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The Essence Test: Picking Up a Supreme Court Fumble

Erratum

corrected header

THE ESSENCE TEST: PICKING UP A SUPREME COURT FUMBLE

Thomas Gentry⁺

Labor arbitration continues to be “the primary method utilized by public and private employers and unions to solve disputes that arise in the workplace under labor agreements,”¹ even though it has been nearly sixty years since the United States Supreme Court first enunciated its guiding principles and the grounds for vacatur of labor arbitration.² Viewed in the context of the Labor Management Relations Act³ (LMRA), this reality becomes especially problematic. The LMRA contains no specific grounds for vacatur of arbitration awards,⁴ and is therefore dependent upon the Supreme Court to have any teeth. This has been an area, however, where the Supreme Court has fumbled repeatedly. The Supreme Court’s missteps are most apparent under the “essence test,”⁵ a judicially created remedy that losing parties to an arbitration dispute often plead in the hopes that a reviewing court will vacate the arbitration award.⁶

The essence test is a common law mechanism created by the Supreme Court in the *Steelworker Trilogy*⁷ cases to enable a judge to vacate an arbitration award that fails to “draw[] its essence from the collective bargaining agreement.”⁸ Multiple circuits have attempted to articulate when an arbitration award fails to draw its essence from the agreement, without a single interpretation appearing

⁺ J.D., The Catholic University of America, Columbus School of Law, 2018; B.A., The Catholic University of America, 2015. I would like to thank Professor Frederick Woods for his expertise and guidance throughout the formulation of this paper. I would also like to thank Professor Megan La Belle and the staff and editors of the Catholic University Law Review for their review of this paper. All errors are my own.

1. *A Practical Guide to Grievance Arbitration*, AMERICAN BAR ASSOCIATION at 1, http://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/grievance_arbitration.authcheckdam.pdf (last visited Mar. 8, 2018).

2. *See infra* Section III.A (discussing the *Steelworker Trilogy* cases decided in 1960).

3. 29 U.S.C. §§ 141–197 (2012).

4. *Infra* Section II.A.

5. *See infra* Section III.B.

6. *See* Jonathan R. Waldron, *Vacatur of Labor Arbitration Awards: Watering Down the Supreme Court’s “Drawn from the Essence” Precedent May Sound the Death Knell for Labor Arbitration*, 2005 J. DISP. RESOL. 539, 544 (discussing losing parties’ use of the essence test and various courts’ willingness to reach the underlying merits of the case when reviewing a labor arbitration award).

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

8. *Enter. Wheel & Car Corp.*, 363 U.S. at 597.

to lead the way.⁹ Circuits have stated that an award fails to draw its essence from the agreement when it is “unfounded in reason and fact,”¹⁰ when the award is “completely irrational,”¹¹ or when the arbitrator is not “arguably construing or applying the contract.”¹² But these attempts to make the essence test a usable standard have proven to be unsuccessful.¹³

In practice, courts have used one of these various interpretations of the essence test to necessarily review the merits of arbitration awards.¹⁴ But under the guiding principles of the *Steelworker Trilogy* cases, courts are forbidden to review the merits of arbitration awards.¹⁵ The issue facing the courts directly relates to the incompatibility of these two judicial principles: allowing vacatur that do not draw their essence from the agreement, yet simultaneously demanding a court refrain from reviewing the merits of that arbitration award.

This Comment will discuss the paradox of these two judicial mandates within the context of the *Adrian Peterson* arbitration appeal through the district court¹⁶ and appellate court.¹⁷ This Comment will examine the development of the essence test in the United States Supreme Court and various circuit courts, as well as the Supreme Court’s preference against review of the merits of arbitration awards. Then, this Comment will demonstrate that the essence test and the Supreme Court’s prohibition of merit review of arbitration awards are conflicting ideas, which require a limited exception to become compatible. This Comment concludes by providing a solution to this conflict: through a collective bargaining agreement (CBA), parties could contractually agree to expand the scope of judicial review to include errors of law or fact, thereby enabling courts to determine that an arbitration award fails to draw its essence from the agreement if an arbitrator commits an error of law or fact. Alternatively, this

9. See Waldron, *supra* note 6 at 546–49 (describing different approaches taken to determining whether an arbitration award derives its essence from the collective bargaining agreement).

10. *Cytec Corp. v. Deka Prods., Ltd. P’ship*, 439 F.3d 27, 33 (1st Cir. 2006).

11. *Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009) (quoting *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1227, 1288 (9th Cir. 2009)).

12. *Memphis Dist. of Browning-Ferris Indus., Inc. v. Teamsters Local Union No. 984*, No. 90-5933, 1991 U.S. App. LEXIS 24760, at *11 (6th Cir. Oct. 10, 1991) (quoting *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

13. See *infra* Section III.C.

14. See *infra* Section III.C; see also *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985) (“This court may engage in a *substantive review* of the award only to determine whether the award is unfounded in reason and fact In such cases, the award fails to draw its essence from the collective bargaining agreement and must be overturned.”) (emphasis added) (internal quotations and citations omitted).

15. See *infra* Part IV (noting that public policy favors the finality of arbitration and, therefore, a judicial rule forbidding courts to review the merits of arbitration awards).

16. *NFL Players Ass’n ex rel. Peterson v. NFL*, 88 F. Supp. 3d 1084 (D. Minn. 2015), *rev’d and remanded* *NFL Players Ass’n ex rel. Peterson v. NFL*, 831 F.3d 985 (8th Cir. 2016).

17. *NFL Players Ass’n ex rel. Peterson v. NFL*, 831 F.3d at 985.

result could be accomplished through legislation: amending the LMRA to provide for explicit grounds for vacatur.

Part I describes the background facts of the *Peterson* case and the role of the essence test throughout that case. Part II discusses the LMRA, its impact upon suits to vacate arbitration awards, and a shift in judicial opinion toward favoring labor arbitration. Part III reviews the *Steelworker Trilogy* cases and describes the essence test in detail, including the conflicting interpretations by the circuit courts. Part IV suggests that collective bargaining could cure problems surrounding the essence test. Part V proposes that, in the alternative, Congress could negate the need for the essence test by enacting specific grounds for vacatur similar to the Federal Arbitration Act. Finally, Part VI demonstrates that the growing popularity of labor arbitration requires a resolution of the essence test and the merit review paradox.

I. THE ADRIAN PETERSON CASE AS AN EXAMPLE OF THE ESSENCE TEST

Adrian Peterson grabbed a “switch”¹⁸ and “struck [his] child repeatedly.”¹⁹ The Minnesota Vikings’ star running back, and one of the National Football League’s most accomplished players,²⁰ was charged with “reckless or negligent injury to a child” in 2014.²¹ This incident involving Peterson’s four-year-old son became front-page news.²² As the story became widely reported, Peterson faced disciplinary action from NFL Commissioner Roger Goodell.²³

18. A “switch,” as it is used in the context of the *Peterson* case, is a small tree branch traditionally used in disciplining a child. Ryan Wilson, *Adrian Peterson Indicted in Child Injury Case in Texas*, CBS SPORTS (Sept. 12, 2014), <http://www.cbssports.com/nfl/news/adrian-peterson-indicted-in-child-injury-case-in-texas/>.

19. *Id.*

20. Adrian Peterson was the seventh pick overall in the 2007 NFL draft. He is a seven time Pro Bowl Player, four time First-team All-Pro player, three time Second-Team All-Pro player, 2012 NFL Most Valuable Player, 2012 NFL Offensive Player of the Year, 2012 NFL Comeback Player of the Year, two time Bert Bell Award Winner, 2007 NFL Offensive Rookie of the Year, three-time NFL rushing yards leader, two-time NFL rushing touchdowns leader, and holds the NFL record for most rushing yards in a single game. *Adrian Peterson*, PRO FOOTBALL REFERENCE <https://www.pro-football-reference.com/players/P/PeteAd01.htm> (last visited April 6, 2018).

21. Wilson, *supra* note 16. Peterson’s reckless assault case was heard in Montgomery County, Texas in front of District Judge Kelly Case. *Peterson Enters No Contest Plea*, ESPN (Nov. 5, 2014), http://www.espn.com/nfl/story/_/id/11819670/adrian-peterson-minnesota-vikings-enter-plea-lesser-charge-felony-child-abuse-charge-avoid-jail.

22. See Wilson, *supra* note 18; Ben Estes, *Vikings RB Adrian Peterson Pleads No Contest to Misdemeanor in Child Abuse Case*, SPORTS ILLUSTRATED (Nov. 4, 2014), <http://www.si.com/nfl/2014/11/04/adrian-peterson-minnesota-vikings-trial-plea>. Peterson’s son’s doctor initially reported that “the boy had a number of lacerations on his thighs, along with bruise-like marks on his lower back and buttocks and cuts on his hand.” Wilson, *supra* note 18. Apparently, Peterson’s son pushed his sibling off of a motorbike video game, at which time Peterson grabbed a thin tree branch referred to as a “switch” and “discipline[d]” the boy. *Id.*

23. See Conor Orr, *Adrian Peterson Suspended Without Pay For Rest of ‘14*, AROUND THE NFL (Nov. 18, 2014, 8:54 AM), <http://www.nfl.com/news/story/0ap3000000430302/article/adrian-peterson-suspended-without-pay-for-rest-of-14>.

The NFL is not new to player discipline and subsequent labor arbitration.²⁴ Just prior to the Peterson incident, the NFL completed its handling of the highly publicized disciplinary proceeding involving former Baltimore Ravens' running back Ray Rice, after a video surfaced of Rice knocking his then-girlfriend unconscious in an elevator.²⁵ Like Ray Rice, Adrian Peterson's disciplinary action for "conduct detrimental to the integrity of, or public confidence in, the game of professional football" would go to arbitration, pursuant to the NFL's Collective Bargaining Agreement.²⁶

After playing only one game in the 2014 season, Peterson was placed on the Commissioner's Exempt List.²⁷ While on the Exempt List, the NFL issued a

24. Over the last few years, there have been several recent high-profile arbitration cases arising from NFL player discipline. For example, after the 2015 AFC Championship Game, which became known as "Deflate Gate," New England Patriots quarterback Tom Brady received a four-game suspension for deflating footballs. *The Case for Tom Brady: An Arbitrator's Take*, THE WASHINGTON POST (June 10, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/06/10/the-case-for-tom-brady-an-arbitrators-take/?utm_term=.33ed9c363c53. Similarly, after a 2014 domestic violence incident, former Carolina Panthers Defensive End Gregg Hardy was suspended for 10 games, subsequently reduced in arbitration to four games. Dan Hanzus, *Greg Hardy Suspension Reduced to Four Games*, AROUND THE NFL (July 10, 2015, 2:28 PM), <http://www.nfl.com/news/story/0ap3000000500985/article/greg-hardy-suspension-reduced-to-four-games>.

25. See generally Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SB NATION (Nov. 28, 2014), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens>. On February 15, 2014, Ray Rice was arrested in Atlantic City, New Jersey for simple assault after he got into a fight with his then-fiancée Janay Palmer. *Id.* Roger Goodell suspended Rice for two games on July 24, 2015. *Id.* On September 8, 2015 TMZ released a surveillance video of the assault incident between Rice and Palmer, which showed Rice strike Palmer in the face, knocking her unconscious. *Id.* Upon seeing the video footage and after receiving heavy criticism from the public, Goodell amended Rice's suspension from two games to an indefinite suspension. *Id.*

26. NFL Collective Bargaining Agreement, Article 46 §1(a) at 204 ("All disputes involving a fine or suspension imposed upon a player for conduct on the playing field (other than as described in Subsection (b) below) or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner.").

27. After news of these charges came out, the Vikings placed Peterson on the "Commissioner's Exempt List," which barred Peterson from all team activities, much like a suspension. Louis Bien, *What is the NFL Exempt/Commissioner's Permission List, and What Does it Mean for Adrian Peterson?*, SB NATION (Sept. 17, 2014, 11:37 AM), <http://www.sbnation.com/nfl/2014/9/17/6333759/nfl-exempt-commissioners-permission-list-explanation-adrian-peterson-greg-hardy>. To be placed on the Commissioner's Exempt List, both the player and Commissioner Roger Goodell must agree. *Id.* At the time of the incident, the NFL player Personnel Policy Manual described the list as follows:

The Exempt List is a special player status available to clubs only in unusual circumstances. The List includes those players who have been declared by the Commissioner to be temporarily exempt from counting within the Active List limit. Only the Commissioner has the authority to place a player on the

new personal conduct policy that required a minimum six game suspension for first time violations involving domestic or child abuse.²⁸

With six weeks remaining in the season, Peterson was taken off the Commissioner's Exempt List and suspended for the remainder of the season,²⁹ forfeiting \$4.2 million in salary.³⁰ This suspension was made pursuant to the NFL's newly implemented personal conduct policy, even though the policy was created after the Peterson incident occurred.³¹ Peterson appealed the disciplinary decision to arbitration, and the arbitrator upheld the decision.³² A

Exempt List; clubs have no such authority, and no exemption, regardless of circumstances, is automatic. The Commissioner also has the authority to determine in advance whether a player's time on the Exempt List will be finite or will continue until the Commissioner deems the exemption should be lifted and the player returned to the Active List.

Id. (citing NFL Player Personnel Policy Manual).

28. Katie Sharp, *NFL Announces New Domestic Violence Policy*, SB NATION (Aug. 28, 2014, 4:06 PM), <http://www.sbnation.com/nfl/2014/8/28/6079465/nfl-announces-new-domestic-violence-policy>.

29. *See Roger Goodell Defends Ray Rice Ban*, ESPN (Aug. 2, 2014), http://www.espn.com/nfl/story/_id/11296028/roger-goodell-defends-suspension-ray-rice-baltimore-ravens-running-back. There was speculation that the severity of Peterson's punishment was largely fueled by the recent public criticism regarding the NFL's handling of the Ray Rice incident. *See id.* ("Goodell also fielded multiple questions about the widespread public reaction to the length of Rice's suspension, which has been criticized as lenient compared with other NFL suspensions for substance abuse and off-field incidents."); *see also* Steve Almasy & Ashley Fantz, *NFL Chief Roger Goodell Faces Intense Criticism After Ray Rice Video*, CNN (Sept. 16, 2014), <http://www.cnn.com/2014/09/09/us/nfl-ray-rice-criticism/> ("Outspoken ESPN personality Keith Olbermann called Goodell an 'enabler of men who beat women' and demanded the commissioner resign or be fired.").

30. Orr, *supra* note 23. After playing in the season opener, Peterson was placed on the "Commissioner's Exempt List" while awaiting discipline from the NFL. *Id.* While on this list, Peterson was able to collect a salary, but could have no participation in any team activities. After spending some time on the Commissioner's Exempt List, Goodell ultimately decided to remove Peterson from the List and suspended him for the remainder of the season, approximately six games. *Id.*

31. NFL Players Ass'n *ex rel.* Peterson v. NFL, 831 F.3d 985, 985 (8th Cir. 2016) ("There is no dispute that the Commissioner imposed Peterson's discipline under the New Policy."); *rev'd and remanded*, NFL Players Ass'n *ex rel.* Peterson v. NFL, 88 F. Supp. 3d 1084 (D. Minn. 2015).

32. Peterson's disciplinary appeal was heard by arbitrator Harold Henderson, who served as an Executive for the NFL from 1991 through 2012. Mr. Henderson served as the NFL's Executive Vice President for Labor Relations for a span of sixteen years, and as Chairman of the NFL Management Council Executive Committee. He also served as the NFL's Executive Vice President for Player Development. Redacted Petition to Vacate Arbitration Award, National Football League Players Ass'n *ex rel.* Peterson v. National Football League, No. 0:14-cv-04990-DSD-JSM, 2014 WL 7145640, at *1 (D. Minn. Dec. 15, 2014). In addition, Mr. Henderson served as arbitrator over the Cowboys' defensive end Greg Hardy's appeal in 2015. Mark Maske, *NFL Appoints Harold Henderson to Resolve Greg Hardy's Appeal*, THE WASHINGTON POST (May 7, 2015), https://www.washingtonpost.com/news/sports/wp/2015/05/07/nfl-appoints-harold-henderson-to-resolve-greg-hardys-appeal/?utm_term=.74f73f42b6c0.

second appeal was filed with the United States District Court for the District of Minnesota, where Judge David Doty overturned the arbitration award.³³

Judge Doty overturned the arbitrator's decision to uphold Goodell's award, claiming that the award "fail[ed] to draw its essence from the [collective bargaining agreement]," because arbitrator Henderson ignored the "law of the shop" when he retroactively applied the new personal conduct policy to Peterson.³⁴ Judge Doty found that the *Rice* decision unequivocally established that the Commissioner cannot retroactively enforce the new personal conduct policy against Peterson's conduct before the creation of that policy.³⁵ According to Judge Doty, the *Rice* decision became the "law of the shop," and the Commissioner ignored the law of the shop; therefore, the suspension did not draw its essence from the collective bargaining agreement.³⁶ Contrary to the *Peterson* arbitrator, Judge Doty found that the *Peterson* case was indistinguishable from the *Rice* case.³⁷

Despite Judge Doty's decision, the Eighth Circuit overruled the District Court and reinstated the arbitration award—finding that Judge Doty incorrectly applied the essence test—and reiterated that judges are forbidden to review the merits of an arbitration award.³⁸ Judge Colloton of the Eighth Circuit stated, "The dispositive question is whether the arbitrator was at least arguably construing or applying the contract, including the law of shop. The arbitrator here undoubtedly construed the *Rice* decision in reaching his decision."³⁹

Judge Colloton reiterated the guiding principles from the *Steelworker Trilogy* cases, including the deference that judges should give to arbitration, stating "[i]n an arbitration case like this one, the role of the courts is very limited," and "[c]ourts are not permitted to review the merits of an arbitration decision even when a party claims that the decision rests on factual errors."⁴⁰ Furthermore, the Judge stated that "[a]n erroneous interpretation of a contract, including the law of the shop, is not a sufficient basis for disregarding the conclusion of the decisionmaker chosen by the parties."⁴¹ Judge Colloton found that the District

33. *NFL Players Ass'n ex rel. Peterson*, 88 F. Supp. 3d at 1091.

34. *Id.* "Retroactive application" in this situation means applying the New Personal Conduct Policy to conduct done before the Policy was created. *See generally id.*

35. *Id.* at 1090 ("It is also undisputed that in the *Rice* arbitration, [Judge Jones] unequivocally recognized that the New Policy cannot be applied retroactively.").

36. *Id.* at 1091 ("Henderson simply disregarded the law of the shop and in doing so failed to meet his duty under the CBA. As a result, the arbitration award fails to draw its essence from the CBA and vacatur is warranted.").

37. *Id.*

38. *NFL Players Ass'n ex rel. Peterson v. NFL*, 831 F.3d 985, 989 (8th Cir. 2016).

39. *Id.* at 994.

40. *Id.* at 993, 995.

41. *Id.* at 994.

Court could not vacate the arbitration award because it disagreed with the arbitrator that the *Rice* and *Peterson* cases were distinguishable.⁴²

The *Peterson* case is just another example in a long line of cases that differ on the application of the essence test and the courts' unsanctioned attempts to use that test to review the merits of an arbitration award.⁴³ To fully understand the paradox that these judicial mandates present, it is necessary to review the development of the LMRA and the development of the Supreme Court's attitude towards arbitration disputes brought under the LMRA.

II. THE COURT'S TRANSITION TO A PREFERENCE FOR ARBITRATION AND THE DEVELOPMENT OF SPECIFIC GROUNDS FOR VACATUR OF LABOR ARBITRATION AWARDS

A. *The Labor Management Relations Act and Federal Arbitration Act as Applied to Labor Disputes*

The traditional view is that labor disputes, meaning disputes involving labor unions⁴⁴ and management over collective bargaining agreements, are primarily governed by the LMRA.⁴⁵ Accordingly, many courts have held that such labor disputes were not within the scope of the Federal Arbitration Act⁴⁶ (FAA).⁴⁷ The FAA governs most "contracts of employment"⁴⁸ that contain pre-dispute agreements to arbitrate claims arising out of one's employment. The Supreme Court, however, distinguished contracts of employment from collective bargaining agreements.⁴⁹ Nevertheless, the FAA continues to be a factor in labor

42. *Id.* Judge Colloton acknowledged that, during arbitration, the arbitrator addressed *Rice* "head-on" and "explained that *Rice* involved *second* discipline imposed on a player for conduct that was already subject to a suspension and fine, whereas *Peterson*'s sanction was the *first* discipline imposed." *Id.* (emphasis in original).

43. *See infra* Section III.C.

44. The National Football League Players Association, which brings claims on behalf of players, is a labor union. *See NFL Players Ass'n ex rel. Peterson*, 831 F.3d at 989.

45. 29 U.S.C. § 185.

46. 9 U.S.C. §§ 1–16 (2012).

47. Jay E. Grenig, et al., "*It's not Over 'Til It's Over*": *After the Arbitration Award in Sports Arbitration*, 70 DISP. RESOL. J. 21, 26 (2015); *see, e.g.*, *United Paperworkers Int'l Union, AFL-CIO, et al. v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) ("The [Federal] Arbitration Act does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce'"); *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 53 (2d Cir. 2001) ("We hold that in cases brought under . . . the Labor Management Relations Act . . . the FAA does not apply.").

48. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115, 119 (2001) (holding that 9 U.S.C. § 1 exempts only contracts of employment involving transportation workers and not all contracts of employment).

49. In *J.I. Chase Co. v. NLRB*, the Supreme Court determined that a collective bargaining agreement could be considered a contract of employment only in "rare cases." 321 U.S. 332, 335 (1944). The Court reasoned that "no one has a job by reason of [a collective bargaining agreement] and no obligation to any individual ordinarily comes into existence from it alone." *Id.*

arbitration to the extent that it may provide guidance to courts reviewing arbitration under the LMRA.⁵⁰ The LMRA provides for labor disputes to be submitted “in any district court of the United States.”⁵¹ The LMRA does not provide various procedures to compel arbitration, nor does it provide specific grounds for vacatur of arbitration decisions.⁵² This is a significant difference between the LMRA and the FAA. The FAA contains statutory grounds for vacatur, including:

(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; or (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.⁵³

Conspicuously, the FAA does not contain a ground for vacatur that is specifically based on the merit of an arbitration award.⁵⁴ Since the LMRA does not contain similar statutory grounds to guide judges in their review of arbitration awards, case law developed to grant the courts jurisdiction to enforce or vacate an arbitration award.⁵⁵ But early American courts looked upon

50. David L. Benetar, *Arbitration of a Labor Dispute-Management Representation*, 11 AM. JR. TRIALS 327, § 1 (2018) (“Although [the] Federal Arbitration Act is formally inapplicable to labor arbitration, [the] Act is used as [a] source of principles to guide formulation of federal common law of labor arbitration”).

51. 29 U.S.C. § 185(a) (“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.”).

52. *See id.*

53. 9 U.S.C. § 10(a)(1)–(4).

54. Stephen L. Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 BERKELEY J. EMP. & LAB. L. 521, 563 (2000) (“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.”).

55. *See Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1503 (7th Cir. 1991) (“A suit to throw out a labor arbitrator’s award is . . . a suit to enforce the labor contract that contained the clause authorizing the arbitration of disputes arising out of the contract. For in arguing against the award, the plaintiff normally will be pointing to implicit or explicit limits that the contract places on the arbitrator’s authority—principally that he was to interpret the contract and not go off on a frolic of his own—and arguing that the arbitrator exceeded those limits.”).

arbitration with disfavor, and the first significant shift was not until 1957 with the case of *Textile Workers Union of America v. Lincoln Mills*.⁵⁶

B. Early Interactions of Arbitration and Judicial Review

The judicial position on the institution of labor arbitration has seen a radical shift since the founding of the nation.⁵⁷ Prior to the American court system, English common law viewed arbitration as an unwarranted usurpation of judicial review.⁵⁸ This English common law sentiment was adopted by the early American court system.⁵⁹ The early courts highly disfavored agreements that “oust[ed] the courts of the jurisdiction conferred by law.”⁶⁰ The early courts saw that every citizen had a “substantial right[.]” to “resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him.”⁶¹

In fact, traditional courts were so hostile towards arbitration that either party could “disavow the agreement [to arbitrate] prior to the actual arbitration,”⁶² which became known as the “revocability doctrine.”⁶³ The revocability doctrine made it nearly impossible for a party to ask a court to compel arbitration.⁶⁴ The early American courts saw this hostility towards arbitration too firmly rooted in the common law for them to overturn.⁶⁵ Although the early courts did not favor arbitration, and even allowed parties to revoke their arbitration agreements, the courts were not willing to second-guess the arbitrator’s decision once the parties submitted their disputes.⁶⁶ Even though the general judicial opinion of arbitration has seen a shift, the notion that judges should not second-guess an arbitrator’s decision as to the merits of the claim has remained consistent.

56. 353 U.S. 448 (1957).

57. See FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 1 (4th ed. 1999). State and federal courts initially viewed labor arbitration as a competing institution of dispute resolution and judges were less likely to accommodate labor arbitration because, in their view, there was strong public policy favoring the intervention of the courts. *Id.*

58. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (noting that there was a “longstanding judicial hostility to arbitration agreements . . . at English common law”).

59. *Id.* (“[The FAA’s] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.”).

60. *Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

61. *Id.*

62. David E. Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 BERKELEY J. EMP. & LAB. L. 296, 301 (1998).

63. Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 98–99 (2012).

64. *Id.* at 98.

65. *Id.* at 101 n.47 (quoting H.R. Rep No. 68–96, at 1 (1924)).

66. See Nicholas R. Weiskopf, *Arbitral Injustice—Rethinking the Manifest Disregard Standard for Judicial Review of Awards*, 46 U. LOUISVILLE L. REV. 283, 291 (2007); see also *Brush v. Fisher*, 38 N.W. 446, 448 (1888) (“[I]t is evident that there are great objections to any general interference by courts with awards.”).

The American courts began to reject the view that arbitration should be disfavored in 1957 with the *Lincoln Mills* case.⁶⁷ By 1960, in the *Steelworker Trilogy* cases, the Supreme Court stated that labor arbitration should not be subject to the same hostility as other types of arbitration.⁶⁸

C. Textile Workers Union of America v. Lincoln Mills

In the *Lincoln Mills* case, Justice Douglas, writing for the majority, held that federal law would govern suits under the LMRA.⁶⁹ This enabled federal courts to interpret the LMRA, to compel arbitration if agreed to in a collective bargaining agreement, and to create binding case law to establish grounds for vacatur. This case initiated a shift to a preference for arbitration, rather than judicial hostility towards it.⁷⁰ In fact, the Supreme Court made its position favoring arbitration even more clear just a few years later in the *Steelworker Trilogy* cases.⁷¹

III. THE STEELWORKER TRILOGY CASES AND THE CREATION OF THE ESSENCE TEST

A. *The Steelworker Trilogy Cases and the Favor of Arbitration in Labor Disputes*

The *Steelworker Trilogy* cases were a series of disputes arising from the arbitration between the Steelworker's Union and their employers.⁷² These cases formed the basis of the current jurisprudence regarding judicial review of labor arbitration. Most notably, these cases demonstrate a shift away from court hostility towards labor arbitration and towards courts favoring labor arbitration.

In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,⁷³ a group of steelworkers performed maintenance and repair work on a barge located in Chickasaw, Alabama.⁷⁴ The owner of the barge terminated nineteen steelworkers, instead hiring other companies to perform the bulk of its

67. Feller, *supra* note 62, at 300. David Feller briefed *Lincoln Mills* and argued the *Steelworker Trilogy* cases and recalled that at the time of briefing *Lincoln Mills* arbitration was still not favored. *Id.* at 299 n.13, 300 n.23.

68. *See infra* Section III.A.

69. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957).

70. Feller, *supra* note 62, at 301 ("So, as of 1957 with *Lincoln Mills* and as of 1960 with the *Steelworkers Trilogy*, arbitration was in a preferred, if not exalted, status.").

71. *Id.*

72. The *Steelworker Trilogy* cases were each decided on the same day, June 20, 1960. *See* *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

73. 363 U.S. 574 (1960).

74. *Id.* at 575.

maintenance work.⁷⁵ These newly contracted companies then hired some of the recently terminated steelworkers to perform the maintenance work on the barge, but at reduced wages.⁷⁶ The Steelworkers Union filed a grievance with the barge employer, claiming that the company was “arbitrarily and unreasonably contracting out work . . . that could and previously ha[d] been performed by Company employees.”⁷⁷ The Steelworkers Union and the employer had a collective bargaining agreement providing for arbitration of this type of dispute so, after the employer refused to arbitrate, the Steelworkers Union petitioned the District Court of Alabama to compel arbitration.⁷⁸

After the District Court and Fifth Circuit ruled in favor of the employer, the Supreme Court granted certiorari and, ultimately, compelled arbitration.⁷⁹ The Court unequivocally stated that public policy favors arbitration.⁸⁰ In stating that public policy favors arbitration, the Court made a point to recognize the previous opposition of the courts towards arbitration.⁸¹ The Court justified its view of public policy by drawing a distinction between labor arbitration and other forms of arbitration, stating, “Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.”⁸² The Court noted that the collective bargaining agreement created a new “common law of a particular industry.”⁸³

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,⁸⁴ the Supreme Court continued to favor arbitration of labor disputes and expanded its application. In *Enterprise Wheel*, a group of steelworkers left their job in protest of one of their co-workers termination.⁸⁵ At the recommendation of a union

75. *Id.* Between 1956 and 1958, the barge owner terminated almost half of its workforce. *Id.* The steelworker bargaining unit was reduced from 42 men to 23 men. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 577.

79. *Id.* at 577–78, 585 (finding that pursuant to section 301 of the LMRA, and pursuant to *Lincoln Mills*, a court may enforce an arbitration provision contained in a collective bargaining agreement).

80. *Id.* at 578 (“The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.”).

81. *Id.*

82. *Id.*

83. *Id.* “One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.” *Id.* at 579–80.

84. 363 U.S. 593 (1960).

85. *Id.* at 595.

representative, the steelworkers asked for permission to return to work.⁸⁶ An official of the employer initially agreed, but later rescinded the offer.⁸⁷ The dispute went to arbitration, pursuant to the collective bargaining agreement, and the arbitrator found that the steelworkers should be reinstated.⁸⁸ The employer refused to comply with the decision of the arbitrator, and the Steelworkers Union petitioned the court to enforce the decision.⁸⁹ The District Court for the Southern District of West Virginia ordered the employer to comply with the arbitration award, but on appeal the Fourth Circuit vacated the award.⁹⁰

The Supreme Court ultimately reversed the Court of Appeals, but agreed that the District Court judgement “should be modified so that the amounts due the employees may be definitely determined by arbitration.”⁹¹ In addition, the Court reiterated its holding that a court may not review the merits of an arbitration award.⁹² While the *Steelworker Trilogy* cases evinced a shift towards favoring arbitration, it was clear that the longstanding judicial policy to refrain from second-guessing arbitrators would remain fundamental. The Court reasoned “[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.”⁹³ The Court also emphasized the importance of the arbitrator’s judgment when it comes to issuing a remedy, and indicated that the courts should defer to the arbitrator’s judgment because he is a professional with working knowledge of the industry.⁹⁴

In the last of the *Steelworker Trilogy* cases, *United Steelworkers of America v. American Manufacturing Co.*,⁹⁵ the Court was asked, once again, to compel arbitration.⁹⁶ A steelworker in that case left his job due to an injury.⁹⁷ Some weeks later, the Steelworkers Union filed a grievance claiming that the

86. *Id.*

87. *Id.*

88. *Id.* at 595. The arbitrator found that discharge was not justified, and that, in view of the facts, a 10-day suspension was more appropriate. The arbitrator ordered reinstatement of the employees, plus back pay, but minus pay equal to a 10-day suspension. *Id.*

89. *Id.*

90. *Id.* at 595–96. The Fourth Circuit vacated parts of the arbitration award because, between the termination of the employees and the conclusion of arbitration, the collective bargaining agreement expired. The Fourth Circuit reasoned, among other things, that reinstatement of the steelworkers was not unenforceable because the collective bargaining agreement expired. *Enter. Wheel & Car Corp. v. United Steelworkers of Am.*, 269 F.2d 327, 331–32 (4th Cir. 1959), *cert. granted*, *Enter. Wheel & Car Corp.*, 363 U.S. at 596. This argument was used at arbitration as well, but the arbitrator rejected the argument. *Enter. Wheel*, 363 U.S. at 595.

91. *Id.* at 599.

92. *Id.* at 596 (“The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.”).

93. *Id.*

94. *See id.* at 596–98.

95. 363 U.S. 564 (1960).

96. *Id.* at 564.

97. *Id.* at 566.

steelworker was entitled to return to work.⁹⁸ Once the employer refused to arbitrate the dispute, the union asked the Court to compel arbitration.⁹⁹

Keeping in line with the previous *Steelworker* cases, the Court again affirmed the policy favoring arbitration and enumerated more standards that would confine the courts' abilities to review the merits of the arbitration award.¹⁰⁰ The Court stated, "[w]hether the moving party is right or wrong is a question of contract interpretation for the arbitrator," and that the "function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator."¹⁰¹

The *Steelworker Trilogy* cases exemplified the Supreme Court's position on judicial review of arbitration in these areas. First, the Court noted its public policy interests, finding that it weighed heavily in favor of the arbitration of labor disputes agreed to in collective bargaining agreements. Second, the Court stated the limits that reviewing courts were bound by when arbitration was freely bargained for in a collective bargaining agreement. Third, the Court underscored its prior holding that no vacatur of arbitration awards based on the merits of the award would remain good law. Thus, while the *Steelworker Trilogy* cases greatly restricted judicial review of arbitration awards, the Court left open some narrow avenues to allow a court to vacate an arbitration award.

B. Arbitration Awards Must Draw Their "Essence from the Contract"

In *Enterprise Wheel*, the Court made clear its intention of favoring arbitration.¹⁰² The Court emphasized the need for the arbitrator to have flexibility in determining the arbitration award.¹⁰³ The Court reasoned that flexibility was important because, "[t]he draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."¹⁰⁴ But, at the same time, the Court recognized the necessity of some safeguards, to ensure that an arbitrator "does not sit to dispense his own brand of industrial justice."¹⁰⁵

To prevent arbitrators from going rogue, the *Enterprise Wheel* Court stated that an arbitration award may be vacated if it fails to "draw[] its essence from the collective bargaining agreement."¹⁰⁶ Thus, if such an award does not draw its essence from the collective bargaining agreement, then the award cannot

98. *Id.*

99. *Id.*

100. *Id.* at 569.

101. *Id.* at 567–68. The Court stated that in circumstances of a collective bargaining agreement which required arbitration of an issue, the parties were bound by the arbitrator's judgment because that was what was bargained for. *See id.* at 568.

102. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

103. *Id.* at 597.

104. *Id.*

105. *Id.*

106. *Id.*

stand.¹⁰⁷ This judicial formulation became known as the “essence test” and continues to be used as one of the primary mechanisms for courts to review arbitration awards under the LMRA.¹⁰⁸

Twenty-seven years after the essence test was first promulgated in the *Steelworker Trilogy* cases, the Supreme Court addressed the essence test again in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*¹⁰⁹ The Court reaffirmed the basic formulation of the essence test—an arbitration award may be vacated if it does not draw its essence from the collective bargaining agreement and if the arbitrator is dispensing his “own brand of industrial justice”—but said little else to clarify the essence test.¹¹⁰ While the Supreme Court reaffirmed the essence test, it also reaffirmed its policy of favoring arbitration and prohibiting courts to review the merits of an award.¹¹¹

These two positions, refusing to review the merits of an arbitration award, while also providing the ability to vacate an award that fails to draw its essence from the agreement, are seemingly contrary.¹¹² This appears to be a paradox, because how can a court determine that an award does not draw its essence from the agreement without reviewing the merits of that award? This problem is evident by the divided interpretations of the circuit courts on how to apply the essence test.¹¹³

C. *How Other Circuits Have Interpreted the Essence Test*

Some circuit and lower courts have interpreted the essence test differently, resulting in varying interpretations.¹¹⁴ For example, in the First Circuit, an arbitration award fails to draw its essence from the contract when it is “unfounded in reason and fact.”¹¹⁵ The Ninth Circuit created a variation of the

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

108. Waldron, *supra* note 6, at 553–54.

109. *United Paperworks Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

110. *Id.* (“As long as the arbitrator’s award draws its essence from the collective bargaining agreement, and is not merely his own brand of industrial justice, the award is legitimate.” (internal quotations omitted)).

111. *Id.* (“The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.”).

112. Waldron, *supra* note 6, at 539 (arguing that “many circuit courts have subtly refused to restrain their desire to vacate labor arbitrator’s awards with which they disagree by developing tests that water down the Supreme Court’s ‘drawn from the essence’ precedent.”).

113. *See infra* Section III.C.

114. Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759, 762 (noting that “lower courts have developed numerous variations of the essence of the contract standard”).

115. *Cytyc Corp. v. Deka Prods. Ltd. P’ship*, 439 F.3d 27, 334 (1st Cir. 2006); *see also* *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34,

essence test to allow vacatur of an award if it is “completely irrational.”¹¹⁶ The Third Circuit finds that an award draws its essence from the agreement when the award “can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties’ intention.”¹¹⁷ The Sixth Circuit finds that an award draws its essence from the agreement when the arbitrator is plausibly or arguably construing the contract.¹¹⁸ The Eleventh and Fifth Circuits find that an arbitration award fails to draw its essence from the agreement when the award is “arbitrary and capricious” and has no basis in the “letter or purpose” of the collective bargaining agreement.¹¹⁹ The Eighth Circuit, in *Bureau of Engraving Inc. v. Graphic Communications International Union, Local 1B*,¹²⁰ interpreted the essence test to include “not only . . . express provisions, but also . . . the industrial common law.”¹²¹ The Eighth Circuit noted that the common law of the shop included “past practices of the industry . . . as well as the parties’ negotiating history and other extrinsic evidence of their intent.”¹²² The Eighth Circuit then went on to say that an award must stand when an arbitrator is “arguably construing or applying the [Collective Bargaining Agreement].”¹²³

38 (1st Cir. 1985) (“This court may engage in a substantive review of the award only to determine whether the award is unfounded in reason and fact In such cases, the award fails to draw its essence from the collective bargaining agreement and must be overturned.” (internal quotations and citations omitted)).

116. *Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009) (“An award may be vacated if it is completely irrational. This standard is extremely narrow and is satisfied only where [the arbitration decision] fails to draw its essence from the agreement.” (brackets in original) (internal quotations and citations omitted)); *see also Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int’l. Union*, 412 F.2d 899, 903 (9th Cir. 1969) (finding that an arbitration award draws its essence from the agreement when “the award represents a plausible interpretation of the contract”).

117. *Major League Umpires Ass’n v. Am. League of Prof’l Baseball Clubs*, 357 F.3d 272, 280 (3d Cir. 2004).

118. *Memphis Dist. of Browning-Ferris Indus. of Tenn., Inc. v. Teamsters Local Union No. 984*, No. 90-5933, 1991 WL 203110 *1, *3-*4 (6th Cir. 1991).

119. *Loveless v. E. Air Lines, Inc.*, 681 F.2d 1272, 1279 (11th Cir. 1982). *See also Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992) (“[A]n award that is arbitrary or capricious is not required to be enforced.”); *Safeway Stores v. Am. Bakery and Confectionery Workers Int’l. Union, Local 111*, 390 F.2d 79, 81 (5th Cir. 1968) (“[I]f the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts. This was a reflection of similar [*Steelworker*] trilogy comments.”).

120. 164 F.3d 427 (8th Cir. 1999).

121. *Id.* In this case, the Eighth Circuit ruled that the arbitration award failed to draw its essence from the collective bargaining agreement based off the industrial common law and the parties’ intent. The court noted that the evidence showed that the parties discussed a monetary remedy for breach of the collective bargaining agreement, but intentionally chose not to include it. Because the parties intentionally chose not to include the monetary provision in the collective bargaining agreement, the award of monetary damages could not have drawn its essence from the agreement. *Id.* at 429–30.

122. *Id.* at 429.

123. *Id.*

Even though the Supreme Court has announced numerous times that arbitration awards should not be reviewed on their merits,¹²⁴ the Eighth Circuit, and other circuits, have used the essence test to do just that.¹²⁵ One scholar has summarized the circuit courts' use of the essence test as, "[i]nstead 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."¹²⁶

This is possibly, at least in part, because the essence test is confusing, and seemingly incompatible with the Court's wishes that lower circuits refrain from reviewing merits of arbitration decisions. The Supreme Court has overturned circuit court decisions for misapplying the standard,¹²⁷ but, despite the conflicting interpretations of the essence test, has yet to provide further guidance on the proper application of the test.

David E. Feller, who briefed *Lincoln Mills* and argued the *Steelworker Trilogy* cases, highlighted the confusion surrounding the essence test in a lecture on his experience with arbitration litigation.¹²⁸ Feller called the Supreme Court's essence test an "unfortunate choice of words," because "[o]ne man's essence may be another man's (or a court's) nonsense!"¹²⁹ Similarly, other scholars have criticized the circuit courts' interpretations of the essence standard as frequently being too broad.¹³⁰ The broadness of the essence test is adequately demonstrated by examining the "arguably" interpretation that is used by multiple circuits.¹³¹ Because "arguably" is so broad, almost all arbitration awards can be said to have a basis in the agreement even when they are not relying on a specific provision of the agreement.¹³² In discussing an interpretation of the "arguably" standard applied to the essence test, one Sixth Circuit judge stated: "[T]he Court appears to say this: whenever it *can* be said by a court sitting in review that the arbitrator

124. See, e.g., *MLB Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

125. See Waldron, *supra* note 6, at 539, 546–49 (illustrating the different standards the circuits developed which suggests reaching the merits of arbitration.); see also Timothy J Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 MO. L. REV. 243, 248–49 (1987) (discussing the paradox that the essence test presents by requiring judges to consider a "myriad of factual circumstances" in order to determine when an award does not draw its essence from the agreement).

126. Hayford, *supra* note 54, at 562.

127. See Waldron, *supra* note 6, at 553.

128. See Feller, *supra* note 62, at 299–302.

129. *Id.* at 302.

130. Randall, *supra* note 114, at 764.

131. *Id.* at 764–65 (discussing *Memphis Dist. of Browning-Ferris Indus., Inc. v. Teamsters Local Union No. 984*, No. 90-5933, 1991 U.S. App. LEXIS 24760, at *11 (6th Cir. Oct. 10, 1991)).

132. Randall, *supra* note 114, at 764; see also *Memphis Dist. of Browning-Ferris Indus. of Tenn., Inc.*, 1991 WL 203110 at *13–14.

is directly (construing) or indirectly (applying) the CBA, then that court may not set aside an arbitrator's decision even if the decision is manifestly erroneous."

This reading cannot be correct, however, as no arbitrator will ever issue a decision so removed from the CBA that it cannot be argued afterwards by either counsel or a judge that the contract played a part in the arbitrator's decision. The very fact of litigation means that someone is making that argument.¹³³

Clearly there is difficulty in interpreting the essence test too broadly. And because the Supreme Court did not foreclose all judicial review of arbitration, it cannot be said that such an interpretation of the essence test is valid. The issue therefore becomes how a court can determine that an arbitration award does not draw its essence from the agreement, without reaching the merits of the award. Is such a test even possible? If the essence test is in fact incompatible with the policy of refraining from review of the merits of an award, what should a reviewing court do? Here are some suggestions about what can be done.

IV. CLARIFYING THE ESSENCE TEST THROUGH THE COLLECTIVE BARGAINING AGREEMENT

A. *Bargaining for an Expanded Scope of Judicial Review*

One solution to the problem of the incompatibility of these two concepts is to create a limited exception for courts to review the merits of those arbitration awards. A contractual provision in the parties' collective bargaining agreement to allow for expanded judicial review when, for instance, "the arbitrator committed errors of law or of fact," could be effective.¹³⁴

Indeed, many arbitration agreements contained such provisions, but the circuit courts were split as to their validity.¹³⁵ The Supreme Court addressed the split in the circuits and ultimately rejected such an attempt to circumnavigate the express grounds for vacatur within the context of the FAA.¹³⁶ However, labor arbitration under a collective bargaining agreement is governed by the LMRA and not the FAA.¹³⁷ The LMRA leaves open the question of whether contractually agreed to expanded judicial review of arbitration would be permissible in the labor context.

133. *Memphis Dist. of Browning-Ferris Indus. of Tenn., Inc.*, 1991 WL 203110 at *13.

134. Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 253-54 (1999).

135. *Compare* *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 U.S. App. LEXIS21248, at *1 (4th Cir. 1997); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) *with* *Kyocera Corp. v. Prudential-Bache Trade Servs. Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 938 (10th Cir. 2001).

136. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (finding that parties may not contractually broaden the scope of judicial vacatur for arbitration awards because the grounds for vacatur in the Federal Arbitration Act are exclusive).

137. Mitchell H. Rubinstein, *Altering Judicial Review of Labor Arbitration Awards*, 2006 MICH. ST. L. REV. 235, 256-57.

One scholar has suggested that the answer to this is yes.¹³⁸ Unlike the FAA, which provides for specific grounds for vacatur,¹³⁹ the LMRA has no such provision.¹⁴⁰ Because the LMRA has no specific grounds for vacatur, the Supreme Court would not have the same concern of parties circumnavigating the express grounds for vacatur as it does in the FAA context. Additionally, a labor collective bargaining agreement is an ongoing negotiation, where the parties may correct any errors along the way, thus further supporting the proposition that collective bargaining agreements can be contractually altered to increase the level of judicial review.¹⁴¹

The problem with this thesis, however, lies in the dicta of a Seventh Circuit decision,¹⁴² where the court stated “[i]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract.”¹⁴³ While this statement is only dicta and not binding, it casts doubt on the proposition that courts would be open to such a system.

Another substantial obstacle to an approach like this is that it undermines the longstanding judicial policy to refrain from reviewing the merits of awards. The policy to refrain from second-guessing arbitrators has been deeply rooted in the American court system since its founding.¹⁴⁴ Even as the court system experienced a tremendous shift towards favoring arbitration beginning with *Lincoln Mills* and the *Steelworker Trilogy* cases,¹⁴⁵ the policy to refrain from reviewing the merits of an award remained consistent. By allowing parties to contractually alter the level of judicial review of arbitration awards, and even agree to allow judges to review the merits of awards, the Court would be going against jurisprudence that it has firmly held for over a century, and would permit private parties to circumnavigate the public policy that prohibits judicial review of the merits of arbitration awards.

138. *Id.* at 264.

139. 9 U.S.C. § 10(a)(1)–(4).

140. *See* 29 U.S.C. § 185(a).

141. Rubinstein, *supra* note 137, at 265. “Additionally, because the parties to a collective bargaining agreement are engaged in a continuing relationship and are free to correct any perceived errors or mistakes that an arbitrator may make by negotiating a new collective bargaining agreement, it is logical to permit parties to alter judicial review of a labor arbitration award under Section 301.” *Id.*

142. *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991).

143. *Id.* at 1505 (emphasis in original).

144. *See supra* note 66.

145. *See generally* *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957).

B. *Why Collective Bargaining Would Cure the Essence Test Fumble*

Even with doubt looming over the validity of contractual alterations of judicial review, such a method would be in the interest of clarity and efficiency and is therefore a legitimate approach. A contractually-agreed-to expanded scope of judicial review would allow a reviewing court to examine the merits of an arbitration award by looking for errors of law or fact, and ultimately determine that an award fails to draw its essence from the agreement if there is such an error of law or fact. Such a judicial vacatur would appear to be consistent with the Supreme Court's policy favoring the intention of the parties in negotiating their arbitration provisions because the contract would demonstrate the intention of the parties to have a court review findings of law and fact.¹⁴⁶ This mechanism would allow reviewing courts to apply the essence test and eliminate the paradox created by the essence test and conflicting mandate to refrain from reviewing the merits of the arbitration awards.¹⁴⁷

The usefulness of this solution can be seen in a hypothetical using the facts from the *Peterson* case.¹⁴⁸ If the NFL collective bargaining agreement contained a provision that allowed for a reviewing judge to review arbitration awards for "errors of law or of fact,"¹⁴⁹ then it is very unlikely that the Eighth Circuit would have overturned the District Court. The District Court held that the arbitrator's award ignored the "law of the shop" and failed to draw its essence from the agreement because it retroactively applied a new personal conduct policy to Peterson.¹⁵⁰ Retired Federal Judge Barbara Jones held in the Rice arbitration that the NFL could not retroactively apply the policy to a player.¹⁵¹ The District Court found that the arbitrator committed an error of fact by distinguishing the *Rice* case from the *Peterson* case, finding "no valid basis to distinguish this case from the *Rice* matter."¹⁵² Accordingly, the District Court went on to overturn the arbitration award relying, in part, on this factual finding that *Rice* and *Peterson* were indistinguishable.¹⁵³

146. *Am. Mfg. Co.*, 363 U.S. at 567–68 ("The function of the court is very limited when the parties have agreed to submit *all* questions of contract interpretation to the arbitrator. . . . Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." (emphasis added)).

147. *See generally* Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs, 357 F.3d 272, 279–80 (3d Cir. 2004).

148. *See* NFL Players Ass'n *ex rel.* Peterson v. NFL, 88 F. Supp. 3d 1084 (D. Minn. 2015), *rev'd and remanded* NFL Players Ass'n *ex rel.* Peterson v. NFL, 831 F.3d 985 (8th Cir. 2016).

149. Younger, *supra* note 134, at 254.

150. *NFL Players Ass'n ex rel. Peterson*, 88 F. Supp. 3d at 1090–91.

151. Barbara S. Jones, *In the Matter of Ray Rice*, ESPN (Nov. 28, 2014), http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf. ("Recognizing that even under the broad deference afforded to [the Commissioner] through Article 46 [of the collective bargaining agreement], he could not retroactively apply the new presumptive penalty to Rice. . . .").

152. *NFL Players Ass'n ex rel. Peterson*, 88 F. Supp. 3d at 1091.

153. *Id.*

On appeal, it is very likely that the Eighth Circuit would have upheld the District Court's decision on the grounds that the collective bargaining agreement allowed for judicial review of factual errors, and on the grounds that circuit courts frequently defer to lower courts on matters of factual findings.¹⁵⁴ In this type of scenario, the ability to contractually expand the scope of judicial review of arbitration could have been extremely beneficial for Peterson and other similarly situated parties.

Circuit and lower courts are already reviewing the merits of arbitration awards, despite the Supreme Court's express prohibition.¹⁵⁵ Some courts have utilized the essence test, applying various interpretations and meanings, to overturn arbitration awards based on the underlying merits of the case.¹⁵⁶ The inability of lower courts to resist reviewing the merits of an arbitration award is perhaps attributable to the fact that courts, on a daily basis, review the merits of claims. This is their function as judges. For a judge to suppress his basic instinct merely because this type of cases happens to come from arbitration can be difficult. In fact, such a scenario was seen in the *Peterson* case.¹⁵⁷

In the *Peterson* case, the District Court effectively reviewed the merits of the arbitration award under the guise of the essence test.¹⁵⁸ The District Court found that the *Peterson* case was not distinguishable from *Rice*,¹⁵⁹ and that by ignoring the law of the shop the arbitration award did not draw its essence from the agreement.¹⁶⁰ The Eighth Circuit explicitly rejected this argument and conclusion.¹⁶¹ The Eighth Circuit gave credit to the arbitrator's finding that the new personal conduct policy was not a change of the previous policy, but more of a clarification of discipline, and therefore was not a retroactive application to

154. See, e.g., *Teitelbaum v. Lay Siok Lin*, 423 Fed. App'x 106, 106 (2d Cir. 2011) ("[W]e defer to factual findings of the district court unless they are clearly erroneous."); *Xiong Dong v. Attorney General of U.S.*, 257 F. App'x 513, 515 (3d Cir. 2007) ("We also defer to factual findings."); *Cruz v. Miller*, No. 92-3141, 1993 WL 83427, at *4 (7th Cir. Mar. 23, 1993) ("[W]e defer to factual findings of state courts.").

155. See Nicholas J. Zidik, *Sitting as "Superarbitrators" or According "Great Deference?" Pennsylvania Courts and the Essence Test Under PERA Since State System of Higher Education (Cheyney University) v. State College and University Professional Association (PSEA-NEA)*, 41 DUQ. L. REV. 579, 582 (2003) (discussing the different iterations of the essence test and its use by the courts to overturn decisions it does not agree with).

156. See *State Sys. of Higher Educ. (Cheyney Univ.) v. State Coll. Univ. Prof'l Ass'n (PSEA-NEA)*, 743 A.2d 405, 413 (Pa. 1999) (discussing the use of less deferential standards of the essence test and its ability to empower courts to become "superarbitrator[s]" to "vacate an award when it finds that the award is at odds with how the members of the court would have decided the case.").

157. See *NFL Players Ass'n ex rel. Peterson v. NFL*, 88 F. Supp. 3d 1084, 1091 (D. Minn. 2015), *rev'd and remanded* *NFL Players Ass'n ex rel. Peterson v. NFL*, 831 F.3d 985 (8th Cir. 2016).

158. See *NFL Players Ass'n ex rel. Peterson*, 88 F. Supp. 3d at 1091.

159. *Id.*

160. *Id.*

161. *NFL Players Ass'n ex rel. Peterson*, 831 F.3d at 994.

Peterson.¹⁶² The Eighth Circuit reminded the District Court that judicial review is forbidden from reaching the merits of an award, even if based on factual errors.¹⁶³ Additionally, the Eighth Circuit went on to say that, “[a]n erroneous interpretation of a contract, including the law of the shop, is not a sufficient basis for disregarding the conclusion of the [arbitrator].”¹⁶⁴

The *Peterson* case is just one example of lower courts using the essence test to review the merits of arbitration awards, and to overturn those awards. In this sense, the essence test seems unworkable. In fact, one scholar suggests that even if the Supreme Court were to add more language to clarify the essence test, it would be of little help.¹⁶⁵ He suggested that judges have an innate instinct to act like judges, namely, to review facts for errors and to apply the correct legal standards.¹⁶⁶ And, that it may even be “foolhardy” to believe that judges can resist the temptation to overturn awards in light of clear errors of law or fact.¹⁶⁷ It therefore makes even more sense to allow parties to contractually alter judicial standards of review.

By allowing parties to contractually agree to alter standards of judicial review, the Supreme Court could perhaps add guiding principles to the essence test that the lower courts may actually follow. If an arbitrator’s decision rests on factual or legal errors, and the collective bargaining agreement allows for judicial review of factual and legal errors, then a judge could hold that the award failed to draw its essence from the agreement because it rested on factual or legal errors. This outcome would be in line with the parties’ intentions, and would provide an opportunity to make the essence test and the prohibition on merit review compatible.

V. GETTING CONGRESS INVOLVED: ADDING TO THE LABOR MANAGEMENT RELATIONS ACT

An alternative avenue to eliminate the continued use of the essence test as an impermissible vehicle to review merits of arbitration awards would be for Congress to create specific grounds for vacatur similar to those in the FAA.¹⁶⁸

162. *Id.* at 994–95 (“The arbitrator, having been presented with the Commissioner’s statements, concluded that the August 2014 communications did not constitute a change of the Personal Conduct Policy. He necessarily found, therefore, that Goodell’s statements were not admissions to the contrary. Courts are not permitted to review the merits of an arbitration decision even when a party claims that the decision rests on factual errors.”).

163. *Id.* at 995.

164. *Id.* at 994.

165. Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 274 (1980) (“[I]t is apparent that this judicial instinct [to interpret and apply standards codified in contracts, regulations, and statutes] will not be stifled by incantations of finality, or by still more verbal formulations of the proper scope of review.”).

166. *Id.*

167. *Id.*

168. See Benetar, *supra* note 50, at 81.

Following the language of the specific grounds for vacatur in the FAA would be a good starting point. In fact, some scholars have suggested that the grounds listed in the FAA are essentially the same common law grounds for vacatur already created for labor arbitration.¹⁶⁹ Indeed, there is a legitimate argument to be made that FAA section 10(a)(4) is analogous to the Supreme Court's essence test, including the Supreme Court's prohibition against merit review of arbitration awards.¹⁷⁰

But arbitration under the FAA and labor arbitration under the LMRA are inherently different. The purposes of arbitration under the FAA and LMRA are "distinct processes, arising in mutually exclusive environments and serving different purposes."¹⁷¹ What works in the context of, for example, commercial arbitration under the FAA, may not be sufficient in labor arbitration under the LMRA.

As stated above, parties to a collective bargaining agreement are engaged in a business negotiation.¹⁷² Labor relations and collective bargaining agreements entail ongoing negotiations that are mutually beneficial to all parties. The relationship between employer and employee, and the terms of employment, are unique to such an extent that it should be afforded a different set of standards than those prescribed under the FAA. Accordingly, FAA section 10(a)(4)¹⁷³ is a good starting point to begin to encompass the essence test, but it should be broadened to allow for review of errors of law or fact as well, such as providing the "vacatur of arbitration awards that fail to draw their essence from the agreement" and that "awards fail to draw their essence from the agreement when they are based on an erroneous interpretation of law or fact."

VI. WHY A MODERN SUPREME COURT NEEDS TO REVISIT THE ESSENCE TEST

This is a current issue for labor arbitration disputes that requires the Supreme Court's immediate attention. Labor arbitration is "the primary method utilized by public and private employers and unions to solve disputes that arise in the workplace under labor agreements."¹⁷⁴ The Court in the *Steelworker Trilogy*¹⁷⁵ cases may not have anticipated the prevalence of labor arbitration in today's

169. Hayford, *supra* note 54, at 563 ("The substance of sub-sections (a)(1)–(3) [of the FAA §10], sanctioning vacatur for serious acts of party, advocate, and arbitrator misconduct is already reflected, to a limited extent, in the labor arbitration case law.").

170. *Id.* at 565–66 (noting that § 10(a)(4) allows vacatur when an arbitrator "exceeded their powers," but that even under this standard a reviewing court must defer to the arbitrator's interpretation of the law, the contract, and findings of fact).

171. Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, 51 DISP. RESOL. J. 22, 83 (1996).

172. *See supra* note 141.

173. 9 U.S.C. § 10(a)(4).

174. *A Practical Guide to Grievance Arbitration*, *supra* note 1, at 1.

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

industries. A modern Supreme Court should review the policy considerations of the *Steelworker Trilogy* Court against reviewing the merits of awards, and ask themselves, considering the prevalence of labor arbitration, is it better public policy to encourage the finality of arbitration, or to get the issue correct?

Moreover, labor arbitration under the LMRA is dependent on case law to continue developing, especially in the context of vacatur.¹⁷⁶ In order for there to be a uniform application of the essence test, the Supreme Court must grant certiorari to more labor arbitration cases. If the Supreme Court does not hear more labor arbitration cases, the essence test will continue down a path of confusion and frustration.

VII. CONCLUSION

Since the *Steelworker Trilogy* cases, the essence test has become increasingly unworkable. The *Peterson* case is just one recent example of the disagreement between circuit and lower courts on the applicability of the essence test. It demonstrated the seeming incompatibility with the Court's mandate to refrain from reviewing the merits of arbitration awards.

The Supreme Court can eliminate mass confusion and discrepancies among the circuits as to the essence test's application and meaning by allowing parties to contractually agree to altered standards of judicial review to allow for vacatur based on things like factual or legal errors. While this approach is not without its difficulties, this method would be in line with the parties' intentions, and allow the courts to avoid the confusing doctrine of the essence test. It would represent sound public policy by allowing parties to freely bargain in labor agreements, and increase the overall efficiency of judicial review of arbitration.

Additionally, this same result could be accomplished through legislation amending the LMRA. Specific grounds for vacatur, similar to those in the FAA, but including vacatur based on errors of law or fact, would eliminate the need for the common-law essence test, while continuing to honor LMRA and FAA arbitrations as distinct processes.

176. The LMRA does not have specific grounds for vacatur.

