CHAPTER 9

HOW THE FEDERAL ARBITRATION ACT WILL STABILIZE AND STRENGTHEN THE LAW OF LABOR ARBITRATION

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Labor arbitration became a central feature of labor-management relations in the United States several decades before the widespread emergence of commercial arbitration during the 1980s. That phenomenon, coupled with the central and unique role we, and the process we serve, play in effecting the national labor policy, led to the traditional view of labor arbitration as something special—a process apart—that can be preserved only if it is accorded legal treatment distinct from commercial arbitration. I come before you this afternoon so that together, we might confront the question of whether this longstanding conventional wisdom is still valid.

The Changed Legal Landscape of Arbitration

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] was moribund, so much so that it was not even mentioned in the majority opinions of the Supreme Court in *Textile Workers v. Lincoln Mills*[2] and the *Steelworkers Trilogy*.[3] These two factors, along with the widespread hostility of the judiciary toward commercial arbitration at the time, propelled the Supreme Court to quarantine labor arbitration from commercial arbitra-

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[1] 9 U.S.C. §§1 et seq.

[2] 353 U.S. 448, 456–57, 40 LRRM 2113 (1957).

[3] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

tion. In doing so the Court legitimated the invention of a new body of federal common law to govern the labor arbitration process under the sanction of section 301(a) of the Labor-Management Relations Act (LMRA).[4]

The current legal status and burgeoning use of commercial arbitration contrasts starkly with the state of affairs extant at the genesis of the bifurcated legal regime for arbitration. The FAA has been rediscovered and used by the Supreme Court as the touchstone for its enthusiastic embrace of commercial arbitration. The Court's resounding rejection of the traditional judicial animus toward commercial arbitration, in tandem with clogged civil court dockets, has resulted in the greatly increased use of arbitration in the commercial sector. Given the radical change that has occurred in the arbitration realm during the last two decades of the 20th century, there is good reason to question whether the longstanding rationale for separate legal treatment of legal arbitration remains viable. Our goal is to determine whether it is.

The Framework for Analysis

The determination of whether joinder of the law of labor arbitration and commercial arbitration makes sense must turn on three primary inquiries. First, we must reexamine the labor arbitration process itself and the institutional role it serves, with an eye toward the changed legal climate I just described. The key question here is whether the "holy writ"[5] set down by Justice Douglas in *Lincoln Mills* and the *Steelworkers Trilogy*—that the unique and important role played by labor arbitration can be preserved only if it is accorded separate legal treatment—was anything more than a convenient fiction made necessary by the legal environment of the late 1950s.

Second, this new law of commercial arbitration—a development of only the last 16 years—must be described and juxtaposed with the law of labor arbitration. The goal here will be to ascertain whether there is enough similarity in these existing, distinct bodies of law to provide the foundation for a cohesive, singular "law of arbitration" centered on the FAA. If the substantive law of labor

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[4]29 U.S.C §§151 et seq.

[5]Summers, *The* Trilogy *and Its Offspring Revisited: It's a Contract, Stupid,* 71 Wash. U. L.Q. 1021, 1024 (1993).

and commercial arbitration can be harmonized, the third primary issue is whether a model can be devised that unifies the law of arbitration and serves the best interests of the process in both the labor and commercial fields.

If these three threshold inquiries warrant the conclusion that such a melding of the law of labor arbitration and commercial arbitration is feasible and advisable, a final question arises. That question concerns the effect of section 1 FAA exemption from the Act's coverage for certain "contracts of employment." I now turn to the first of our three principal inquiries.

Dispelling the Mystique of Labor Arbitration

This portion of my comments I approach from substantial trepidation. No one has more respect than I do for the institution of labor arbitration, or more reverence for the people whose good work elevated the process to the lofty station it has enjoyed for the last 40 years. Nevertheless, an objective assessment of the current state of arbitration law obliges us all to reconcile the romantic view of our work with the current legal reality we and the process face. The perspective I advocate acknowledges that the changing legal milieu in which we find ourselves demands that we not cling to outdated, unnecessary fictions that may have outlived their usefulness.

The Supreme Court's Response to The Legal Environment at Midcentury

By the mid-1950s labor arbitration had assumed such a central role in the national labor policy that 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 the seminal law of labor arbitration—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 in general so strongly disfavored.[6]

Thus, in *Lincoln Mills* the Supreme Court divined in section 301(a) of the LMRA an implied rejection of the longstanding rule

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[6]Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards,* 19 Berkeley J. Emp. & Lab. L. 296 (1998).

of *Red Cross Lines v. Atlantic Fruit Co.*[7] that executory agreements to arbitrate were unenforceable as a matter of law. In *Steelworkers v. American Manufacturing Co.*,[8] the Court distanced labor arbitration from the crippling rule of the Cutler-Hammer doctrine—describing it and similar anti-arbitration pronouncements by the judiciary as based on an inappropriate "preoccupation with ordinary contract law."[9]

In *Steelworkers v. Warrior & Gulf Navigation Co.*,[10] the Supreme Court drew a similar but more forceful distinction between the proper rules for deciding enforceability and substantive arbitrability matters under the new federal common law of labor arbitration authorized by section 301(a) of the LMRA and "the run of [commercial] arbitration cases, illustrated by *Wilko v. Swan*." 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. The Court concluded, "the hostility evinced by courts toward arbitration of commercial agreements has no place [with regard to labor arbitration]."[11]

Institutionalization of the Bifurcated View of Arbitration

The post-*Steelworkers Trilogy* Supreme Court opinions built upon the presumption that the law of labor arbitration was to be constructed out of whole cloth, under the vague directive of section 301(a) and section 203(d) of the LMRA and without 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*. I for one grew up professionally without ever really questioning the mantra underpinning the bifurcation of arbitration law—that labor arbitration and labor arbitrators are unique, imbued with a

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[7]264 U.S. 109, 120–21 (1924) (cited in *Lincoln Mills v. Textile Workers*, 230 F.2d 81, 84, 37 LRRM 2462 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448, 40 LRRM 2113 (1957)) ("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.")

[8]*Supra* note 3.

[9]*Id.* at 567.

[10]*Supra* note 3.

[11]*Id.* at 578.

special kind of "right stuff" that could be preserved only if labor arbitration were accorded special, separate treatment under the law.

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. That bifurcation was the only viable means for securing the role of labor arbitration as the linchpin of the national labor policy.

The Legal Legitimization of Commercial Arbitration

Since 1983 the Supreme Court has stood the law of commercial arbitration on its ear, throwing out the longstanding 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*.[12] The Court's robust embrace of commercial arbitration has produced pro-arbitration pronouncements no less enthusiastic than the homilies spoken in praise of labor arbitration by Justice Douglas 40 years 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, obliges us all to ask an important question. Do the process of labor arbitration and the parties it serves benefit any longer by being isolated from the developing body of substantive arbitration law now emerging under the imprimatur of the strong pro-arbitration public policy of the FAA? I believe the answer is no.

The fact is that the legal environment that propelled the Supreme Court to wax so eloquent regarding our profession 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 our work without destroying the essence, effectiveness, and standing of labor arbitration, a door will be opened to a new era of labor arbitration law. I will now turn to an explanation of why I assert that result is achievable.

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[12]346 U.S. 427, 436–37 (1953).

The Contemporary Legal Playing Field: A Juxtaposition of Labor and Commercial Arbitration Law

The legal developments I have just described join the question at the core of this inquiry: whether the recently developed strong pro-arbitration posture of the Supreme Court outside the labor arbitration orbit has eliminated the need for two separate bodies of arbitration law. The answer to the question lies in a juxtaposition of the current law of labor arbitration and commercial arbitration intended to identify the similarities and intersections between them. Modern arbitration law has four primary focuses:

1. the preemptive effect of relevant federal law;
2. the issue of the enforceability of agreements to arbitrate;
3. substantive arbitrability—which, along with enforceability, I will refer to as the "front-end" issues because they arise at the beginning of the arbitration process; and
4. the standards for vacatur of arbitration awards—which I will call the "back-end" issue because it arises at the terminus of the arbitration process.

The Essential Predicate—Federal Preemption

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

1. Federal Preemption in 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 "federal common law" of labor arbitration to that effect. That was the Court's mission in *Lincoln Mills.*

Lincoln Mills divines within the sparse words of section 301(a) of the LMRA sweeping authorization to fashion a body of federal law pertaining to the enforcement of collective bargaining agreements and the arbitration provisions they embrace. The belief that this body of pro-arbitration law should preempt contrary state law is founded on the central role labor arbitration plays in effecting the national labor policy, 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 identified in section 301(a) of the LMRA, 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*[13] and *Teamsters Local 174 v. Lucas Flour Co.*[14]—the Court established that although state courts can decide suits pertaining to labor arbitration agreements, they are obliged to apply federal law, where such law exists. Thus, despite the vague and arguably dubious foundation provided by section 301(a) of the LMRA, the rule of federal preemption is complete in labor arbitration.

2. Federal Preemption in Commercial Arbitration Law. Unlike labor arbitration, where 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. However, 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.

As it had done in labor arbitration with regard to the LMRA, the Supreme Court, in a series of opinions beginning in 1984 with *Southland Corp. v. Keating,*[15] swept aside the jurisdictional view of the FAA. In *Southland,* the Supreme Court found in the legislative history of the FAA 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. The Court identified two problems enactment of the FAA was intended to resolve: (1) the old common law hostility toward arbitration, and (2) the failure of state arbitration acts to require the enforcement of contractual agreements to arbitrate. 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 these two significant problems.

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[13]368 U.S. 502, 49 LRRM 2619 (1962).
[14]369 U.S. 95, 49 LRRM 2717 (1962).
[15]465 U.S. 1, 22–23 (1984).

The Supreme Court has addressed issues of the FAA-state law interface on three occasions in the years since *Southland—Perry v. Thomas*,[16] *Allied-Bruce Terminimix Cos. v. Dobson*,[17] and *Doctor's Associates v. Cassarotta*.[18] *Southland*, *Perry*, *Terminix*, and *Cassarotto* 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 FAA. The Court has repeatedly confirmed its position that the Act's broad pro-arbitration public policy extends to the full reach of the Commerce Clause and has reiterated its belief that state courts are obliged to apply that federal law, even in the face of contrary state statutory or case law.

3. Conclusion. Stabilization of the 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 section 301(a) of the LMRA and the FAA serves that purpose by effectively "trumping" inconsistent state law. 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 that law.

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

In general terms, a party seeking to enforce a contractual arbitration provision must both (1) prove the existence of a valid agreement to arbitrate to which the individual resisting enforcement knowingly and voluntarily consented, and (2) 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 its subject matter is substantively arbitrable. This melding of the enforceability and substantive arbitrability determi-

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[16]482 U.S. 483, 28 WH Cases 137 (1987).
[17]513 U.S. 265 (1995).
[18]517 U.S. 681 (1996).

nations 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 section 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 nonconsensual. It almost certainly was for this reason that in its three primary enforceability / substantive arbitrability opinions—*American Manufacturing*, *Warrior & Gulf*, and *AT&T Technologies v. Communication Workers*[19]—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.

The Supreme Court's 1986 opinion in *AT&T Technologies* cogently summarizes and amplifies the four "principles" of *American Manufacturing* and *Warrior & Gulf* regarding the front-end issues.[20] In concert, the first two of those principles 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. Consistent with the contractual view of labor arbitration, the Court also believes that, unless the parties agree otherwise, determination of substantive arbitrability issues is a matter for judicial, not arbitral, decision.

The third principle identified in *AT&T Technologies* holds that in deciding substantive arbitrability matters the courts are not to intrude upon the merits of the underlying claim in arbitration. Thus, a court's assessment of the viability of the relative merit of a grievance cannot be a factor in determining its arbitrability. Fourth, and 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.

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[19]475 U.S. 643, 121 LRRM 3329 (1986).
[20]*Id.* at 648–52.

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. Permitted to forego the question of whether the agreement to arbitrate is the product of a consensual relationship, 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 same dynamic is at play in the law of commercial arbitration.

2. The Law of Commercial Arbitration. In the commercial sector, the agreement to arbitrate has a significant consensual element. Like section 301(a) of the LMRA, section 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 expressly address the issue of consent within the context of a challenged commercial arbitration agreement. Nevertheless, it is clear that the Court believes the dimensions 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.

Consent-related issues notwithstanding, to date the law of commercial arbitration pertaining to enforceability and substantive arbitrability is in complete congruity with the just-described front-end principles of labor arbitration. Each of the "Commercial Arbitration Trilogy" opinions—*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[21] *Southland*,[22] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[23]—concerned an issue of enforceability

[21]460 U.S. 1 (1983).
[22]*Southland Corp. v. Keating*, *supra* note 15.
[23]473 U.S. 614 (1985).

presented by either a common law doctrine or a state statute that dictated against enforcing the agreement to arbitrate. In each of the 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 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 section 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 a transaction involving interstate commerce. The Court further characterized the effect of section 2 of the FAA as being to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[24] In words that would subsequently be echoed in *AT&T Technologies* with regard to the "presumption of arbitrability" under the federal common law of labor arbitration, the Court 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."[25]

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*[26] and *First Options of Chicago v. Kaplan*.[27] In *Byrd*, the Supreme Court held the FAA requires 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.

The principal issue in *First Options* concerned the proper standard for court review of an arbitrator's decision on a matter of substantive arbitrability. Citing to *AT&T Technologies*, the Supreme

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[24]460 U.S. at 24.
[25]*Id.* at 24–25.
[26]470 U.S. 213 (1985).
[27]514 U.S. 938 (1995).

Court held that the answer to the question of who has the primary power to decide arbitrability turns on whether the parties mutually intended to submit the matter to the arbitrator for decision. If they have, the standard for judicial review should be very deferential, giving the arbitrator considerable leeway and setting the arbitral decision aside only in certain narrow circumstances. 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.

In setting down this decision rule, the 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."[28] Thus, like other matters pertaining to effectuation of the agreement to arbitrate, it is clear the Court believes the key role of the courts is to ascertain the precise nature of the parties' bargain and, having done so, enforce it.

3. Conclusion. 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. This is true because in both bodies of law, in the absence of consent-related issues pertaining to enforceability, the only question remaining is the purely contractual one of whether the issue in dispute falls within the scope of the parties agreement to arbitrate.

Thus, despite the Supreme Court's disparaging references to the law of contracts as applied to arbitration in *American Manufacturing*[29] and *Warrior & Gulf*,[30] it is clear that in both labor and commercial arbitration, enforceability and substantive arbitrability matters are in fact decided as simple matters of contract law—the objective being to give effect to the parties' agreement to arbitrate. Accordingly, and this is important, it can be fairly said that the identity of this dimension of the law of labor arbitration and commercial arbitration demonstrates that at the front end of the arbitration process there is today a de facto unification of the law.

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[28]*Id.* at 943.
[29]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960).
[30]*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

The "Back-End" Issue—Vacatur of Challenged Awards

At first glance, the law of vacatur in labor arbitration and commercial arbitration appears 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.

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 section 10(a)(1)–(4) of the FAA. The first three of those FAA 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 failed to produce a mutual, final, and definite award.

Despite these contrasting origins, in recent years the law of vacatur in the labor and commercial spheres has become virtually indistinguishable. This melding of vacatur law has occurred largely as a result of the "cross-pollination" between the bodies of law effected at the level of the U.S. Circuit Courts of Appeals. I will now briefly recap the manner in which that phenomenon has transpired.

1. Labor Arbitration. The true heart of the law of vacatur, in both labor and commercial arbitration, lies in the final opinion of the *Steelworkers Trilogy—Steelworkers v. Enterprise Wheel & Car Corp.*[31] The Court's approach to vacatur in *Enterprise Wheel* was at once simple and elegant, and founded squarely 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."[32]

The perspective reflected in *Enterprise Wheel* centers on the assertion 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." In a sentence that has taken on significance few

[31]363 U.S. 593, 46 LRRM 2423 (1960).
[32]*Id.* at 596.

could have imagined in 1960, the Court stated, "[The 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."[33]

At this point in the scholarly piece I explain why I believe 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 vacatur the Court intended to establish. Instead, that phrase was but a corollary, an aside. It was intended to flesh out and explain the true axiom of *Enterprise Wheel,* which holds that vacatur is justified only when the award unequivocally shows that the arbitrator exceeded the contractual authority granted the arbitral office by the parties.

An 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. Remember this point. It is a key to my thesis.

The Supreme Court has spoken definitively to the issue of vacatur on only two occasions since 1960—in its 1983 opinion in *W.R. Grace*[34] and its 1987 opinion in *Misco.*[35] *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 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 in the opinion, it is asserted that the courts are not permitted to evaluate the accuracy (based on the facts) or the correctness (based on the contract) of challenged arbitration awards, or the remedy orders arising therefrom.

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[33]*Id.* at 597.
[34]*W.R. Grace & Co. v. Rubber Workers Local 759,* 461 U.S. 757, 113 LRRM 2641 (1983).
[35]*Paperworkers v. Misco, Inc.,* 484 U.S. 29, 126 LRRM 3113 (1987).

Instead, *Misco* emphatically 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—that is, to decide 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 application of these two tests demonstrates that the issue decided by the arbitrator is embraced by the arbitration bargain and the arbitral decision is based on an interpretation of the parties' contract and their submission to arbitration, the award must be confirmed.

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. Read together (again with *Misco* being the most important) the two opinions send 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. 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, which is well-defined and dominant, and ascertainable by reference to statutes and legal precedents, is vacatur on public policy grounds warranted.

2. Commercial Arbitration. 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 the arbitration process to closure by permitting parties dissatisfied with the arbitral result to escape that outcome under only very limited circumstances. As I noted earlier, by its terms section 10(a) holds the parties to their arbitration bargains absent serious, prejudicial misconduct by those involved in the process or an award that either fails to produce a definite result, decides as issue(s) not submitted to arbitration, or demonstrates that the arbitral outcome is not grounded in an interpretation of the parties' contract. The clear purpose of section 10(a) is to enforce

the arbitration bargain at the back end of the process, in the same manner section 2 enforces that bargain at the front end.

Section 10(a) of the FAA does not authorize, either expressly or implicitly, vacatur on grounds other than the four it articulates. Nevertheless, in the hands of the U.S. Circuit Courts of Appeals section 10(a) 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.

These opinions typically first "tip their hat" to the narrow strictures of section 10(a) and then cite to the Supreme Court's 1953 opinion in *Wilko*[36] 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 section 10(a) of the FAA to constitute the exclusive grounds for vacatur of commercial arbitration awards. Having thusly satisfied themselves that the Supreme Court approves the creation of nonstatutory grounds for vacatur beyond those stated in section 10(a), the circuit courts embark on an adventure in judicial creativity that seemingly knows no bounds.

The current disarray in the law of vacatur in the commercial arbitration venue is the result of the Supreme Court's omission to address the issue in any meaningful way. In recent years, the Court has repeatedly implored the lower courts to respect parties' arbitration bargains at the front end of the commercial arbitration process. However, unlike labor arbitration law, the Court has not closed the circle in commercial arbitration law by addressing the issue of vacatur. Thus, the effect of the "contractual perspective" reflected in the FAA at the back end of the process has not been clarified and the issue of the exclusivity/nonexclusivity of the section 10(a) statutory grounds for vacatur remains unresolved.

The Supreme Court's failure to clarify the standards for vacatur of commercial arbitration awards has effectively liberated the U.S.

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[36]*Wilko v. Swan*, 346 U.S. 427 (1953). The *Wilko* dictum states:

> While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of [relevant law] would "constitute grounds for vacating the award pursuant to section 10[a] of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions [to arbitration] . . . the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation.

Id. at 436–37 (citation omitted).

Circuit Courts of Appeals to fashion principles for judicial review of arbitration awards that go well beyond the narrow conduct- and contract-focused inquiries approved by Congress in section 10(a) of the FAA. In doing so, they have borrowed freely and without obvious deliberation from the corpus of labor arbitration law.

Through a curious process of "cross-pollination" between vacatur law in the commercial and labor spheres, all of the U.S. Circuit Courts of Appeals have embraced one or more of these nonstatutory grounds for vacatur. A survey of recent circuit 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—that is, "manifest disregard" of the law;
- the award fails to draw its essence from the parties' underlying contract;
- the award violates an explicit "public policy" that is well defined and dominant;
- the award is in "manifest disregard" of the contract;
- the award is arbitrary and capricious;
- the award is completely irrational;
- the arbitrator interprets unambiguous language in any way different from its plain meaning;
- the arbitrator's interpretation of the contract is not barely colorable; or
- the facts of the case fail to support the award, or the award is based on an unambiguous and undisputed mistake of fact.

This 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. It is federal common law at its best.

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 arbitration 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 arbitral result. Instead, they are presented with questions of contract interpretation, law, and fact they deem themselves fully qualified to decide. When vacatur

petitions are viewed in that context, many judges find the temptation to tinker with the merits of awards they perceive to be deeply flawed irresistible.

3. Conclusion. The disparate origins of the federal common law of vacatur in labor and commercial arbitration notwithstanding, the standards for vacatur each body of law is producing are strikingly similar. They center on an ever-expanding mass of nonstatutory grounds for vacatur founded on the labor arbitration "essence from the agreement" and "public policy" standards and the commercial arbitration "manifest disregard" of the law construct. As those nonstatutory grounds in labor and commercial arbitration continue to metastasize and feed upon one another, they exact and increasing toll on the finality and integrity (both perceived and real) of both processes. If a way is not discovered to stop the growth of the "cancer" that is the creation of the "cross-pollination" between the law of vacatur in labor arbitration and commercial arbitration, the future of neither process can be assured.

The Juxtaposition Summarized

The building chaos at the back end of the process threatened to destabilize both labor arbitration and commercial arbitration by creating manifold caveats and exceptions to the seminal rule of finality that truly makes "arbitration works." 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 the same state of equilibrium that characterizes the front-end issues of enforceability and substantive arbitrability, unification of the two bodies of law wound be a fait accompli. Because it is not, today both processes are in peril of being greatly diminished as true, viable vehicles for achieving binding resolutions of contractual disputes without resort to litigation in a court of law.

I will now identify the key to both stabilizing the law of labor arbitration and securing the long-run institutionalization of commercial arbitration. It lies in finding a way to recenter the law of vacatur on the contractual view of arbitration and the true meaning of the "essence from the agreement" standard. In the next portion of my comments I will describe how that can be accomplished.

A Template for Completing Unification of the Law of Labor and Commercial Arbitration

The dysfunctional "cross-pollination" that today plagues the law of vacatur in labor and commercial arbitration results largely from the absence in either venue of clearly worded consensus standards for applying the nonstatutory grounds for vacatur that both respect the arbitration bargain and prevent judicial intrusion into the merits of disputed awards. At the heart of the vacatur conundrum the U.S. Circuit Courts of Appeals are creating is the inability or unwillingness of many federal judges to let stand awards they believe to be seriously flawed by errors of contract interpretation, law, fact, or application of contract or law to fact.

What is needed is a straightforward, easily understood analytical framework for vacatur determinations. When applied at the back end of the labor and commercial arbitration process, that vacatur 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 powerful fiction. It must also unify and harmonize the law of vacatur in labor and commercial arbitration in a manner that terminates the pernicious interface between the two that is currently distorting them both.

The model I propose for redirecting and disciplining the law of vacatur consists of three elements, all of which rely on the identity between the strong pro-arbitration public policy divined in the LMRA and expressly stated by Congress in the FAA. It leverages the traditional law of vacatur in labor arbitration against the Court's recently discovered enthusiasm for arbitration in the commercial sector, as anchored in the FAA.

The Contractual Perspective

The model I advocate is premised on the contractual nature of labor and commercial arbitration, a characteristic repeatedly confirmed by the Supreme Court and reflected in the clear public policy articulated in the FAA. Both hold that arbitration is a simple matter of contract. The model centers on the assertion that the proper—indeed the only—role of the courts is to enforce the parties' arbitration bargain, at both ends of the process.

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. I will now demonstrate that this is precisely the result a proper melding of the common law of vacatur in labor arbitration and section 10(a) of the FAA will achieve.

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

In at least seven different places in *Enterprise Wheel*,[37] the Supreme Court confirmed that 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. The Fourth Circuit's decision in *Enterprise Wheel*[38] was reversed precisely because it "was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. [Instead, the lower court] merely disagreed with the arbitrator's construction of [the contract]."[39]

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.[40] It did so because "acceptance of this view [of the "essence" standard] would require courts . . . to review the merits of every construction of the contract [by the arbitrator.]"[41] 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.[42]

This view that an award may draw its essence from the contract without being correct on the contract and accurate on the facts is reflected in numerous passages in *W.R. Grace*[43] and *Misco*.[44] 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

[37]*Steelworkers v. Enterprise Wheel & Car Corp., supra* note 31.
[38]*Steelworkers v. Enterprise Wheel & Car Corp.*, 269 F.2d 327, 44 LRRM 2349 (4th Cir. 1959).
[39]363 U.S. at 598.
[40]*Id.* at 598–99.
[41]*Id.*
[42]*Id.* at 599.
[43]*W.R. Grace & Co. v. Rubber Workers Local 759, supra* note 34.
[44]*Paperworkers v. Misco, Inc., supra* note 35.

should not reject an award on the ground that the arbitrator misread the contract."[45] The "plain language" passage in *Misco* was not meant to license judges to interpret disputed contract language in making the "essence from the agreement" determination. Rather, that passage 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.

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 powers delegated to the arbitral office by the parties. But for the oblique "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, provide 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 of the process, in both the labor and commercial fields.

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

This is so clear there is no way the U.S. Circuit Courts of Appeals could misapply the "essence from the agreement" standard—right? Wrong! The opinions of the Circuit Courts of Appeals 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" constructs. In the hands of the federal appellate courts, the narrow contract-based principle that is the core of the law of vacatur in labor arbitration has morphed into what looks very

[45] *Id.* at 38.

much like a "big error" standard for vacatur in both labor and commercial arbitration.

In the scholarly piece, I note two prime examples of this emerging phenomenon in the U.S. Circuits Courts of Appeals. My current personal favorite is from a 1998 First Circuit labor arbitration opinion—*Coastal Oil of New England v. Teamsters Local 25 A/W*.[46] Therein, the Court asserted that

> [t]he scope of [judicial] review is limited to claims that 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."[47]

I could cite myriad other examples of this phenomenon in the circuit courts. In the interest of time, I will not.

The dominant mode of analysis reflected in the evolving circuit court case law flatly ignores the Supreme Court's 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."[48] It also dismisses without discussion the Supreme Court's clear assertion 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. Instead, the evolving majority view in the circuit courts produces a holding that an award draws its essence from the contract only when the reviewing court agrees that it is based on an acceptably correct (or perhaps, more accurately, "not unacceptably erroneous") interpretation of the contract and an acceptably accurate reading of the pertinent facts.

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 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

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[46]134 F.3d 466, 157 LRRM 2294 (1st Cir. 1998).

[47]*Id.* at 469 (quoting *Food & Commercial Workers Local 1445 v. Stop & Shop Cos.*, 776 F.2d 19, 21, 120 LRRM 3155 (1st Cir. 1985).

[48]*W.R. Grace & Co. v. Rubber Workers Local 759, supra* note 34, at 765 n.8.

challenged award draws its essence sufficiently from the contract without obliging the courts that apply it to evaluate, at some level, the correctness of the arbitrator's interpretation of the contract or the accuracy of the arbitrator's findings of fact.

Through the process of "cross-pollination" I described earlier, this very same dynamic is also contaminating the law of vacatur in labor arbitration. The havoc being generated by this dynamic vividly demonstrates that the seminal nonstatutory ground for vacatur needs to be rechanneled and returned to its origins in the words of Justice Douglas, as refined and reiterated in *Misco*. I believe the key to achieving that end, and accomplishing the broader goal of stabilizing the law of labor arbitration lies in section 10(a) of the FAA.

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

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 asked to apply the "essence from the agreement" standard. Perusal of their opinions invariably leads to the inference that these members of the judiciary do not understand the contractual nature of arbitration and have failed to grasp the Supreme Court's abiding conviction that the parties' arbitration bargain must be respected—even by the losers.

Section 10(a)(4) of the FAA provides the perfect device for disciplining the lower federal courts in their application of the "essence"-based nonstatutory grounds for vacatur. The first clause of section 10(a)(4) sanctions vacatur when "the arbitrators exceeded their powers." A representative sampling of the relevant commercial arbitration case law set out in the full article confirms that the "powers" of the arbitrator referred to in section 10(a)(4) are contractual in nature.

Thus, and this is most important, the section 10(a)(4) case law from the commercial sector reveals its congruency with the *Enterprise Wheel* and *Misco* articulations of the "essence from the agreement" ground for vacatur in labor arbitration. I assert that the test for vacatur under the "essence from the agreement" standard is precisely the same as the section 10(a)(4) "exceeded authority" standard.

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 section 10(a) of the FAA and the contractual view of arbitration—the "manifest disregard" of the law ground and the "public policy" ground. A proper framing of the "manifest disregard of the law" analysis directs a reviewing court's inquiry 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. By ignoring the known law, the arbitrator engaged in misconduct or misbehavior prejudicing the rights of a party—the same "trip wire" to vacatur embraced by section 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 view of the "manifest disregard" of the law standard comports with the contractual view of arbitration.

Similarly, a reviewing court properly applying the contract law-based "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. 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, vacatur is justified. Otherwise, it is not.

When appropriately effected, neither of these nonstatutory grounds for vacatur license judicial oversight or second-guessing of labor or commercial arbitration awards in pursuit of egregious arbitral errors warranting vacatur. At the same time, neither requires judicial "line drawing" of the type that invariably leads a court to evaluate the merits of challenged arbitration awards. Consequently, both of these standards can be comported with section 10(a) of the FAA and the "essence from the agreement" contract-based standard of labor arbitration law.

Conclusion

I have demonstrated how a revitalized section 10(a) of the FAA can become the guardian of the arbitration bargain at the back end of the process. Proper use of section 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.

I believe that 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 given the opportunity, it will read section 10(a) expansively. I am convinced the Court will eventually resurrect section 10(a) in the same manner it earlier breathed line into section 2 of the FAA, and employ it as the means for bringing closure to the law of arbitration. The model I offer provides a road map for that effort.

The Section 1 FAA Issue

In the interest of time I will speak only a few words regarding the section 1 FAA "problem" caused by its statement 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."[49] Again, this issue is the subject of more extensive analysis [in the full article].

The question here is whether collective bargaining agreements are "contracts of employment" per the section exemption. Even if the Supreme Court were to hold that they are, the predominant "narrow" view of the section 1 exemption as being limited to employees directly involved in the interstate transportation of articles of commerce would limit the exemption to a few industries. Regardless of the actual scope of the section 1 exemption, there can be no doubt that the "hunting license" granted the federal courts in *Lincoln Mills*[50] authorizes them to tap into the substantive

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[49]9 U.S.C. §1 (1994).
[50]*Textile Workers v. Lincoln Mills,* 353 U.S. 448, 40 LRRM 2113 (1957).

provisions of the FAA in the course of fashioning and refining the federal common law of labor arbitration. This is true even if section 1 of the FAA proscribes the courts from directly applying the Act in a few industries.

In the end, it makes no difference whether the application of the pro-arbitration public policy of the FAA is effected directly or obliquely. The outcome is the same. The federal courts, in the course of attempting to stabilize and strengthen the law of labor arbitration, may properly tap the strong pro-arbitration public policy articulated in the FAA, including its section 10(a) standards for vacatur.

Conclusion

The summary tour of the most significant dimensions of the law of labor arbitration and commercial arbitration we have just completed demonstrates that the law in these two venues is in a state of substantial symmetry. The law of labor arbitration and commercial arbitration pertaining to federal preemption and the front-end issues of enforceability and substantive arbitrability is in symbiosis. The fiction created by *Lincoln Mills* and the *Steelworkers Trilogy*[51] that labor arbitration must be accorded legal treatment separate and apart from commercial arbitration is completely extinguished in this area of arbitration law.

There is also an emerging symmetry in labor and commercial 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, so much so that the very fabric of Justice Douglas's 40-year-old fiction is being shredded. It is time to change the way we think about the standards for vacatur.

I have proposed an alternative model for redirecting the law of vacatur that can remedy this growing crisis. That paradigm is faithful both to the relevant labor arbitration law and the principles set out in section 10(a) of the FAA. It restores the "essence

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[51]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 31.

from the agreement" analysis to the "exceeded authority" construct that was central to the Supreme Court's definition of that seminal nonstatutory ground in *Enterprise Wheel*[52] and *Misco*.[53] It harmonizes the "essence" standard with section 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.

I believe that 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. Section 10(a) of the FAA is an appropriate vehicle for achieving that result. It is up to the federal courts to discover this solution by continuing the long tradition of judicial inventiveness first sanctioned by the Supreme Court in *Lincoln Mills* and the *Steelworkers Trilogy*.

I have attempted to throw down the gauntlet. It is my hope that someone in the federal judiciary will pick it up.

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[52]*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 38. 46 LRRM 2423 (1960).
[53]*Paperworkers v. Misco, Inc.*, *supra* note 35.