. 20 (1991).

face does nothing more than establish that suits for violation of collective bargaining agreements can be brought in the federal district courts.[27] At the outset of its substantive analysis, the Court, in an opinion authored by Justice Douglas, identified the critical question before it to be "whether §301 is more than jurisdictional" (i.e., does it do anything more than create subject matter jurisdiction in the federal courts for suits to enforce collective bargaining agreements?).[28] In the "cloudy and confusing" legislative history of §301 the Court discerned "a few shafts of light" that illuminated its inquiry.[29] Most significantly, the Court found evidence that Congress considered "[s]tatutory recognition of the collective [bargaining] agreement as a valid, binding, and enforceable contract [to be] a logical and necessary step" in the promotion of industrial peace and responsible behavior by employers and unions.[30]

Building on its reading of the relevant legislative history, and extrapolating from the broader issue of the enforceability of collective bargaining agreements to the narrower question of the enforceability of the binding arbitration provisions contained in collective bargaining agreements, the Court concluded:

> Plainly the [employer's] agreement to arbitrate grievance disputes is the *quid pro quo* for [the union's] agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.[31]

In this manner, the Supreme Court in *Lincoln Mills* discovered in §301(a) sweeping authorization to fashion a body of federal law pertaining to the enforcement of collective bargaining agreements and the arbitration

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27. Section 301(a) provides in relevant part:

> 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.

29 U.S.C. §301(a) (1988).

28. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 452 (1956); see also Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 459-61 (1954). In *Westinghouse*, in a convoluted holding consisting of three separate opinions, the Supreme Court dodged the question of whether Congress intended §301(a) to make collective bargaining agreements enforceable. Instead, focusing on a narrowly drawn aspect of the jurisdictional dimension of the provision, the Court held that §301(a) did not authorize unions to bring suit in federal court to enforce the personal benefits and rights accorded bargaining unit employees (as individuals) by collective bargaining agreements, and concluded that by including §301(a) in the LMRA "Congress did not intend to burden the federal courts with suits of this type."

29. *Lincoln Mills*, 353 U.S. at 452.

30. *Id.* at 454.

31. *Id.* at 455.

provisions they incorporate. The belief that this body of pro-arbitration law should preempt contrary state law is founded on the central role the labor arbitration process plays in effecting the national labor policy of ensuring labor peace, amplified by the Supreme Court's abiding belief in the substantial skills and abilities of labor arbitrators.

Having granted itself license to flesh out the pro-arbitration public policy it identified in §301(a), the Supreme Court proceeded in short order to define the reach of the federal common law of labor arbitration and the role of the state courts in effecting it. In two 1962 opinions—*Charles Dowd Box Co. v. Courtney*,[32] and *Teamsters Local 174 v. Lucas Flour*[33]—the Court established that while state courts can decide suits concerning labor arbitration agreements, in doing so they are obliged to apply federal law, where such law exists.

Despite the vague and arguably dubious foundation provided by §301(a) of the LMRA, the rule of federal preemption is complete in the labor arbitration realm. State courts may (along with federal courts) decide matters pertaining to the enforcement of labor arbitration agreements, substantive arbitrability, and vacatur of labor arbitration awards. However, such matters must be decided under federal law. State law principles, whatever their origin, that conflict with the strong pro-arbitration policy discerned by the Supreme Court to reside in §301(a) of the LMRA are preempted by the federal common law of labor arbitration sanctioned by the Act.

2. *Commercial Arbitration Law*

Unlike labor arbitration, for which the rule of preemption was essentially manufactured from whole cloth, the touchstone for federal preemption in commercial arbitration is a federal statute specifically focused on arbitration—the Federal Arbitration Act. Nevertheless, careful evaluation of the manner in which the Supreme Court went about determining the FAA to be preemptive of conflicting substantive state law reveals a no less creative approach than it employed in the labor arbitration venue. Like §301(a) of the LMRA, the FAA was viewed by many, including several Supreme Court Justices, as strictly jurisdictional in nature—intended by Congress to do nothing more than establish the jurisdiction of the federal courts to hear suits for enforcement of agreements to arbitrate between parties of diverse citizenship.[34]

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32. 368 U.S. 502 (1962).

33. 369 U.S. 95 (1962).

34. *See* Southland Corp. v. Keating, 465 U.S. 1, 22-23 (1984) (O'Connor, J. dissenting) (asserting that the "clear congressional intent underlying the FAA" was "to require federal, not state, courts to

Beginning in 1984 with *Southland Corporation v. Keating*,[35] the Supreme Court in a series of opinions swept aside this jurisdictional reading of the FAA. Like all of the commercial arbitration preemption cases, *Southland* centers on the conflict between the pro-arbitration policy of the FAA and an anti-arbitration state statute. *Southland's* analysis of this issue opens with a citation to the statement in the Court's seminal 1983 opinion, *Moses Cone Memorial Hospital v. Mercury Construction Corp.*,[36] that the purpose of the FAA is to ensure that "parties to an arbitrable dispute [move] out of court and into arbitration as quickly and easily as possible."[37] The Court observed further that: "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate."[38]

In *Southland*, the Supreme Court found a conflict between the California Supreme Court's interpretation of the California Franchise Investment Law as guaranteeing claimants under the statute access to a judicial forum and §2 of the FAA, which makes agreements to arbitrate within in its reach enforceable.[39] In the course of so holding, the Court stated:

> In enacting §2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.... Congress has thus mandated the enforcement of arbitration agreements.[40]

Pointing to its earlier opinion in *Prima Paint Corp. v. Flood & Conklin*,[41] the Court next averred: "[t]he statements of the Court in *Prima Paint* that the [Federal] Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to

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respect arbitration agreements."); see also IAN R. MACNEIL, AMERICAN ARBITRATION LAW, 139-47 (1992) (objecting strenuously to the "bizarre transformation" of the FAA from a procedural statute applicable only in the federal courts to a "regulatory federal statute superseding state law" and governing in federal as well as state courts).

35. 465 U.S. 1 (1984).

36. 460 U.S. 1 (1983).

37. *Southland*, 465 U.S. at 10 (quoting *Moses Cone*, 460 U.S. at 22).

38. *Id.*

39. Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994).

40. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

41. 388 U.S. 395 (1967).

apply in state as well as federal court."[42] Next, relying on the assertion in *Moses Cone* that the FAA "creates a body of federal substantive law" as implying that the law established by the Act is applicable in the state and federal courts, the *Southland* opinion goes on to confirm the view that the issue of the arbitrability of the California law claim in dispute was "a question of substantive federal law . . . that governs that issue in either state or federal court."[43]

The remainder of the majority opinion in *Southland* analyzes the legislative history of the FAA, finding therein clear indication that Congress intended the rule making otherwise valid contractual agreements to arbitrate enforceable to have a broad reach, unencumbered by state-law constraints.[44] The Court identified two problems enactment of the FAA was intended to resolve: (i) the old common law hostility toward arbitration; and (ii) the failure of state arbitration acts to require the enforcement of contractual agreements to arbitrate.[45] It then opined that confining the reach of the substantive law created by the FAA to the federal courts would frustrate the intent of Congress to fashion a statutory scheme that would ameliorate those two significant problems.[46]

The Supreme Court has addressed issues of the FAA-state law interface on three occasions in the years since *Southland*—in *Perry v. Thomas*,[47] *Allied-Bruce Terminix Cos., Inc. v. Dobson*,[48] and *Doctor's Associates Inc. v, Casarotto*.[49] *Southland*, *Perry*, *Terminix*, and *Casarotto* speak in one very clear voice regarding the interface between the FAA and state arbitration law. The substantive law of commercial arbitration is that set out in the Federal Arbitration Act. The Court has repeatedly confirmed its position that the FAA's broad pro-arbitration policy extends to the full reach of Commerce Clause authority and reiterated its belief that state courts are obliged to apply that federal law, even in the face of contrary state statutory or case law. These four preemption opinions also signal that the Supreme Court will not tolerate efforts by the state legislatures or judiciaries to undermine the clear purpose of the FAA—the enforcement of contractual agreements to arbitrate. The rules that govern enforcement of commercial arbitration agreements under state law must be the same rules applied in enforcing all contracts.[50]

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42. *Southland*, 465 U.S. at 12.
43. *Id.*
44. *See id.* at 13-14.
45. *See id.* at 14.
46. *See id.*
47. 482 U.S. 483 (1987).
48. 513 U.S. 265 (1995).
49. 517 U.S. 681 (1996).
50. Because they are not germane to this dimension of the juxtaposition of the law of preemption

3. *The Federal Role Secured*

Stabilization of the relevant law of labor arbitration and commercial arbitration was possible only if that law could evolve unencumbered by interference from the states, whose courts and legislatures had often been openly anti-arbitration. The strong pro-arbitration public policy perceived by the Supreme Court in §301(a) of the LMRA and in the FAA serves that purpose by effectively "trumping" inconsistent state law. The role left for the states is twofold. Where the federal law is clear—at the front end and back end of the arbitration process—state arbitration law can only mimic the federal standards. Where the law is incomplete or unclear, due to the relatively narrow focus of the FAA and the federal common law of labor arbitration on matters arising at the front end and the back end of the arbitration proceeding, the states are free to fill the gaps left by federal law.[51]

That the Supreme Court established so pervasive a rule of federal preemption in the absence of any clear indication in the language or legislative history of the LMRA or the FAA that Congress intended either statute to preempt contrary state substantive law is remarkable. By facilitating the creation of a single body of preemptive federal law in both labor and commercial arbitration, the Court established the baseline for unification of arbitration law.

B. *The "Front-End" Issues—Enforceability and Substantive Arbitrability*

In general terms, a party seeking to enforce a contractual arbitration provision must both (i) prove the existence of a valid agreement to arbitrate to which the individual resisting enforcement knowingly and voluntarily consented; and (ii) establish that the substantive matter in dispute is within the scope of that arbitration agreement. An enforceable, valid arbitration agreement is meaningless within the context of a particular dispute absent proof that the subject matter of the controversy is substantively arbitrable—i.e., the parties mutually understood the arbitration mechanism to embrace the issue. This melding of the enforceability and substantive arbitrability

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in labor and commercial arbitration, this section will not discuss the two Supreme Court opinions establishing the contract-based caveat to the broad rule of FAA preemption. Those opinions, *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), are the subject of comment in Section V of the analysis.

51. The current effort underway by the National Conference of Commissioners on Uniform State Laws to revise the Uniform Arbitration Act is premised on this view of the role of state law. The Revised Uniform Arbitration Act ("RUAA") will provide the states with a framework for regulating the arbitration process with regard to issues not preempted by federal law. Among the issues of this nature that will be addressed by the RUAA are arbitrator disclosure of potential conflicts of interest, arbitrator immunity, discovery and related aspects of pre-hearing procedure, and punitive damages.

determinations is the most salient characteristic of arbitration law pertaining to the front-end issues of enforceability and substantive arbitrability.

1. Labor Arbitration Law

The labor arbitration bargain is domiciled within the collective bargaining agreement, which, pursuant to §301(a) of the LMRA, is enforceable as a matter of law against the employer and the union. The contractual relationship between the majority representative union and the employer that gives rise to the collective bargaining agreement is non-consensual.[52] It results from the selection of the union as the majority representative of the employees in the bargaining unit and the parties' concomitant statutory duty to bargain collectively in good faith with one another. It almost certainly was for this reason that in its three primary enforceability/substantive arbitrability opinions, *American Manufacturing*,[53] *Warrior & Gulf*,[54] and *AT&T Technologies v. Communications Workers of America*,[55] the Supreme Court effectively presumed that arbitration provisions contained in collective bargaining agreements are valid—without exploring any of the conventional doctrines of contract law pertaining to the enforceability of contracts.

In *American Manufacturing*, instead of an enforceability framework centering on the question of whether a particular arbitration agreement is the product of a voluntary and knowing agreement to arbitrate, the Court relied on the strong pro-arbitration public policy articulated in §203(d) of the LMRA.[56] It observed that public policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."[57] The Court then summarily swept aside anti-arbitration contract law principles such as those reflected in the *Cutler-Hammer* doctrine.[58] By doing so, it cleared the way

52. *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 550 (1964) ("Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that is not in any real sense the simple product of a consensual relationship.").

53. 363 U.S. 564 (1960).

54. 363 U.S. 574 (1960).

55. 475 U.S. 643 (1986).

56. In *American Mfg.*, 363 U.S. at 566, the court cites and discusses §203(d) of the LMRA, 29 U.S.C. §173(d)(1988). Section §203 (d) reads:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

57. *American Mfg.*, 363 U.S. at 566.

58. *See id.* at 567.

for a rule whereby labor arbitration agreements are presumed to be valid and enforceable as a matter of national labor policy.

The *American Manufacturing* opinion then proceeded to define the role of the courts in effecting that dimension of the national labor policy, switching to a substantive arbitrability mode of analysis. It observed that when, as is true in "standard form" (broad scope) arbitration clauses, the parties have agreed to submit all questions of contract interpretation to arbitration, the role of the courts is "confined to ascertaining whether the party seeking arbitration is making a claim which is on its face governed by the contract."[59] The opinion concludes by emphasizing that in such circumstances the labor arbitration agreement must be enforced in order that the party seeking to compel arbitration not be deprived of its bargain for the arbitrator's judgment.[60]

In *Warrior & Gulf*, the Court reiterated its view of labor arbitration as the touchstone of the national labor policy, observing that "a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."[61] Next, as it had in *American Manufacturing*, the Court addressed and dismissed as inapposite in the labor arbitration forum the strongly anti-arbitration tones of its 1953 opinion in *Wilko v. Swan*.[62] Noting the "quite different functions" served by labor arbitration vis-à-vis commercial arbitration, the Court concluded, "the hostility evinced by courts toward arbitration of commercial agreements has no place here."[63]

The Court then engaged in a lengthy and oft-quoted soliloquy praising the special role served by labor arbitrators and the unique skills set they bring to bear in facilitating the effective functioning of the "system of industrial self government" created by the collective bargaining agreement and fashioning the "common law of the shop."[64] Again, as it had in *American Manufacturing*, the Court shifted to a substantive arbitrability mode of analysis, stating that "arbitration is a matter of contract and a party cannot be required to submit to arbitration and dispute he has not agreed to so submit."[65]

Juxtaposing this principle with the pro-arbitration policy reflected in §203(d) of the LMRA, the Court made clear that "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" an order to arbitrate must

59. *Id.* at 567-68.
60. *See id.*
61. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).
62. 346 U.S. 427.
63. *Warrier & Gulf*, 363 U.S. at 578.
64. *Id.* at 579-82.
65. *Id.* at 582.

issue, and emphasized that "[d]oubts should be resolved in favor of coverage."[66] It concluded by observing in a footnote that "the question of [substantive] arbitrability is for the courts to decide" and clarified that when such a question is raised, its proponent bears the burden of clearly demonstrating that the parties mutually intended to exclude the matter at issue from their agreement to arbitrate.[67]

The Supreme Court's 1986 opinion in *AT&T Technologies* cogently summarizes and then applies the four "principles" of *American Manufacturing* and *Warrior & Gulf*:

> "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit."
>
> The "question of [substantive] arbitrability . . . is undeniably an issue for judicial determination."
>
> In deciding substantive arbitrability matters, the courts are not to rule on (or touch upon) the merits of the underlying grievances.
>
> In deciding substantive arbitrability, there is a strong presumption of arbitrability, in that arbitration should be not be denied unless it can be positively said that the matter in dispute is not covered by the contractual arbitration clause.[68]

In concert, the first two principles drawn from the Steelworkers Trilogy reveal several things. It is clear that the Court sees labor arbitration as a matter of contract. Consequently, enforceability determinations turn on the scope of issues the parties have agreed will be subject to resolution by arbitration. The arbitration agreement is enforceable only with regard to issues falling within the scope of that agreement.[69]

Consistent with the contractual view of labor arbitration, the Court also believes that, unless the parties agree otherwise, determination of substantive arbitrability is a matter for judicial, not arbitral, determination.[70] This is so because the arbitrator has no authority unless the issue sought to be arbitrated is embraced by the parties' contract. Accordingly, it is appropriate for a court to decide, in the first instance, if the arbitrator has been contractually authorized to decide the matter in controversy.[71] This is so because the arbitrator cannot properly be assigned the task of ascertaining her own jurisdiction.

The third principle identified in *AT&T Technologies* holds that in

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66. *Id.* at 582-83.

67. *Id.* at 583 n.7.

68. AT&T Techs. v. Communications Workers of Am., 475 U.S. 643, 648-50 (1986).

69. *See id.* at 648-49 (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

70. *See id.* at 649 (also citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)).

71. *See id.*

deciding substantive arbitrability matters the courts are not to intrude upon the merits of the underlying claim in arbitration.[72] Thus, a court's assessment of the viability of the substantive merit of a grievance cannot be a factor in determining its arbitrability. Finally, the Court noted the rule of presumptive arbitrability whereby "positive assurance" that a dispute is not captured by the contractual arbitration clause is required before it can properly be deemed inarbitrable. Close calls must be decided in favor of arbitration.[73]

The Supreme Court's treatment of the "front-end" issues of enforceability and substantive arbitrability in labor arbitration directs the judicial inquiry in such cases toward a single question of contract law: "whether the [party resisting arbitration] agreed to arbitrate a particular dispute."[74] Permitted to forego the question of whether the agreement to arbitrate is consensual, the Court created an analytical framework that blurs the line between enforceability and substantive arbitrability, invariably focusing on the latter question. The arbitration agreement is presumed to be valid and is enforced with regard to a particular grievance if the issue it presents is within the scope of the arbitration bargain. The subsequent analysis will reveal the same dynamic at play in the law of commercial arbitration.

2. *Commercial Arbitration Law*

In the commercial sector, the agreement to arbitrate has a significant consensual element. Like §301(a) of the LMRA, §2 of the FAA makes arbitration agreements within its reach enforceable as a matter of federal substantive law. However, unlike labor arbitration, the commercial arbitration agreement is not the product of a statutory mechanism that compels the parties to form a contractual relationship. Instead, the arbitration bargain is enforceable only if the party seeking enforcement can demonstrate that it was the product of a voluntary and knowing agreement between the parties.

The Supreme Court has never been obliged to address expressly the issue of consent within the context of a challenged commercial arbitration agreement.[75] Nevertheless, it is clear that the Court believes the dimensions

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72. *See id.*

73. *Id.* at 650.

74. *Id.* at 652-66 (Brennan, J., concurring); *cf.* Summers, *supra* note 6, at 1027 (asserting that lack of an articulated "contractual framework" for analysis in the Steelworkers Trilogy, coupled with the extensive description of the role and exalted station of labor arbitrators has obscured the "underlying contract principles" upon which those opinions rest).

75. In a line of cases that are part of the modern, post-1982 law of commercial arbitration, the Supreme Court spoke to the issue of whether statutory-based claims may be the subject of arbitration

of the common law of contracts pertaining to consent, consideration, and unconscionability are relevant factors in determining the enforceability of commercial arbitration agreements, when it is claimed that the agreements were not entered into voluntarily or knowingly.[76] These claims typically arise in commercial relationships involving unequal economic power, access to information, and sophistication of the parties (e.g., employer-employee, business-consumer, franchiser-franchisee relationships). In such relationships, especially those involving adhesion contracts, concerns captured by the doctrine of unconscionability frequently lead to heightened judicial scrutiny in order to ensure the contract to arbitrate is the product of a knowing and voluntary agreement.[77]

Consent-related issues notwithstanding, the law of commercial arbitration pertaining to enforceability and substantive arbitrability is today in complete congruity with the principles of labor arbitration law described above. All three of the "Commercial Arbitration Trilogy" opinions—*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[78] *Southland Corp. v. Keating*,[79] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[80]—were concerned in one way or another with a question of enforceability of an agreement to arbitrate. In each case the enforceability issue arose because of a common-law doctrine or state statute that dictated against enforcing the agreement to arbitrate, and in each the first step in the Court's analysis was a broad invocation of the liberal, pro-arbitration public policy set out in the FAA.

Thus, *Moses Cone* describes §2 of the FAA as "a congressional

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agreements enforceable under the FAA. *See* Gilmer v. Interstate/Lane Johnson, 500 U.S. 20 (1991); Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989); Shearson/American Express v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). These opinions did not touch upon matters of consent. Instead, they served to vitiate the long-standing rule that, as a matter of federal law, a party to an otherwise valid, broad form employment arbitration agreement could not be compelled to arbitrate claimed violations of its rights guaranteed by federal statutory law.

76. Thus, for example, in *Perry v. Thomas*, the Supreme Court observed as follows:

> An agreement to arbitrate is valid, irrevocable and enforceable, *as a matter of federal law*, 'save upon grounds as exist at law or in equity for the revocation of any contract.' Thus state law, whether of legislative or judicial origin, is applicable [to deciding issues pertaining to the enforceability of arbitration agreements] if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of §2 [of the FAA].

482 U.S. 483 n.9 (1987) (citing 9 U.S.C. § 2; Prima Paint Corp. v. Flood & Conklin, 388 U.S. 395, 404 (1967)); Southland v. Keating, 465 U.S. 1, 16-17, n.11 (1984)).

77. *See, e.g.*, Renteria v. Prudential Ins. Co. of Am., 113 F.3d 1104 (9th Cir. 1997), Lai v. Prudential Ins., 42 F.3d 1299 (9th Cir. 1994); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997).

78. 460 U.S. 1 (1983).

79. 465 U.S. 1 (1984).

80. 473 U.S. 614 (1985).

declaration of a liberal federal policy favoring arbitration agreements . . . ."[81] In *Southland*, the Supreme Court stated, "[I]n enacting §2 of the [FAA], Congress declared a national policy favoring arbitration. . . ."[82] And in *Mitsubishi*, the Court observed that the FAA "simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'"[83] In all three opinions, after identifying and/or reiterating the strong pro-arbitration public policy of the FAA, the Court proceeded to address the question of the enforceability of the arbitration agreement at issue by speaking in terms of the substantive arbitrability of the claim in controversy.

In *Moses Cone*, the Supreme Court identified the substantive arbitrability of the underlying dispute as the "basic issue" presented in the federal court suit brought by one of the parties seeking to enforce a contractual arbitration agreement. It then noted that §2 of the FAA governs the issue, thereby declaring a liberal federal policy favoring arbitration, which makes enforceable written agreements to arbitrate in contracts evidencing transactions involving interstate commerce. The Court further characterized the effect of §2 of the FAA as creating "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[84] It observed that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[85]

The remaining essential elements of the Supreme Court's approach to matters of enforceability of the agreement to arbitrate and substantive arbitrability in commercial arbitration are set out in *Dean Witter Reynolds v. Byrd*[86] and *First Options of Chicago, Inc. v. Kaplan*.[87] In *Byrd* the Court held that the FAA required federal district courts to grant a motion to compel arbitration of arbitrable pendent state claims even when (then) inarbitrable federal law claims arising from the same facts and circumstances would have to be litigated separately in a court of law. That such action would result in an inefficient maintenance of bifurcated proceedings in separate forums did not deter the Court from holding that the agreement to arbitrate the substantively arbitrable state law claims was

81. *Moses Cone*, 460 U.S. at 24.

82. *Southland*, 465 U.S. at 10.

83. *Mitsubishi.*, 473 U.S. at 625 (quoting *Moses Cone*, 460 U.S. at 24-25 n. 32).

84. *Moses Cone*, 460 U.S. at 24. The Court's words would subsequently be echoed in *AT&T Technologies* with regard to the "presumption of arbitrability" under the federal common law of labor arbitration. *See* AT&T Technologies v. Communication Workers of Am., 475 U.S. 643, 650 (1986).

85. *Moses Cone*, 460 U.S. at 24.

86. 470 U.S. 213 (1985).

87. 514 U.S. 938 (1995).

enforceable pursuant to §2 of the FAA.[88]

As it had done in *Moses Cone*, the Court in *Byrd* identified the pre-eminent purpose of the FAA to be the enforcement of agreements to arbitrate, and deemed efficiency and judicial/adjudicatory economy to be subordinate priorities.[89] *Byrd* sends another, very strong signal regarding the Supreme Court's conviction that commercial arbitration agreements must be enforced as a matter of federal law. That signal was further amplified in *First Options*.

The principal issue in *First Options* concerned the proper standard for court review of an arbitrator's decision on a matter of substantive arbitrability. It posed the question: should the court's review of the arbitrator's substantive arbitrability determination be *de novo*, or should it be made based on the same deferential standard used in reviewing the arbitrator's decision on the merits of the matter submitted to arbitration?[90] The Court characterized this issue as largely involving a determination of *who* should have the primary power to decide *whether* a disputed matter falls within the scope of the parties' arbitration agreement.[91]

The Supreme Court, citing *AT&T Technologies*, held that the answer to the "who has the primary power to decide arbitrability" question turns on whether the parties mutually intended to submit it to the arbitrator for decision. If they did, then the standard for judicial review is very deferential, giving the arbitrator considerable leeway and setting the arbitral decision aside only in "certain narrow circumstances."[92] If the parties have not unequivocally agreed to submit the arbitrability issue to arbitration, the normal deferential standard for review of an arbitrator's award is not applicable. Instead, a "court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently"—with no special deference to the arbitrator's decision of the issue.[93]

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88. *See Byrd*, 470 U.S. at 217.

89. *See id.* at 221 ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation . . . .").

90. *See First Options*, 514 U.S. at 943. The second issue presented in *First Options* is not relevant to the focus of this article and therefore is not addressed other than in this footnote. It concerned the standard for review by a federal circuit court of appeals of the decision by a federal district court to deny a motion to vacate (or grant a motion to confirm) a commercial arbitration award under the FAA. *See id.* at 941. The Court held that in carrying out such review, appellate courts should accept findings of fact that are not clearly erroneous and decide questions of law *de novo*. *See id.* at 947-949.

91. *See id.* at 943.

92. *Id.* Following this quote the Court inserted a "*See, e.g.,*" cite to the FAA §10(a) grounds for vacatur and the "manifest disregard" of the law standard first articulated in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), noting further that *Wilko* had been "overruled on other grounds" in *Rodriguez v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

93. *Id.* at 943.

In setting down this decision rule, the Supreme Court reiterated its view of commercial arbitration as "simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[94] Thus, like other matters pertaining to effectuation of the agreement to arbitrate, it is clear the Court believes the role of the courts in deciding arbitrability disputes is to ascertain the precise nature of the parties' bargain and, having done so, enforce it.

It is significant that in fashioning the decision rule in *First Options*, the Court cited to its two seminal arbitrability opinions in the labor arbitration field—*Warrior & Gulf* and *AT&T Technologies*.[95] Because the Court based its holding in *First Options* in significant part on labor arbitration law precedent, it can rationally be inferred that the rule of *First Options* applies in the labor arbitration sphere. At a minimum, it is clear that the law of substantive arbitrability in labor and commercial arbitration is founded on the same contract law-based principles.

3. *Closure and Symmetry at the Front End of the Process*

Once the juxtaposition of labor arbitration and commercial arbitration law moves past the consent-related aspects of the law of enforceability, it becomes impossible to distinguish between the Supreme Court's mode of analysis of enforceability and substantive arbitrability matters in the two arenas. In both bodies of law, when the consent-related dimensions of the enforceability determination have been dispensed with, the only question remaining is purely contractual: whether the issue in dispute falls within the scope of the parties' agreement to arbitrate. Accordingly, it can be fairly said that the identity of this dimension of the law of labor arbitration and commercial arbitration serves to demonstrate that at the front end of the arbitration process there is today a *de facto* unification of the law.

Absent a claim that a commercial arbitration agreement was not consensual or was otherwise unconscionable, the enforceability and substantive arbitrability determinations in both venues turn on a single question: does the parties' presumptively valid agreement to arbitrate embrace the issue in dispute? If it does, the parties' agreement is enforceable as it pertains to the disputed issue, and they are ordered to arbitrate. Thus, despite the Supreme Court's disparaging references to the law of contracts as applied to labor arbitration agreements in *American Manufacturing* and *Warrior & Gulf*, it is clear that in both labor and commercial arbitration, enforceability and substantive arbitrability matters

94. *Id.*

95. *Id.* at 944-945.

are in fact decided as simple matters of contract law—the objective being to give effect to the parties' agreement to arbitrate.

C. *The "Back-End" Issue—Vacatur of Challenged Awards*

At first glance, the laws of vacatur in labor arbitration and commercial arbitration appear to differ substantially. The source of the pro-arbitration public policy upon which the law of labor arbitration rests—the LMRA—says nothing about vacatur, and precious little about arbitration. Labor arbitration vacatur law is founded solely on federal common law emanating from the "emphatic ambiguities" of the Steelworker's Trilogy[96] as elucidated and supplemented by the Supreme Court's opinions in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers of America*[97] and *United Paperworkers International Union v. Misco, Inc.*[98] The two touchstones of this body of law are the "essence from the agreement" standard first articulated in *Enterprise Wheel* and the "public policy" ground for vacatur first identified in *W.R. Grace*.

In contrast, the law of vacatur in commercial arbitration is grounded, at least in theory, on the four clearly worded statutory grounds for vacatur set out in §§10(a)(1)-(4) of the FAA.[99] The first three of those statutory standards sanction vacatur of awards for certain types of party, advocate, and/or arbitrator misconduct or misbehavior that can taint the arbitration proceeding and prejudice the rights of a party. Section 10(a)(4) permits judicial reversal of the arbitral result if the "arbitrators exceeded their powers" or if they fail to produce a mutual, final, and definite award. Save for one oblique reference to "manifest disregard" of the law in its 1953 opinion in *Wilko*,[100] the Supreme Court has never addressed the issue of

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96. Summers, *supra* note 6, at 1021.

97. 461 U.S. 757 (1983).

98. 484 U.S. 29 (1987).

99. Section 10(a) of the FAA provides as follows:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §10(a)(1988).

100. Wilko v. Swan, 346 U.S. 427, 436 (1953). The oft-cited *Wilko* dictum states: "In unrestricted submissions, [of disputes to arbitration], the interpretations of the law by the arbitrators *in contrast to*

vacatur in the commercial arbitration field.

Despite these contrasting origins, in recent years the law of vacatur in the labor and commercial spheres has effectively melded. This melding has occurred largely as a result of the "cross-pollination" between the bodies of law occurring at the level of the U.S. Circuit Courts of Appeals. The manner in which that phenomenon has transpired is briefly recapped in the analysis below.

1. Labor Arbitration Law

The true heart of the law of vacatur, in both labor and commercial arbitration, lies in the final opinion of the Steelworkers Trilogy, *Enterprise Wheel*.[101] Like its theory pertaining to enforceability and substantive arbitrability set out in *American Manufacturing* and *Warrior & Gulf*, properly interpreted, the Court's approach to vacatur in *Enterprise Wheel* was uncomplicated, and founded on a contractual view of the arbitration process. It is premised on the straightforward assertion that because the parties have bargained for the arbitrator's resolution of their contractual disputes, "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[102]

The perspective reflected in *Enterprise Wheel* centers on a belief that the role of the arbitrator is "confined to interpretation and application of the collective bargaining agreement; [and does not permit the arbitrator] to dispense his own brand of industrial justice."[103] In a sentence that has taken on significance few could have imagined in 1960, the Court stated: "[T]he arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it *draws its essence from the collective bargaining agreement*."[104] (emphasis supplied). This sentence and the one following it,[105] along with the remaining commentary in the majority opinion, establish three principles.

First, the analysis itself is couched in terms that demonstrate the Court believed the vacatur decision is not concerned with, and in no way should turn upon, the correctness of the arbitrator's interpretation of the collective bargaining agreement. In that regard, near the end of the opinion, the Court

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manifest disregard are not subject, in the federal courts, to review for error in interpretation."(emphasis added).

101. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

102. *Id.* at 596.

103. *Id.* at 597.

104. *Id.*

105. *See id.* ("When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.").

stated: "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[106]

Second, in clarifying the circumstances in which a refusal to enforce a challenged award would be proper, the Court spoke only in terms of an arbitrator exceeding the authority granted the arbitral office by the parties. It made clear that an arbitrator exceeds that contractually granted authority by failing to base the award in the collective bargaining agreement, or by deciding an issue not embraced by the parties' submission of the dispute to arbitration. Thus, the Court's analysis in *Enterprise Wheel* centered on determining whether the arbitrator had "exceeded his authority,"[107] "exceeded the scope of the submission,"[108] "not stayed within the areas marked out for his consideration,"[109] "[failed to] premise his award on his construction of the contract,"[110] or made a decision "not based on the contract."[111] None of these criteria for vacating or declining to confirm a disputed award have anything to do with the correctness of the arbitrator's interpretation of the collective bargaining agreement. Such matters, the Court said, pointing to *American Manufacturing* and its contractual perspective on the arbitration process, are questions for the arbitrator to decide.[112]

The third important dimension of *Enterprise Wheel* is found in its unmistakable directive to the lower courts as to the manner and the mindset in which they are to go about deciding whether to enforce disputed awards. It instructs that in evaluating whether an arbitration award draws its essence from the collective bargaining agreement, the courts are to give the benefit of the doubt to the arbitrator, cautioning that "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award."[113]

The analysis just described reveals that the Court's oft-cited admonition that the arbitrator's award must "draw[ ] its essence from the collective bargaining agreement" was not the true focus of the standard for

106. *Id.* at 599.

107. *Id.* at 598.

108. *Id.* at 597.

109. *Id.* at 598.

110. *Id.*

111. *Id.*

112. *See id.* (citing United Steelworkers of Am. v. American Manufacturing Co., 363 U.S. 564, 568-69 (1960)).

113. *Id.*

vacatur the Court intended to establish.[114] Instead, that famous phrase was but a corollary intended to flesh out and explain the true axiom of *Enterprise Wheel*: that vacatur is justified only when the award unequivocally shows that the arbitrator exceeded the contractual authority granted the arbitral office by the parties. The arbitrator exceeds the arbitral authority in one of two ways: by basing the award on something other than an interpretation and application of the relevant language of the collective bargaining agreement, or by deciding a matter not submitted to arbitration for resolution. Absent a finding that the arbitrator "exceeded authority" in one of these two ways, enforcement of a challenged award cannot properly be denied—even if the award reflects, or is based upon, egregious arbitral error.

The Supreme Court has spoken definitively to the issue of vacatur in labor arbitration on only two occasions since 1960—in its 1983 opinion in *W.R. Grace* and its 1987 opinion in *Misco*.[115] *Misco* is the more important of the two. It provides a very cogent, and the most recent available, perspective on the Supreme Court's general attitude regarding the proper role of the judiciary when parties petition for the vacatur or confirmation of labor arbitration awards.

First, *Misco* confirms that employers and unions that have contractually committed themselves to accept the awards of mutually selected arbitrators as the final and binding disposition of unsettled grievances must be held to their arbitration bargains. In eight different places, the opinion asserts that the courts are not permitted to evaluate the correctness (on the contract and/or relevant law) or the accuracy (on the facts) or of challenged arbitration awards, or the remedy orders arising therefrom.[116]

Instead, in very clear terms *Misco* sets out the following framework for application of the "essence from the agreement" standard for vacatur. A court's first task in evaluating a challenged award is to ascertain whether the parties agreed to arbitrate the issue in controversy—i.e., to decide

114. *Cf.* Feller, *supra* note 9, at 302. Professor Feller laments the "unfortunate choice of words" by Justice Douglas in coining the "essence from the agreement" test in *Enterprise Wheel*. He suggests that "what [Justice Douglas] meant . . . is only what he said immediately before [the "essence from the agreement" phrase], that 'an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.'" *Id. See also* Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985) (Judge Posner opining that it might have been better if in *Enterprise Wheel* Justice Douglas had never coined the "essence from the agreement" standard and instead had relied on a straightforward "exceeded authority" test for vacatur of labor arbitration awards).

115. W.R. Grace & Co. v. Local Union No. 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983); United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36-41 (1987).

116. *See id.* at 36-41.

whether the matter in dispute is substantively arbitrable. If so, the court is to determine whether the arbitrator based the award on an interpretation and application of the language of the collective bargaining agreement negotiated by the parties and decided only issues actually submitted to arbitration for resolution. If the issue decided by the arbitrator is embraced by the arbitration bargain and the arbitral decision is based on the parties' contract and submission to arbitration, the award must be confirmed.[117]

Misco notes a single circumstance, not concerned with the accuracy or the correctness of the arbitral result in which a court may vacate a challenged arbitration award. That occurs when a party or the arbitrator has engaged in affirmative misconduct by refusing to hear relevant evidence.[118] In considering this ground for vacatur of labor arbitration awards, the Court pointed with approval to §10[(a)(3)] of the FAA,[119] observing that "the federal courts have often looked to the [Federal Arbitration] Act for guidance in labor arbitration cases."[120] This ground for vacatur jibes with the standard set out in §10(a)(3) of the FAA.

The second dimension of *W.R. Grace* and *Misco* opened a new venue for the review of labor arbitration awards—the "public policy" exception to the general rule of nonreviewability by the courts. In *W.R. Grace*, the Supreme Court observed: "[a]s with any contract, . . . *a court may not enforce a collective bargaining agreement that is contrary to public policy*."[121] (emphasis supplied) Elucidating this newly minted rule, the Court stated:

> If the contract as interpreted by the [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public

117. *See id.* at 36-38. One dimension of *Misco's* attempt to elucidate regarding the proper mode of application of the "essence from the agreement" standard for vacatur has caused confusion—the caveat that "[t]he arbitrator may not ignore the plain language of the contract." *Id.* at 38. The *Misco* opinion does not reconcile the "plain language" reference with the repeated strong admonitions throughout the remainder of the opinion cautioning against any form of judicial intrusion into the merits of disputed awards. The first of those admonitions is contained in the very sentence in which the "plain language" phrase appears, to wit: "[T]he parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *Id.* That omission and the failure to explain how the lower courts are to go about determining when an arbitrator has ignored the "plain language" of the collective bargaining agreement have been the source of some judicial mischief. Professor Summers comments as to the "contradictory" nature of the advice offered by the Court in *Misco*. He finds most confounding the pairing of the Court's assertion that by contracting for arbitration an employer and union agree to accept the arbitrator's view of the facts and the meaning of the collective bargaining agreement with the contention that "the arbitrator may not ignore the plain meaning of the contract." Summers, *supra* note 6, at 1042.

118. *See Misco*, 484 U.S. at 40-41.

119. *See id.*

120. *Id.* at 40, n.9 (citing Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969); Pietro Scalzitti Co. v. IUOE, Local No. 150, 351 F.2d 576 (7th Cir. 1965)).

121. W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983) (citing Hurd v. Hodge, 334 U.S. 24, 34-35 (1948)).

> policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests.[122]

In *Misco*, the Supreme Court emphasized the contract law basis of the "public policy" exception. It observed that the judicial authority to refuse enforcement of a disputed labor arbitration award because it is contrary to public policy "is a specific application of the more general doctrine, rooted in the common law [of contracts], that a court may refuse to enforce contracts that violate law or public policy."[123]

The Court next revisited its holding in *W.R. Grace*, noting two points that follow from the decision rule set out there:

> First, a court may refuse to enforce a collective bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in [*W.R. Grace*] does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy.[124]

Misco then establishes the two minimum prerequisites to vacatur on public policy grounds. First, the purported public policy must satisfy the definition of that term set out in *W.R. Grace.* Second, the violation of such public policy that will result from enforcement of the challenged arbitration award must be "clearly shown."[125]

Misco sends a clear message that the "public policy" exception provides a very narrow avenue whereby courts can circumvent the "no review on the merits" rule of *Enterprise Wheel.* Arbitration awards that breach common sense, or are founded on even obvious errors of fact, do not trigger vacatur under the "public policy" rubric. Vacatur on public policy grounds is warranted only when enforcement by a court of the award (most particularly effectuation of the arbitrator's remedy order—e.g., reinstatement of a discharged grievant) demonstrably leads to the violation of an explicit public policy that is well defined and dominant and ascertainable by reference to statutes and legal precedents.

2. *Commercial Arbitration Law*

Section 10(a) of the FAA is also a model of simple elegance. Interpreted literally, the four primary grounds for vacatur whose application it sanctions serve to bring closure to the arbitration process by permitting parties dissatisfied with the arbitral result to escape that outcome under only

122. *Id.* (citing *Hurd*, 334 U.S. at 35 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945))).

123. *Misco*, 484 U.S. at 42 (citing *W.R. Grace*, 461 U.S. at 766).

124. *Id.* at 43.

125. *Id.* at 43 (citing *W.R. Grace*, 461 U.S. at 766).

very limited circumstances, none of which pertain to the correctness or accuracy of the award.[126] Thus it is clear that §10(a) is intended to hold the parties to their arbitration bargain at the back end of the process—in the same manner §2 enforces that bargain at the front end.

Section 10(a) of the FAA does not authorize vacatur, either expressly or by implication, on grounds other than the four it articulates. Nevertheless, in the hands of the U.S. Circuit Courts of Appeals, it has become but a minor dimension of the law of vacatur in commercial arbitration. The great bulk of that case law makes no more than passing reference to the statutory grounds for vacatur, viewing them as only a starting point for ascertaining when vacatur is warranted.

In these opinions the circuit courts typically first "tip their hat" to the narrow strictures of §10(a) and then cite to *Wilko* and its perceived sanction in dictum of the "manifest disregard" of the law standard. The *Wilko* dictum is almost uniformly viewed by the circuit courts as indicating that the Supreme Court does not consider §10(a) of the FAA to constitute the exclusive grounds for vacatur of commercial arbitration awards.[127] Having thus satisfied themselves that the Supreme Court approves the creation of nonstatutory grounds for vacatur beyond those stated in §10(a), the circuit appeals courts embark on an adventure in judicial creativity that seemingly knows no bounds.[128]

The current disarray in the law of vacatur in commercial arbitration is the result of the Supreme Court's decision not to address the issue in any

126. As noted earlier, §10(a) sanctions vacatur of arbitration awards only when there is serious, prejudicial misconduct by a party, advocate or arbitrator, or when an award fails either to produce a definite result, decides an issue not submitted to arbitration, or demonstrates that the arbitral outcome is not grounded in an interpretation of the parties' contract. *See supra* note 99.

127. *See, e.g.*, Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990). The First Circuit, after citing to §10(a) statutory grounds, moved to a detailed analysis of the "very limited power [of the courts] to review arbitration awards outside of section 10(a)." *Id.* at 8. Shortly thereafter, the *Advest* court clarified its view by stating "[t]he manifest disregard [standard] derives directly from dicta employed by the [Supreme] Court in *Wilko v. Swan* . . . . The lane of review that has opened out of this language is a judicially created one, not to be found in 9 U.S.C. §10[a]." *Id.* at 9 n.5 (citing Merrill Lynch Pierce Fenner & Smith v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986); Jenkins v. Prudential-Bache Securities, Inc., 847 F.2d 631, 634 (10th Cir. 1988)); see also Bowles Financial Group Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1011-13 (10th Cir. 1994) (noting, after engaging in a discussion of the narrowness of court review under the §10(a) FAA standards for vacatur, that courts have never limited their review of arbitration awards to a strict reading of §10(a) and identifying and applying a "fundamentally fair hearing" standard for judicial review); Gammaro v. Thorp Consumer Discount Co., 15 F.3d 93, 95-96 (8th Cir. 1994) (after a brief discussion of the purposes underlying the FAA, citing in obiter dictum to a list of non-statutory grounds it perceived to stand for the proposition that judicial review of a commercial arbitrator's decision will be "limited to that provided by sections 10 and 11 of the FAA and to *whatever additional judicial review this court may deem appropriate.*"(emphasis added)) (citing Stroh Container Co. v. Delphi Indus. Inc., 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986)).

128. For a full treatment of the evolution of vacatur law in commercial arbitration, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731-843 (1996).

meaningful way. This omission has liberated the U.S. Circuit Courts of Appeals to fashion principles for judicial review of arbitration awards that go well beyond the narrow conduct and contract-focused inquiries established by Congress in §10(a). In doing so they have borrowed freely and without obvious deliberation from the corpus of labor arbitration vacatur law.

Relying in large part on this interface between vacatur law in the commercial and labor spheres, all of the U.S. Circuit Courts of Appeals have recognized one or more nonstatutory grounds for vacatur. A survey of recent Circuit Appeals Court opinions reveals that, among other criteria applied across the various circuits, challenged commercial arbitration awards are subject to vacatur on the following grounds:

- the arbitrator, possessed of a knowledge of the law pertinent to the dispute nevertheless chose to ignore it—i.e., "manifest disregard" of the law;[129]
- the award fails to draw its essence from the parties' underlying contract;[130]
- the award violates an explicit "public policy" that is well defined and dominant;[131]
- the award is arbitrary and capricious;[132]
- the award lacks a "rational basis" in the contract,[133] or is "completely irrational;"[134]
- the arbitrator interprets unambiguous language in any way different from its plain meaning;[135]
- the arbitrator's interpretation of the contract is "barely colorable,"[136] or is "not plausible;"[137]

129. *See* Dirussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 822 (2d Cir. 1997); M&C Corporation v. Erwin Behr & Co., 87 F.3d 844, 851 (6th Cir. 1996); *Advest*, 914 F.2d at 9; O.R. Sec., Inc. v. Professional Planning Ass'n, Inc., 857 F.2d 742, 747 (11th Cir. 1988).

130. *See* Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1022 (10th Cir. 1993); Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990); Inter-City Gas Corp. v. Boise Cascade Corp., 845 F.2d 184, 187 (8th Cir. 1988).

131. *See* Brown v. Rauscher Pierce Refnses, Inc., 994 F.2d 775, 782 (11th Cir. 1993); Seymour, 988 F.2d at 1023; Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d. 81, 83 (D.C. Cir. 1980).

132. *See* Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992) *cert. denied,* 507 U.S. 915 (1993); Raiford v. Merrill Lynch, 903 F.2d 1410, 1412 (11th Cir. 1990).

133. *Brown*, 994 F.2d 775, 779 (citing Robbins v. Day, 679 F.2d 679, 684 (11th Cir.), *cert. denied,* 506 U.S. 870 (1992)).

134. *See* French v. Merrill Lynch, Pierce, Fenner & Smith, 784 F.2d 902, 906 (9th Cir. 1986); Swift Indus. Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3d Cir. 1972).

135. *See* Inter-City Gas Corp. v. Boise Cascade Corp., 845 F.2d 184, 187, 189 (8th Cir. 1988); Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1197-98 (9th Cir. 1982).

136. John T. Brady & Co. v. Form-Eze Sys., Inc., 623 F.2d 261, 264 (2d Cir. 1980).

137. Employers Ins. of Wasau v. National Union Fire Ins., 933 F.2d 1481, 1486 (9th Cir. 1991).

- the facts of the case fail to support the award, or it is based on an unambiguous and undisputed mistake of fact.[138]

Unlike the federal common law of labor arbitration, which the Supreme Court deemed to be statutorily authorized by §301(a) of the LMRA, the body of commercial arbitration vacatur law pertaining to the nonstatutory grounds is not rooted in the FAA and has never been expressly sanctioned by the Supreme Court.

In the absence of legislative guidance or authoritative precedent from the commercial arbitration case law, on the first occasion of recognizing one of the nonstatutory grounds other than "manifest disregard" of the law, the Circuit Courts of Appeals routinely turn to the law of labor arbitration for support.[139] That support is most often found in opinions elaborating on the "essence from the agreement" standard of *Enterprise Wheel* and *Misco*. It is this process that led the several Circuit Courts of Appeals to create the "arbitrary and capricious award," the "clearly irrational award," the "plain meaning of the contract," and related nonstatutory grounds for vacatur in commercial arbitration.[140] These and the other "essence"-linked nonstatutory grounds for vacatur, as well as a number of the variants of the "manifest disregard" of the law and the "public policy" grounds invariably oblige a reviewing court to delve into the merits of challenged awards. That inquiry is inevitable because under each of those standards vacatur is ultimately triggered by a judicial finding of an arbitral error of sufficient gravity to demand that the award be reversed.

The approach to judicial decisionmaking reflected in the commercial arbitration vacatur case law concerning the nonstatutory grounds for vacatur is undisciplined and highly dysfunctional. When deciding petitions for vacatur in the commercial sphere, judges are unhindered by the type of exhortations made by the Supreme Court in *Enterprise Wheel* and *Misco*, commanding judicial restraint and respect for the labor arbitration award. Instead of grievance-related matters, the proper resolution of which requires specialized knowledge of the collective bargaining agreement and the "common law of the shop" of labor arbitration, in commercial arbitration cases judges are presented with familiar questions of contract interpretation,

138. *See* Valentine Sugars, Inc. v. Donau Corp., 981 F.2d 210, 214 (5th Cir.), *cert. denied* 509 U.S.923 (1993).

139. *See, e.g.*, Enterprise Wheel & Car Corp. 363 U.S. 593, 597 (1960) (labor arbitration case); Remmey v. Painewebber, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied* 513 U.S. 1112 (1995) (citing Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union, 973 F.2d 276, 282 (4th Cir. 1992)); Eljer Mfg., Inc v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir.), *cert. denied* 512 U.S. 1205 (1994) (citing National Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 959, 960 (7th Cir. 1993)); Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1022 (10th Cir. 1993) (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987)).

140. *See supra* notes 128-134 and accompanying text.

law, and fact they deem themselves fully qualified to decide.[141] The pertinent recent U.S. Circuit Court of Appeals case law demonstrates that when judges view troublesome awards in that context, the temptation to tinker with results they perceive to be deeply flawed is often irresistible.[142]

In recent years, the Supreme Court has repeatedly implored the lower courts to respect the parties' arbitration bargains at the front end of the commercial arbitration process.[143] However, unlike labor arbitration law, the Court has never closed the circle in commercial arbitration law by addressing the issue of vacatur. Thus, the effect, at the back end of the process, of the "contractual perspective" reflected in the FAA has not been clarified. At the same time, the issue of the exclusivity/non-exclusivity of the §10(a) statutory grounds for vacatur remains unresolved.[144] The Circuit Courts of Appeals have filled the void left by the Supreme Court, fashioning a burgeoning body of judicially created grounds for vacatur of commercial arbitration awards. This body of law is every bit as creative and just as much manufactured from whole cloth as the parallel law of vacatur in labor arbitration. It is federal common law of the most obvious kind.

3. The Building Chaos at the Back End of the Process

The disparate origins of the federal common law of vacatur in labor and commercial arbitration notwithstanding, the standards for vacatur each is producing are strikingly similar. Those standards center on an ever-expanding set of nonstatutory grounds for vacatur emanating from the "essence from the agreement," "public policy," and "manifest disregard" of the law constructs. As those nonstatutory grounds continue to metastasize and feed upon one another, they exact an increasing toll on the finality and integrity (perceived and real) of both processes. More and more, parties and advocates enter into arbitration with the belief that they are entitled to and will receive a "second bite at the apple" in the courts if they are dissatisfied with the arbitral outcome. The incongruity of this perspective with the Supreme Court's contractual view of labor and commercial arbitration is addressed at length in the next major section of this analysis.

D. The Juxtaposition of Labor and Commercial Arbitration Law Summarized

The building chaos at the back end of the process threatens to

141. *See supra* notes 101-113 and accompanying text (re. *Enterprise Wheel)* and *supra* notes 115-120 and accompanying text (re. *Misco*).

142. *See supra* notes 127-138 and accompanying text.

143. *See supra* notes 86-95 and accompanying text.

144. *See supra* notes 127-138 and accompanying text.

destabilize both labor arbitration and commercial arbitration by creating manifold caveats and exceptions to the seminal rule of finality that truly makes arbitration work. That state of affairs stands in stark contrast to the harmony and stability that prevails with regard to the law of federal preemption and the front-end issues of enforceability and substantive arbitrability. If the law pertaining to the back end of the labor and commercial arbitration processes were in that same state of equilibrium, unification of the two bodies of law would be a *fait accompli.* Because it is not, unification is not currently feasible.

The key to stabilizing the law of labor arbitration and securing the long-run institutionalization of commercial arbitration lies in finding a way to re-center the law of vacatur on the contractual view of arbitration and the true meaning of the "essence from the agreement," "public policy," and "manifest disregard" of the law grounds. The analysis now turns to a description of how that can be accomplished.

V.
A TEMPLATE FOR COMPLETING UNIFICATION OF THE LAW OF LABOR AND COMMERCIAL ARBITRATION

The dysfunctional cross-pollination that today plagues the law of vacatur results largely from the absence in either venue of clearly worded consensus standards for applying the nonstatutory grounds that both respect the arbitration bargain and prevent judicial intrusion into the merits of disputed awards. This void is most noticeable in commercial arbitration. There, the Supreme Court's omission to speak definitively to the issue of vacatur has licensed the U.S. Circuit Courts of Appeals to engage in what might be called "hyper-inventiveness," which is spilling over into the law of labor arbitration and overwhelming the "essence from the agreement" standard.

At the heart of the vacatur conundrum being created by the Circuit Courts of Appeals is the apparent inability or unwillingness of many federal judges to let stand awards they believe to be seriously flawed by errors of contract interpretation, law, or fact. Although the parties have by their arbitration bargain mutually agreed to accept the decision of the arbitrator in binding resolution of any future disputes, the evolving case law demonstrates that many judges cannot resist the urge to usurp the arbitral result when they believe it necessary to ensure that justice is done. The judicial mindset that permits courts to negate the arbitral outcome bargained for by the parties in the name of ensuring correct and accurate results is completely out of step with the language of §10(a) of the FAA and the vacatur-related pronouncements of the Supreme Court in labor arbitration.

What is needed is a straightforward, easily understood analytical

framework for vacatur determinations. When applied at the back end of labor and commercial arbitration, that paradigm must command the same degree of judicial deference for the end product of the processes that was originally achieved in labor arbitration by Justice Douglas's words in *Enterprise Wheel*.[145] It must also unify and harmonize the law of vacatur in labor and commercial arbitration in a manner that terminates the troublesome interaction currently distorting the two bodies of law. Only then will the law of vacatur and the law of labor arbitration be at homeostasis.

The blueprint proposed below for redirecting and disciplining the law of vacatur consists of three elements, all of which rely on the intersection between the strong pro-arbitration public policy divined in the LMRA, and that expressly stated by Congress in the FAA. The idea here is to build upon, and move forward from, the fiction that the Supreme Court was compelled to construct some forty years ago from the empty vessel that is §301(a) of the LMRA. By leveraging that traditional body of law against the Court's recently discovered enthusiasm for arbitration in the commercial sector, as anchored in the FAA, labor arbitration vacatur law can be reinvigorated and returned to its original purpose of protecting the parties' arbitration bargain at the back end of the process.

A. The Contractual Perspective

The first element of the model is recognition of the fact that at its core, arbitration—labor and commercial—is a simple matter of contract and, concomitantly, the role of the courts is to effect the arbitration bargain at both ends of the arbitration process.[146] At the time of *Lincoln Mills* and the Steelworkers Trilogy, the Supreme Court found it necessary to sweep aside several arbitration-specific corollaries of the common law of contracts that rendered executory agreements to arbitrate unenforceable. The Court's rejection of the rules of *Red Cross Lines*, *Cutler-Hammer*, and *Wilko* does not imply that it rejects the contractual view of labor arbitration.

To the contrary, in the course of summarizing the principles of the Steelworkers Trilogy pertaining to enforceability and substantive arbitrability in *AT&T Technologies*, the Court cited first to the axiom of *Warrior & Gulf* that holds "'arbitration is a matter of contract.'"[147] The *AT&T Technologies* opinion then characterizes this axiom as "recogniz[ing]

145. *See* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-99 (1960); see also *supra* notes 101-114 and accompanying text.

146. *See* Summers, *supra* note 6 (asserting that the law of vacatur in labor arbitration can be explained and advanced if one views labor arbitration as a matter of contract).

147. AT&T Techs. v. Communication Workers of Am., 475 U.S. 643, 648 (1986) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, citing United Steelworkers of Am. v. American Manufacturing, 363 U.S. 564, 570-71 (1960) (Brennan, J. concurring)).

the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."[148] This first principle of *Warrior & Gulf*, reiterated by the Court in *AT&T Technologies*, was best articulated by Justice Brennan's concurrence (joined by Justices Harlan and Frankfurter) in *American Manufacturing* and *Warrior & Gulf* wherein he stated, "the arbitration promise is itself a contract" and goes on to affirm that "[labor] arbitration is a creature of contract."[149]

The Supreme Court's vacatur-related opinions in the labor arbitration also reflect the contractual view of labor arbitration. The *Enterprise Wheel* explication of the "essence from the agreement" standard makes clear that it is the underlying collective bargaining agreement and the parties' submission to arbitration that demarcate the arbitrator's decisionmaking authority. If an arbitrator steps outside of those bounds, the award is subject to vacatur for the arbitrator having exceeded the contractual authority granted by the labor arbitration agreement.

This perspective is reiterated in both *W.R. Grace* and *Misco*. In the former opinion, the Court stated that even if a court disagrees with the arbitrator's interpretation of the collective bargaining agreement, the reviewing court cannot second-guess it because the arbitrator's interpretation is what the parties bargained for in the arbitration agreement.[150] Similarly, *Misco* reaffirms that "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than a judge, it is the arbitrator's view of the facts and the meaning of the contract [and not that of a reviewing court] that they have agreed to accept."[151]

The contractual perspective reflected in the common law of labor arbitration developed under §301(a) of the LMRA comports closely with the straightforward contractual perspective reflected in §§2 and 10(a) of the FAA. Section 2 says that commercial arbitration agreements within its reach are enforceable at the front end of the process, subject to "such grounds as exist at law or in equity for the revocation of any contract." [152] Section 10(a) reiterates that contractual view at the back end of the process by holding the parties to their contractual agreement to arbitrate absent proof that the proceeding was marred by a narrow range of exceptional contingencies, none of which concern the merits of the arbitral result.

148. *Id.* at 648-49 (citing Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974)).

149. United Steelworkers of Am. v. American Mfg., 363 U.S. at 569-71 (Brennan, J. concurring); *Warrior & Gulf*, 363 U.S. at 585 (Brennan, J. concurring).

150. *See* W.R. Grace & Co. v. Local Union No. 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 765 (1983).

151. Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987).

152. 9 U.S.C. § 2 (1994).

The FAA statutory grounds for vacatur are very narrow. They do not contemplate that an objecting party can escape the arbitral result merely because the arbitrator made an incorrect or inaccurate decision.[153] Thus, the statutory scheme for vacatur set out in the FAA jibes perfectly with the Supreme Court's assertion that in labor arbitration "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[154]

Like the FAA, the modern case law of commercial arbitration leaves no doubt that the Supreme Court has fully embraced the contractual view of commercial arbitration.[155] That perspective is reflected, in implied terms, throughout the Commercial Arbitration Trilogy of *Moses Cone*, *Mitsubishi*, and *Southland*. On the surface, these three opinions deal with disparate issues. Nevertheless, as a group they serve to bring to the fore the public policy set out in the FAA—holding parties to commercial arbitration agreements to their bargains.

Thus, even in the face, respectively, of a parallel state court action brought by a party seeking to avoid arbitration, a pre-existing rule of federal law barring arbitration of a particular issue, and an anti-arbitration state statute, the Court held in each of those seminal cases that the pro-arbitration public policy reflected in the FAA prevailed and the arbitration bargain was enforced. The Court maintained the same focus in *Terminix*, holding that state law that places arbitration agreements on an "unequal footing" with other contracts is preempted by the FAA.[156] In addressing a variety of specific issues, *Perry*, *First Options*, and *Cassarotto* sound in the very same tones.

In *Volt Information Sciences v. Stanford*,[157] the Supreme Court spoke of the contractual perspective in more explicit terms. In that case, the California Court of Appeals had interpreted a boilerplate "choice-of-law" provision in the underlying contract containing the arbitration agreement that designated California state law as indicating the parties' intent that California law, not the FAA, would govern any arbitration proceedings arising under the broader contract. Deferring to the California Court's interpretation of the "choice-of-law" provision, the Supreme Court concluded that the provision mooted the otherwise preemptive effect of the FAA.[158] In so holding, the Court stated:

> [I]t does not follow that the FAA prevents the enforcement of agreements to

153. For a full discussion of the § 10(a) statutory grounds, see Hayford, *supra* note 128 at 745-763.

154. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

155. For a fuller explanation of the assertion that the modern law of commercial arbitration centers on the Supreme Court's contractual view of the process, see Hayford, *supra* note 5.

156. Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 281 (1995).

157. 489 U.S. 468 (1989).

158. *See id.* at 478.

> arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to *the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.* Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements. Just as they may limit by contract the issues they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.[159]

Mastrobuono v. Shearson Lehman Hutton, Inc.,[160] handed down six years after *Volt*, significantly narrowed the circumstances under which a "choice-of-law" provision in an underlying contract can moot the preemptive effect of the FAA, requiring definitive proof that a contractual choice-of-law provision was intended by the parties to render the FAA inapplicable to their arbitration agreement.[161] Nevertheless, the fact that the Supreme Court is willing to concede that the parties may, by contract, circumvent the otherwise all-pervasive reach of the FAA in commercial arbitration matters stands as strong testimony to its belief that arbitration is a matter of contract and the role of the courts is to give effect to the parties' contractual intent.

There can be no doubt the Supreme Court believes that arbitration, both labor and commercial, is essentially a matter of contract. Proper effectuation of the Court's perspective at the back end of the arbitration process compels judges to hold the parties to their contractual agreements to accept the arbitrator's decision in final and binding resolution of future disputes.[162] This is precisely the result that a proper melding of the common law of vacatur in labor arbitration and §10(a) of the FAA will achieve. The second element of the model establishes the predicate for that event.

B. The True Meaning of the "Essence From the Agreement" Standard

In at least seven different places in *Enterprise Wheel*, the Supreme Court confirmed that the vacatur is triggered under the "essence from the agreement" standard only if a reviewing court determines that the arbitrator somehow exceeded the authority accorded the arbitral office by the parties' arbitration agreement and/or the submission of the issue to arbitration.[163] The Court of Appeals decision in *Enterprise Wheel* was reversed precisely because "it was not based upon any finding that the arbitrator did not

159. *Id.* at 479 (citation omitted, emphasis added).

160. 514 U.S. 52 (1995).

161. *Id.* at 58-63.

162. *See* John Hancock Mutual Life Ins. Co. v. Olick, 151 F.3d 132, 136-37 (3d Cir. 1998) ("[a]rbitration is, above all, a matter of contract and courts must respect the parties' bargained-for method of dispute resolution.").

163. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-99 (1960).

premise his award on his construction of the contract. [Instead, the lower court] merely disagreed with the arbitrator's construction of [the contract]."[164]

In *Enterprise Wheel*, the Supreme Court squarely rejected what it perceived as the contention that an incorrect arbitral interpretation of a disputed contract provision can be deemed not based on the contract, thereby failing to draw its essence therefrom. It did so because "acceptance of this view [of the "essence" standard] would require courts . . . to review the merits of every construct of the contract [by the arbitrator]." Because that "plenary review" of the merits would "make meaningless" the parties' bargain for a final and binding decision by the arbitrator, the Supreme Court rejected it in resounding terms.[165]

This view that an award may draw its essence from the contract without being correct on the contract and law and accurate on the facts is reflected in numerous passages in *W.R. Grace* and *Misco*. In *W.R. Grace*, the Supreme Court spoke to the irrelevancy under the "essence from the agreement" standard of the fact that a reviewing court might believe the award to be incorrect, or might have reached a different result. It explicitly cast aside as misdirected the employer's argument that in deciding a petition for vacatur or confirmation of an arbitration award, a court should itself interpret the disputed provisions of the underlying contract.[166]

Misco sounds in the same tones. As noted earlier, the Court asserted some eight times that in applying the "essence from the agreement" standard for vacatur, the courts have no business looking to the merits of challenged awards. Most significantly, in *Misco* the Supreme Court explicitly rejected the employer's contention that vacatur was warranted because the arbitrator had committed "grievous error." The Court, while tacitly conceding there may have "improvident, even silly factfinding" by the arbitrator, nevertheless concluded such error, if proven, would be "hardly a sufficient basis for disregarding what the agent appointed by the parties [to resolve contractual disputes had] determined to be the historical facts."[167]

Even the one troublesome dimension of the *Misco* opinion—the assertion that "[t]he arbitrator may not ignore the plain language of the contract"—is followed immediately by the assertion that "a court should not reject an award on the ground that the arbitrator misread the

164. *Id.* at 598.

165. *Id.* at 598-99. It is interesting to note that Justice Whittaker's solo dissent in *Enterprise Wheel* was based on the very line of reasoning so firmly rejected by the majority. *See id.* at 602.

166. *See* W.R. Grace & Co. v. Local Union No. 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 765-66 (1983).

167. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 39 (1987).

contract."[168] That statement, along with the remainder of the Court's "essence"-related analysis in *Misco* indicates that the "plain language" passage was not meant to license judges to interpret disputed contract language in making the "essence from the agreement" determination. Rather, it is properly read as reinforcing the rule that arbitrators must base their decisions on the language of the collective bargaining agreement. When they do not, vacatur is warranted for an arbitral act of exceeding the authority granted them by the contract.

1. The Supreme Court's View of the "Essence from the Agreement" Standard Summarized

The Supreme Court's position as to the reach and effect of the "essence from the agreement" standard is unambiguous. The test for vacatur is simply whether the arbitrator has exceeded the authority of the powers delegated to the arbitral office by the parties.[169] But for the arguably ambiguous "plain language" passage in *Misco*, there is not one scintilla of evidence that the Court sees the "essence" standard as sanctioning any judicial intrusion into the merits of challenged arbitration awards in the course of deciding petitions for vacatur—even where gross error is alleged.

The contractual perspective upon which all of the law of arbitration is founded, linked with the "exceeded authority" take on the "essence from the agreement" standard, provides an airtight seal at the back end of the process. In tandem, these two cardinal principles bring the law of arbitration full circle by holding parties to their arbitration bargains at the back end of the process in the same manner the Supreme Court has done at the front end, in both the labor and commercial fields.

2. The "Essence" Standard in the Hands of the U.S. Circuit Courts of Appeals

This is so clear that there is no way the U.S. Circuit Courts of Appeals could misapply the "essence from the agreement" standard—right? Wrong! The opinions of those courts consistently demonstrate that they are for the most part unable to articulate and apply the various nonstatutory grounds for vacatur in a manner that remains loyal to the "essence/exceeded authority" construct. In the hands of the federal appellate courts, the narrow contract-based principle that is the core precept of the law of vacatur in labor arbitration has metamorphosed into what looks very much like a "big

168. *Id.* at 38.

169. *See* Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985).

error" standard for vacatur in both labor and commercial arbitration.

A few recent examples drawn from the U.S. Circuit Courts of Appeals' case law reveals the nature and reach of this emerging majority view. Recently, the Sixth Circuit, asserting that its review of arbitration awards is "not toothless," stated that an award fails to draw its essence from the contract when:

> (1) [I]t conflicts with express terms of the collective bargaining agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported or derived from the agreement; or (4) it is based on "general considerations of fairness and equity" instead of the exact terms of the agreement.[170]

A similar, sweeping read of the range of judicial inquiry permitted under the general aegis of the "essence from the agreement" standard, extending beyond questions of contract interpretation to disputed arbitral findings of fact, is reflected in a 1998 opinion of the First Circuit:

> [T]he scope of review is limited to claims that the arbitrator's decision is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."[171]

The Third Circuit has held that it will vacate an award if it is not based on an "arguable interpretation" of the contract, opining that a court "may only vacate an award if it is entirely unsupported by the record [on the facts] or if it reflects a 'manifest disregard' of the [parties' contract]."[172]

Particularly sobering is the evidence opinions like the three just cited provide that the Circuit Courts of Appeals have begun to apply the various "big error" standards for vacatur, which originated for the most part in the commercial arbitration sphere, in labor arbitration cases. In doing so they are slowly vitiating the unequivocal command of the Supreme Court that labor arbitration awards are not subject to vacatur because of arbitral errors of contract interpretation or fact.

The Supreme Court has repeatedly stated that even a grievously flawed award can draw its essence from the parties' contract—as long as it is the result of the arbitrator's interpretation of the contract. The dominant mode

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170. Beacon Journal-Publishing Co. v. Akron Newspaper Guild, Local No. 7, 114 F.3d 596, 600 (6th Cir. 1997) (quoting Cement Divs., National Gypsum Co. v. United Steelworkers of Am., 793 F.2d 759, 766 (6th Cir. 1986)).

171. Coastal Oil of New England, Inc. v. Teamsters Local A/W, 134 F.3d 466, 469 (1st Cir. 1998) (quoting Local 1445 United Food Workers Int'l v. Stop & Shop Companies, 776 F.2d 1921 (1st Cir. 1985)). It is notable that in formulating this review standard in a labor arbitration case, the First Circuit made no citation to *Enterprise Wheel* or *Misco*.

172. Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1291 (3d Cir. 1996) (citing News America Publications, Inc. v. Newark Typographical Union, Local 103, 918 F.2d 21, 24 (3d Cir. 1990)).

of application of the "essence from the agreement" standard reflected in the evolving circuit appeals court case law disregards that truism. At the same time, by permitting reviewing courts to evaluate the correctness of arbitrator's contract interpretation decisions, the emerging majority view among the circuit courts flatly ignores the unequivocal statement in *W.R. Grace* that interpreting a disputed contract provision is "a privilege not permitted to federal courts in reviewing an arbitral award."[173] It also fails to contemplate the admonition of *Misco* that "[c]ourts . . . do not sit to hear claims of factual or legal error by an arbitrator."[174]

Instead of declining to weigh the merits, the Circuit Courts of Appeals are fashioning standards whereby a challenged award is deemed to draw its essence from the contract only when the reviewing court determines that it is based on an acceptably correct interpretation of the contract.[175] It is in the course of attempting to define the "line" between tolerable and intolerable errors of contract interpretation (and fact) that the never-ending refashioning and extension of Justice Douglas's famous construct transpires. The inevitable futility of that effort reveals the fatal flaw inherent in the error-based approach to the "essence from the agreement" standard. It is impossible to devise a clear, easily understood error-based measure for ascertaining whether a challenged award draws its essence sufficiently from the contract without obliging the courts that apply it to evaluate the correctness of the arbitrator's interpretation of the contract.[176] That is a step the Supreme Court has definitively proscribed the lower courts from taking.[177]

More and more in recent years the "essence from the agreement" test, refashioned, re-articulated, and extended in a multitude of ways, has come to dominate the law of vacatur in commercial arbitration. Through the process of cross-pollination described earlier, this very same dynamic is contaminating the law of vacatur in labor arbitration. The havoc being

173. W.R. Grace & Co. v. Local Union No. 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 765 (1983).

174. Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

175. As indicated by the quotes immediately above, many of the circuit courts have bridged from this perspective on the "essence" ground to a parallel standard that permits vacatur if a reviewing court determines that the arbitrator grossly misread the facts pertinent to the controversy giving rise to the award. The rule resulting from this extension of the "new essence from the agreement" test holds that glaring errors of either contract interpretation or fact subject challenged awards to vacatur. It directly controverts the Supreme Court's admonition in *Misco* that "[b]ecause 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." *Misco*, 484 U.S. at 37-38.

176. The same "line-drawing" dilemma plagues the efforts of the several Circuit Courts of Appeals to devise workable standards for vacating awards because of grave arbitral errors of fact.

177. *See* United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) ("[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.").

generated by this dynamic vividly demonstrates that the seminal nonstatutory ground for vacatur needs to be re-channeled and returned to its origins in the words of Justice Douglas in *Enterprise Wheel.* The key to achieving that end and accomplishing the broader goal of stabilizing the law of labor arbitration and commercial arbitration lies in the third element of the model—§§10(a) of the FAA.

C. Section 10(a) of the FAA—Key to Stabilizing the Law of Vacatur

As discussed earlier, the wording of, and the narrow grounds for vacatur prescribed by, §10(a) of the FAA do not contemplate any judicial intrusion into the merits of challenged arbitration awards. The substance of sub-sections (a)(1)-(3), sanctioning vacatur for serious acts of party, advocate, and arbitrator misconduct is already reflected, to a limited extent, in the labor arbitration case law.[178] Such misconduct or misbehavior justifies vacatur because it eviscerates the arbitration bargain by denying the parties a full and fair adjudication of their disputes. Consequently, vacatur on these three statutory grounds jibes completely with the contractual view of labor and commercial arbitration. Therefore, if §10(a)(4) of the FAA can be harmonized with the "essence from the agreement" standard and the remainder of the law of vacatur in labor and commercial arbitration, §10(a) should be acknowledged as providing a complete template for vacatur law in both venues.

The current disarray in the law of vacatur in both labor and commercial arbitration is in large part the result of a single flaw in the thinking of many federal judges when they are confronted with petitions for vacatur. The pertinent opinions of these judges indicate they either do not fully understand, or are unwilling to acknowledge, the contractual nature of arbitration and the wide-ranging ramifications of the parties' decision to opt out of the traditional justice system.[179] Key here is the frequently

178. *See Misco,* 484 U.S. at 40 (applying the § 10(a)(3) standard for vacatur in a case involving alleged arbitrator misconduct); see also Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501,1505 (7th Cir. 1991) ("[u]nless the award was procured by fraud, or the arbitrator had a serious conflict of interest—circumstances that invalidate the contractual commitment to abide by the arbitrator's result—his interpretation of the contract binds the court . . . .").

179. *See, e.g.,* Leed Architectural Prods., Inc. v. United Steelworkers of Am., 916 F.2d 63, 65 (2d Cir. 1990) ("An arbitrator's authority to settle disputes under a collective bargaining agreement is contractual in nature, and is limited to the powers that agreement confers. He may not shield an 'outlandish disposition of a grievance' from judicial review 'simply by making the right noises—noises of contract interpretation.'") (citing Torrington Co. v. Metal Prods. Workers Union, 362 F.2d 677, 680 & n. 5 (2d Cir. 1966), quoting In re Marine Pollution Serv. Co., 857 F.2d 91, 94 (2d Cir. 1988)); Container Prods., Inc. v. United Steelworkers of Am., 873 F.2d 818, 819 (5th Cir. 1989) (Under the Fifth Circuit's "jurisdictional" view of the "essence form the agreement" standard reflected in this opinion an arbitrator who makes a decision or directs a remedy deemed by a reviewing court to conflict with the express terms of the parties' collective bargaining agreement commits an *ultra vires* act that exceeds his contractual authority and warrants vacatur.); *see also* Delta Queen Steamboat Co. v. Marine Engineers

demonstrated reticence to acknowledge the Supreme Court's abiding conviction that the parties' arbitration bargain must be respected—even by parties that lose in arbitration. The unwillingness of those judges to let stand what they perceive to be egregiously flawed awards has destabilized both labor and commercial arbitration by robbing both of their finality.[180]

Beneficial Ass'n, 889 F.2d 599, 602 (5th Cir. 1989) ("[F]ederal courts are free to scrutinize the award to ensure that the arbitrator acted in conformity with the *jurisdictional prerequisites of the collective bargaining agreement.*") (emphasis added). In *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988), the Eighth Circuit, after asserting that it would not "review the merits of [commercial arbitration] awards," went on to state:

> The arbitrator's authority, however, is not unlimited. Although the arbitrator may interpret ambiguous contract language, *the arbitrator may not disregard or modify unambiguous contract provisions.* As the Supreme Court has stated in the labor context, "[t]he arbitrator *may not ignore the plain language of the contract.*" *More specifically, if the arbitrator interprets unambiguous language in any way different from its plain meaning, [the arbitrator] amends or alters the agreement and acts without authority.*" Thus, we will review the arbitration award to ensure that is grounded on the parties' contract.

Id. (citations omitted, emphasis added) (citing Sears Roebuck & Co. v. Teamsters Local Union No. *243*, 683 F.2d 154, 155 (6th Cir. 1982), *cert. denied,* 460 U.S. 1023 (1983) (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)); *see also* District No. 72 & Local Lodge 1127, Int'l Ass'n of Mach. & Aerospace Workers v. Teter Tool & Die, Inc., 630 F. Supp. 732, 736 (N.D. Ind. 1986) (citing Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1198 (9th Cir. 1982)); Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997) (In analyzing what it characterized as the "FAA's implied grounds for vacatur" the Second Circuit first reaffirmed its belief that courts are not to "second guess an arbitrator's resolution of a contract dispute") (quoting John T. Brady & Co. v. Form-Eze Sys., Inc., 623 F.2d 261, 264 (2d Cir. 1980). The court then stated: "[h]owever, awards may be vacated. . .in the limited circumstances *where the arbitrator's award is in manifest disregard of the terms of the [parties' contractual] agreement*" (emphasis added) *Id.* (citing Leed Architechtural Prods., Inc. v. United Steel Workers, Local 6674, 916 F.2d 63, 65-66 (2nd Cir. 1990)).

180. See, for example, Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, 103 F.3d 449, 453 (Benavides, C.J. dissenting) (5th Cir. 1997). In this remarkable labor arbitration opinion the Fifth Circuit substituted its own interpretation of the collective bargaining for the arbitrator's interpretation and as a result concluded that he had exceeded his contractual authority, warranting vacatur. Another example is Dallas & Mavis Forwarding Co. v. General Drivers, Warehousemen, & Helpers Local Union No. *89*, 972 F.2d 129, 134 (6th Cir. 1992). In *Dallas & Mavis* the Sixth Circuit reiterated its belief that:

> An [arbitrator's] award fails to draw its essence from the [collective bargaining] agreement when: (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on "general considerations of fairness and equity" *instead of the exact terms of the agreement.*

Id. at 134 (quoting Cement Divisions, Nat'l Gypsum Co. v. United Steelworkers of Am., 793 F.2d 759, 766 (6th Cir. 1986) (quoted in Beacon Journal Publishing Co. v. Akron Newspaper Guild, 114 F.2d 596, 600 (6th Cir. 1997) and Kuhlman Electric Corp. v. UAW, 144 F3d 898, 902 (6th Cir. 1998)); *see also* General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 957 v. Dayton Newspapers, Inc., 190 F.3d 434, 437 (6th Cir. 1999) (holding the same) (quoting Cement Divisions, National Gypsum Co. v. United Steelworkers of Am., 793 F.2d 759, 766 (6th Cir. 1986); Bruno's, Inc. v. UFCW, 858 F.2d 1529 (11th Cir. 1988) (vacating an award based on its interpretation of the contractual management rights provision of the collective bargaining agreement which it read as barring the arbitrator from ordering a remedy that would effectively impose a new rule, the making of which the court deemed exclusively reserved to the employer by the management rights provision of the agreement). In the first commercial arbitration case in which it recognized the "manifest disregard" of the law ground, the Fifth Circuit made clear its belief that the standard permits vacatur when arbitrators commit errors of law, asserting

By distorting the "essence from the agreement" standard into a vehicle legitimating judicial intrusion into the merits of challenged awards, the appeals courts are constructing a body of law at the back end of the arbitration process that is hauntingly reminiscent of the old *Cutler-Hammer* doctrine. Recall that by that rule courts asked to enforce arbitration agreements would do so only when they found the subject grievance at issue to be meritorious. The current trend in application of the "essence" standard and the other nonstatutory grounds for vacatur has precisely the same effect as the long-defunct *Cutler-Hammer* doctrine—albeit from the opposite end of the arbitration process.

Section 10(a)(4) of the FAA provides the perfect device for disciplining the lower federal courts in their application of the nonstatutory grounds for vacatur. It is ideally suited as a vehicle for re-channeling the vacatur analysis in a manner loyal both to the Supreme Court's intent regarding the "essence from the agreement" standard and its contractual view of the proper role of the judiciary in effecting the arbitration bargain. The first clause of §10(a)(4) sanctions vacatur when "the arbitrators exceeded their powers."[181] The relevant commercial arbitration case law confirms that the "powers" of the arbitrator referred to in §10(a)(4) are contractual in nature.[182]

Consistent with this view of the reach of the "exceeded powers" standard, the relevant commercial arbitration case law establishes that "the test for vacating an award under section 10(a)(4) of the [Federal] Arbitration Act is whether the arbitrator exceeded the powers delegated to him by the parties."[183] Because arbitration is a matter of contract, the contours of the arbitrator's authority in a given case are determined by

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that "the judicial review of arbitral adjudication of federal statutory employment rights under the FAA and the 'manifest disregard of the law' standard'. . . must be sufficient to ensure that arbitrators comply with the requirements of the statute at issue." Williams v. Cigna Financial Advisors Inc., 197 F.3d 752 (5th Cir. 1999) (quoting Gilmer v. Interstate/Lane Johnson, 500 U.S. 20, 32 n.4 (1991) (quoting in turn Shearson/American Express v. McMahon, 482 U.S. 220, 232 (1987)). In applying the "public policy" ground for vacatur the Tenth Circuit noted:

> [W]e can overturn an arbitration award that is challenged on [public] policy grounds only if it is contrary to a "well defined and dominant" [public] policy embodied in laws and judicial precedent. (citation omitted) We are not entitled to merely substitute our judgment for that of the arbitration panel, no matter how wrong we may believe the panel's decision to be. In this limited review we accept the facts found by the arbitration panel, but *review its conclusions de novo to determine if they violate public policy.*

Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1024 (10th Cir. 1993) (quoting *Misco*, 484 U.S. at 44 (citing Delta Air Lines v. Air Line Pilots Ass'n., 861 F.2d 665, 670 (11th Cir. 1988), *cert. denied,* 493 U.S. 871 (1989) (citations omitted, emphasis added))).

181. 9 U.S.C. § 10(a)(4) (1994).

182. Hayford, *supra* note 124, at 751.

183. Eljer Mfg., Inc. v. Kowin Development Corp., 14 F.3d 1250, 1255-56 (7th Cir.), *cert. denied,* 512 U.S. 1205 (1994).

reference to the arbitral agreement.[184] Section 10(a)(4) does not give the courts the authority to examine the merits of an award in the course of applying the "exceeded powers" standard.[185] Therefore, an arbitrator does not exceed her powers under §10(a)(4) merely because the arbitration award is the product, in whole or in part, of faulty arbitral reasoning or error.

The contract law underpinnings of §10(a)(4) are unmistakable. If the arbitrator actually interprets the contract in dispute and decides only the issues placed before the arbitration tribunal for resolution, the award is immune from vacatur under §10(a)(4).[186] A reviewing court must defer to the arbitrator's interpretation of law and contract and findings of fact.[187] It is the submission of issues to the arbitrator, and the definition of the arbitrator's authority as set forth in the arbitration agreement that establish the parameters for the §10(a)(4) "exceeded powers" inquiry. Thus—and this is most important—the §10(a)(4) case law from the commercial sector reveals its symmetry with the *Enterprise Wheel* and *Misco* articulations of the "essence from the agreement" ground for vacatur in labor arbitration.

The congruency between the §10(a)(4) "exceeded powers" case law and the words of the Supreme Court in *Enterprise Wheel* and *Misco* validate Judge Posner's contention that Justice Douglas should have made the test for vacatur in labor arbitration "simply whether the arbitrator had exceeded the powers delegated to him by the parties."[188] The test for vacatur under the "essence from the agreement/exceeded authority" standard and the §10(a)(4) "exceeded powers" standard is exactly the same.

D. Reconciling the "Manifest Disregard" of the Law and "Public Policy" Grounds with the Remainder of the Law of Vacatur

Only two dimensions of the current law of vacatur in commercial and labor arbitration remain to be reconciled with §10(a) of the FAA and the contractual view of arbitration—the "manifest disregard" of the law ground and the "public policy" ground. When properly cabined, neither of these nonstatutory grounds for vacatur license judicial oversight or second-guessing of labor or commercial arbitration awards in pursuit of egregious

184. *See* Davis v. Chevy Chase Financial Ltd., 667 F.2d 160, 165 (D.C. Cir. 1981).

185. *Id.* at 164.

186. *See* Davis v. Prudential Secs., Inc., 59 F.3d 1186, 1194 (11th Cir. 1995) ("[T]he law is well-established that an arbitrator 'can bind the parties only on issues they have agreed to submit to him.'" (quoting Butterkist Bakeries v. Bakery, Confectionery and Tobacco Workers Int'l Union, AFL-CIO, Local No. 361 726 F.2d 698, 700 (11th Cir. 1984) (quoting Piggly Wiggly Operators' Warehouse v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1, 611 F.2d 580, 583 (5th Cir. 1980))).

187. *See* Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 332 (7th Cir. 1995) (citing *Eljer Mfg.*, 14 F.3d at 1254, 1257).

188. Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985), *cert. denied,* 475 U.S. 1010 (1986).

arbitral errors warranting vacatur. Neither requires judicial "line drawing" of the type that invariably leads a court to evaluate the merits of disputed arbitration awards. Consequently, both of these standards can be comported with §10(a) of the FAA and the "essence from the agreement" standard of labor arbitration law.

A proper framing of the "manifest disregard" of the law analysis directs a reviewing court's attention not to the degree of the arbitrator's purported error of law, but rather toward the manner in which the arbitrator decided the question of law at issue. "Manifest disregard" of the law occurs when an arbitrator has correctly interpreted the law and then ignored it. The reason for vacatur is not an erroneous decision. Rather, vacatur occurs because the arbitrator, by ignoring the known law, engaged in misconduct or misbehavior prejudicing the rights of a party—the same "trip wire" to vacatur established by §10(a)(3) of the FAA. Because this type of arbitrator misconduct would deny the affected party the benefit of its arbitration bargain, vacatur under this §10(a)(3) focused view of the "manifest disregard" of the law standard comports with the contractual view of arbitration.[189]

Similarly, a reviewing court properly applying the "public policy" standard for vacatur is not obliged to evaluate the arbitrator's analysis and decision of disputed questions of law. Rather than ascertaining the correctness of the arbitrator's resolution of the questions of law submitted for decision, the court need only look to the effect of the award on the party seeking vacatur. Vacatur is justified if the voluntary implementation or judicial enforcement of the award would compel the petitioner for vacatur to violate the subject statute, common law doctrine, or constitutional provision rising to the level of public policy. Otherwise, it is not justified.[190]

Because proper application of the "public policy" ground does not require a reviewing court to evaluate the merits of challenged awards, it is congruent with the "no review on the merits" rule that underpins the "essence from the agreement" standard. Noted earlier was the Supreme Court's observation that the "public policy" ground is rooted in the common law of contracts axiom that holds a court may refuse to enforce contracts that violate law or public policy.[191] These two factors reconcile the "public policy" ground with the remainder of the law of labor and commercial arbitration.

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189. For a full discussion of this view of the "manifest disregard" of the law ground for vacatur, see Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: Key to Stabilizing the Law of Vacatur*, 1999 J. DISP. RESOL. 117-140 (1999).

190. For a full discussion of this view of the "public policy" ground for vacatur, see Hayford, *supra* note 124, at 778-85.

191. See supra text accompanying note 123.

E. Order Restored to the Law of Vacatur

Viewed from the contractual perspective, the promise to arbitrate made in the typical "standard" or "broad form" arbitration agreement is not conditioned on the achievement of an acceptable arbitral result. Presuming the process itself is fair and the arbitrator is truly neutral, parties disappointed with the arbitral result, because they previously bargained for final and binding resolution of any future contractual disputes via arbitration, have no legitimate expectation that the courts will intervene to ensure a correct and accurate arbitral outcome. Otherwise, the contractual binding arbitration agreement is rendered a nullity.

The analysis above demonstrates how a revitalized §10(a) of the FAA can become the guardian of the arbitration bargain at the back end of the process by re-channeling and disciplining judicial application of the "essence form the agreement" ground for vacatur. Proper utilization of §10(a) as the vehicle for unifying and harmonizing the law of vacatur will stabilize both labor and commercial arbitration by preventing judges from usurping the arbitral bargain when they find the award repugnant to their sense of justice.

The Supreme Court's consistent emphasis of the contractual nature of arbitration and its literal reading of the FAA with regard to the front end issues of enforceability and substantive arbitrability predict that, when presented with the appropriate opportunity, the Court will read §10(a) expansively. There is good reason to believe the Court will eventually resurrect §10(a) in the same manner it earlier breathed life into § 2 of the FAA, employing § 10(a) as the means for bringing closure to both the law of vacatur and the broader body of arbitration law. The model proposed above provides a road map for that effort.

VI.
THE SECTION 1 FAA ISSUE

There is but one substantial potential obstacle to the unification of arbitration law advocated here: §1 of the FAA. The cause for concern is found in the statement in §1 that "nothing herein [the FAA] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[192] The §1 exception for "contracts of employment" raises two questions with regard to the application of the FAA's substantive provisions in the labor arbitration field.

First, are collective bargaining agreements "contracts of employment" for purposes of the §1 exception?

192. 9 U.S.C. § 1 (1994).

If so, how broadly does the exception sweep—does it exclude from the FAA's coverage the collective bargaining agreements of all workers in industries affecting interstate commerce, or does it exclude only the contracts of classes of workers directly engaged in the interstate transportation of articles of commerce?

By the mid-1950s, a sizeable body of §1 law was emerging from the U.S. Circuit Courts of Appeals. The reported cases centered on the first question just posited.

In the pre-Steelworkers Trilogy era, the Third, Fourth, Fifth, and Sixth Circuit Courts of Appeals held that collective bargaining agreements are "contracts of employment," excluded from the coverage of the FAA.[193] The First and Second Circuits held the opposite.[194] The Supreme Court's decision in *Lincoln Mills* to authorize the fashioning of a body of federal common law of labor arbitration, spun "out of the empty darkness of §301 [of the LMRA],"[195] mooted the question of whether §1 embraces collective bargaining agreements.[196]

The U.S. Circuit Courts of Appeals largely ignored the issue for some twenty-five years following the Steelworkers Trilogy. In the modern era, both the Fourth and the Sixth Circuits have reaffirmed that they continue to consider collective bargaining agreements to fall within the §1 FAA exclusion.[197] In 1987, the Eleventh Circuit held for the first time that collective bargaining agreements are "contracts of employment" excluded from FAA coverage by its §1.[198] The Tenth Circuit held the same in 1989.[199]

The Supreme Court has never squarely addressed the §1 FAA issue. Any hints within its prior statements as to the position the Court might take if presented with that question are roughly balanced. The first statement is

193. *See* Lincoln Mills of Ala. v. Textile Workers Union of Am., 230 F.2d 81, 84 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1956); United Electrical, Radio & Machine Workers of Am. v. Miller Metal Products, Inc., 215 F.2d 221, 224 (4th Cir. 1954); Amalgamated Ass'n. of Street, Elec. Ry. & Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc., 192 F.2d 310, 314-15 (3d Cir. 1951); International Union United Furniture Workers of Am. v. Colonial Hardwood Flooring Co., 168 F.2d 33, 35 (4th Cir. 1948); Gatliff Coal Co. v. Cox, 142 F.2d 876, 882 (6th Cir. 1944).

194. *See* Signal-Stat Corp. v. Local 475, United Elec., Radio & Machine Workers of Am., 235 F.2d 298, (2d Cir. 1956); Local 205, United Elec., Radio & Machine Workers of Am. v. General Electric Co., 233 F.2d 85,98-100 (1st Cir. 1956).

195. American Postal Workers Union v. U.S. Postal Serv., 823 F.2d 466, 472 (11th Cir. 1987).

196. *See* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1366-67 (1997).

197. *See* Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1067 (4th Cir. 1993) (cited in Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879)); Occidental Chemical Corp. v. Int'l Chemical Workers Union, 853 F.2d 1310, 1315-16 (6th Cir. 1988).

198. *American Postal Workers Union*, 823 F.2d at 473.

199. *See* United Food & Commercial Workers Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940, 943-44 (10th Cir. 1989); *see also* Posadas de Puerto Tico Assocs., Inc. v. Associan de Empleados de Casino de Puerto Rico, 873 F.2d 479, 482 (1st Cir. 1989) (wherein the First Circuit observed in passing that "the [FAA], by its terms, is inapplicable to most labor contracts. . .").

found in a 1944 opinion not concerned with the FAA, *J.I. Case Co. v. NLRB*.[200] Therein the Court drew a sharp distinction between collective bargaining agreements and individual "contracts of employment." The key to the Court's determination that the collective bargaining agreement "is not . . . a contract of employment except in rare cases" was the fact that "no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone." The Court went on to characterize the collective bargaining agreement as a "trade agreement, rather than a contract of employment."[201]

The Supreme Court's second statement relevant to the § 1 FAA issue is contained in a footnote in the 1987 *Misco* opinion. It states: "the [Federal] Arbitration Act does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce'. . . but the federal courts have often looked to the Act for guidance in labor arbitration cases."[202] This footnote in *Misco* is the touchstone for the post-Trilogy opinions of the Circuit Courts of Appeals holding that collective bargaining agreements are "contracts of employment" excluded from FAA coverage by §1 of the Act.

It is significant that in *Misco* the Supreme Court omitted to provide any explanation or cite to any authority for the abrupt assertion just quoted. In addition, the assertion is inconsistent with the Court's subsequent decision in *Gilmer v. Interstate/Lane Johnson Corp.*[203] to leave open the issue of the general reach of the §1 exemption as it applies to all "contracts of employment."[204] These dimensions of the relevant Supreme Court case law, coupled with the paucity of substantive analysis in the pre-Steelworkers Trilogy circuit appeals court case law to the same effect, leave significant room for doubt as to how the Court will eventually opine.[205]

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200. 321 U.S. 332 (1944). In *J.I. Case* a union had brought a refusal to bargain unfair labor practice charge against an employer that declined to bargain with the union because it had executed individual employment contracts with the majority of the employees in the bargaining unit. The Court's explanation of why a collective bargaining agreement is not "contract of employment" arose in that context. *Id.* at 334-35.

201. *Id.* at 335.

202. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 41 n.9 (1987) (cites omitted).

203. 500 U.S. 20, 25 (1991).

204. *Id.* at 25-27 n.2; *see also* Pryner v. Tractor Supply Company, 109 F.3d 354, 357 (7th Cir. 1997) (noting that the *Misco* omission and the reservation of the § 1 issue in *Gilmer* leave unclear the Supreme Court's position as to the applicability of the § 1 exclusion on collective bargaining agreements).

205. *See* Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1504 (7th Cir. 1991) (before citing to the dissent in *Gilmer* and to *Misco*, the Court observed: "The question of the applicability of [the FAA] to labor contracts is unsettled.").

In recent years, the Supreme Court has made two additional, oblique references to the § 1 exemption issue vis-à-vis collective bargaining agreements. In *Wright v. Universal Maritime Corp.*, 525 U.S. 70 (1998), the Court, after discussing relevant FAA-based law regarding the arbitrability of statutory claims, "decline[d] to consider the applicability of the FAA" to a labor arbitration case because the lower court, presumably relying on Fourth Circuit precedent (Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996)) had not cited to the FAA

A holding that §1 of the FAA embraces collective bargaining agreements would oblige the Supreme Court to limit the reach of the FAA for the first time in the modern era. The Court has repeatedly demonstrated in recent years that it is willing to take bold steps and reject old precedent in the name of effecting the strong pro-arbitration public policy it now finds to reside in the FAA. That recent track record counsels against any prediction of a holding limiting the FAA's scope—presuming there is good reason for the Court to extend the reach of the FAA to the labor arbitration sphere. The preceding analysis shows there is.

Unification of the law of arbitration under the imprimatur of the FAA would remain viable even if at some future date collective bargaining agreements were definitively determined to fall within the §1 exclusion. There are two reasons for that assertion. Both are rooted in the relevant case law from the U.S. Circuit Courts of Appeals.

First, over the years all but two[206] of the Circuit Courts of Appeals that have addressed the broader question of the reach of §1 (concerning "contracts of employment" in general, not limited to the collective bargaining arena) have narrowly construed the §1 phrase "workers engaged in foreign or interstate commerce" that qualifies the term "contract of employment."[207] The key here is the fact that §1 limits the employment contract exclusion to workers "engaged *in* interstate commerce" as opposed to the typical jurisdictional terms of art referring to industries "involving interstate commerce" or "affecting interstate commerce." The strong majority view of that phrase holds that the scope of the §1 exclusion for "contracts of employment" is properly limited only to employees engaged in the actual movement of interstate or foreign commerce,[208] or what are commonly referred to as the "transportation industries."[209] By this test, the

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as authority. *Wright*, 525 U.S. at 78. The final reference is found in Justice Stevens's dissent in *Gilmer v. Interstate/Lane Johnson Corp.*, 500 U.S. 20, 36 (1991) (Stevens, J. dissenting). Therein Justices Stevens, joined by Justice Marshall, asserted that the individual employee-employer arbitration agreement at issue was part of an employment contract falling within the §1 FAA exclusion. *Id.* at 36.

206. The two outlyers were the Fourth and Ninth Circuits. *See* Craft v. Campbell Soup Co., 161 F.3d 1199, 1201-06 (9th Cir. 1998); United Elec. Radio & Machine Workers of Am. v. Miller Metal Prods., 215 F.2d 221, 224 (4th Cir. 1954).

207. In the commercial arbitration sector see, e.g., Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 363-64 (7th Cir. 1999); Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1060-61(11th Cir. 1998); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835-37 (8th Cir. 1997); Cole v. Burns Int'l Sec. Servs, 105 F.3d 1465, 1470-73 (D.C. Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 597-601 (6th Cir. 1995); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971).

208. Pietro Scalzitti Co. v. International Union of Operating Engineers, Local 150, 351 F.2d 576, 579-80 (7th Cir. 1965).

209. Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984); *cf.* Bacashihua v. United States Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) (holding that a collective bargaining agreement covering employees of the U.S. Postal Service was within the § 1

employment contracts of employees outside the narrow confines of these "interstate commerce movement" industries, whether individual employment contracts or collective bargaining agreements, are within the purview of the FAA.

There is a further indicator of the depth and breadth of support for the majority view that §1 should be confined to "interstate commerce movement" industries. The several Circuit Courts of Appeals that have explicitly or implicitly deemed collective bargaining agreements to be "contracts of employment" as per §1 of the FAA, when presented with the "broad" versus "narrow" scope question, have uniformly opted for the "narrow" view.[210] The result worked by those opinions is curious in that it substantially reverses the effect of the courts' earlier holdings that collective bargaining agreements are "contracts of employment" excluded from the coverage of the FAA. Nevertheless, when presented with the second §1 question previously identified, the several Circuit Courts of Appeals have consistently answered it in a manner that restores the vast majority of the labor arbitration agreements regulated by the LMRA to FAA coverage. It appears almost certain that all private sector collective bargaining agreements, save those in the rail, air transport, interstate bus and trucking industries, are directly subject to the terms of the FAA. But for those limited sectors of the economy, there is no obstacle to unification of the law of labor and commercial arbitration.

The belief that the §1 exclusion of "contracts of employment" from FAA coverage does not substantially hamper the unification of the law of labor and commercial arbitration is further strengthened by one final dimension of the relevant case law. In *Lincoln Mills,* the Supreme Court tacitly acknowledged that §301(a) of the LMRA provides little if any real guidance to the lower courts in fashioning the federal common law of labor arbitration. Consequently, it granted the lower courts license, in the course of creating that body of law, to look beyond the LMRA —to "our national labor laws," to the "penumbra of statutory mandates," and even to state law compatible with the purpose of §301(a). It advised the lower courts that "[t]he range of judicial inventiveness will be determined by the nature of the problem [faced]."[211]

The license granted the federal courts in *Lincoln Mills* authorizes them

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exclusion); *accord* American Postal Workers Union v. United States Postal Service, 823 F.2d 466, 473 (11th Cir. 1987).

210. *See, e.g., Scalzitti,* 351 F.2d at 579-80; *Bacashihua,* 859 F.2d at 405; Tenney Eng'g, Inc. v. United Elec. Radio & Machine Workers of Am., (U.E.) Local 437, 207 F.2d 450, 452-54 (3d Cir. 1953); *cf.* Pryner v. Tractor Supply Co., 109 F.3d 354, 357-58 (7th Cir. 1997) (noting the Seventh Circuit precedent holding that § 301 of the LMRA and the attendant federal common law of labor arbitration supersede the FAA with regard to issues the former body of law addresses) (citing Martin v. Youngstown Sheet & Tube Co., 911 F.2d 1239, 1244 (7th Cir. 1990)).

211. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456-57 (1956).

to tap into the substantive provisions of the FAA in the course of fashioning and refining the federal common law of labor arbitration. This is true even if §1 of the FAA proscribes them from directly applying the Act in all or a few industries. In the end, it makes no difference whether the pro-arbitration public policy of the FAA is accessed directly or tangentially. The outcome is the same.

This process has been going on, *sub rosa*, for some time. The current identity in the law of commercial and labor arbitration regarding federal preemption and the front-end issues of enforceability and substantive arbitrability demonstrate the phenomenon. Most notably, in *Misco* the Supreme Court cited to and relied squarely on what is now §10(a)(3) of the FAA as a key basis for its holding that an arbitrator's refusal to hear certain after-acquired (post-discharge) evidence did not constitute misconduct warranting vacatur.[212] Curiously, it was in this very passage that the *Misco* footnote appears that provides the contemporary basis for the argument that the FAA does not apply to collective bargaining agreements and their arbitration mechanisms. Nevertheless, in that footnote, immediately after stating that the FAA "does not apply to 'contracts of employment'" the Supreme Court observed, "the federal courts have often looked to the [FAA] for guidance in labor arbitration cases" and then proceeded to do exactly that.

The analytical tack employed by the *Misco* Court validates the assertion that ultimately, it does not matter whether the standards of the FAA are applied directly or obliquely in labor arbitration. *Misco* resoundingly demonstrates that whatever the route taken to tap into the FAA, the result is the same. Where it is needed, as in the law of vacatur, the FAA can provide substantive public policy guidance to the courts in stabilizing and strengthening the law of labor arbitration.

VII.
A NEW EQUILIBRIUM IN LABOR ARBITRATION LAW

There is today effectively one body of arbitration law with regard to federal preemption and the front-end issues of enforceability and substantive arbitrability. The fiction created by *Lincoln Mills* and the *Steelworkers Trilogy* that labor arbitration must be accorded legal treatment separate and apart from commercial arbitration is completely extinguished in this area of arbitration law. The current interface between labor and commercial arbitration law regarding the front-end issues is a positive one that acts to further the stability and efficacy of both processes.

There is also an emerging symmetry in labor and commercial

212. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987).

arbitration law at the back end of the process, with regard to the standards for vacatur of awards. That symmetry is highly dysfunctional. The dynamic at its core is preventing the maturation and institutionalization of commercial arbitration and diminishing the integrity and effectiveness of labor arbitration through a legally unprincipled and intellectually undisciplined cross-pollination between the two bodies of law.

It is painfully clear that the law of vacatur is in need of a philosophical reorientation. The various devices currently employed by the U.S. Circuit Courts of Appeals for reviewing challenged arbitration awards in both sectors does not enable them to articulate and apply the nonstatutory grounds for vacatur without intruding into the merits of those awards. Unless a way is found to alter that dynamic, the current instability at the back end of both arbitration processes can only, and almost certainly will be exacerbated.

The model proposed here for redirecting the law of vacatur can remedy this building crisis. This paradigm is faithful both to the origins of labor arbitration law and the relevant principles set out in §10(a) of the FAA. It refocuses the "essence from the agreement" analysis to the "exceeded authority (powers)" construct that was central to the Supreme Court's definition of this seminal nonstatutory ground in *Enterprise Wheel* and *Misco*. It harmonizes the "essence" standard with §10(a) of the FAA and reconciles the "manifest disregard" of the law and "public policy" nonstatutory grounds for vacatur with the Act and the contractual underpinnings of the arbitration process.

Amelioration of the growing disarray in the law of vacatur is critical to ensuring that labor arbitration remains the linchpin of the national labor policy. The willingness of the U.S. Circuit Courts of Appeals to construct and apply intrusive standards for review of labor arbitration awards presents a palpable threat to the viability of the process. The Supreme Court cannot permit that threat to go unanswered.

The time is right to bring the interactions between labor arbitration and commercial arbitration out of the closet, formalize it, and refine it, with a particular focus on the one remaining area where unification of the law of arbitration is not yet complete—vacatur. Section 10(a) of the FAA provides a realistic foundation on which to base a solution to the dilemma presently confounding the back end of the labor arbitration process. It is up to the federal courts to discover that solution by continuing, but redirecting, the long tradition of judicial inventiveness sanctioned by the Supreme Court some forty years ago in *Lincoln Mills* and the Steelworkers Trilogy.