MISGUIDED FAIRNESS? REGULATING ARBITRATION BY STATUTE: EMPIRICAL EVIDENCE OF DECLINING AWARD FINALITY

Michael H LeRoy
MISGUIDED FAIRNESS?
REGULATING ARBITRATION BY STATUTE:
EMPIRICAL EVIDENCE OF DECLINING AWARD FINALITY

MICHAEL H. LeROY

PROFESSOR
INSTITUTE OF LABOR AND INDUSTRIAL RELATIONS, AND COLLEGE OF LAW
UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN
504 E. ARMORY
CHAMPAIGN, IL 61820
(217) 244-4092
e-mail: m-leroy@uiuc.edu

Fall 2007

Manuscript: 63 Pages (Including Appendix I and Appendix II)
Word Count: 27,508 (Including Footnotes and Appendix I)
Summary

The Federal Arbitration Act (FAA) created a national policy that promotes arbitration. Congress passed this law to end judicial hostility to arbitration. So far, no one has questioned this premise. My Article shows, however, that nineteenth century courts enforced arbitrator awards, even those that failed to conform to “technicalities and niceties.” Acting on the mistaken advice that judges excessively interfere with arbitration, Congress enacted a law that transfers oversight of arbitration from the judiciary to legislatures.

This change is affecting how court reviews arbitrator awards. I collected data in 426 federal and state court rulings in employment disputes from June 1975 through April 2007. Federal district judges confirmed 92.7% of arbitrator awards, compared to 78.8% for state courts. This statistically significant difference was also observed for appellate courts, where the confirmation rate in federal courts was 87.7%, contrasted to 71.4% for state courts.

The anomalous structure of the FAA explains why federal courts are more deferential than state courts. The statute allows litigants to choose federal or state court to challenge an award. In federal court, the standard of review is among the narrowest in the law. Oddly, however, the FAA also allows states to define their own standards. Fewer states now replicate the FAA, as a growing number adopt more intrusive standards.

The Revised Uniform Arbitration Act is exacerbating this situation. Passed in 2000, RUAA has been enacted by 12 states—and the number is likely to grow. RUAA aims to curb recent abuses in arbitrations by legislating fairness into arbitration. However, by strictly regulating arbitrator disclosures, and limiting arbitrator powers to order attorney’s fees and other relief, RUAA creates new and more conditions that erode the finality of arbitration decisions.

Fairness principles in RUAA are laudable, but RUAA drafters ignored an ancient maxim of fairness—the Magna Carta’s injunction that justice delayed is justice denied. They never imagined that so many arbitrations at the state level would leave the underlying arbitration agreements, which secure a promise for a final and binding award, in tatters. The apparent winner in arbitration is therefore deprived of justice.

These recent developments trace to 1925, when Congress transferred oversight of arbitration from courts to legislatures. Today, this means that arbitration is more exposed to lobbying efforts by special interests who want to tailor ADR processes—under the aegis of the FAA—to suit their preferences. My data show that the U.S. has two different justice systems for enforcing arbitration awards. The federal domain is minimalist, rooted in centuries of common law experience, and also devoid of political maneuvering. Many states, however, naively promise more fairness in arbitration while subjecting this private process to special deals that are worked out in obscure legislative committees.

State expansion of reviewing standards poses three significant problems: (1) Foremost, this trend is fragmenting the national policy that favors arbitration by allowing a plurality of judicial review standards. When Congress and the Supreme Court beat the drum to proclaim that the FAA provides a national arbitration policy, they are wrong. (2) The results imply that RUAA will stimulate forum shopping. Award winners should run to federal court to confirm their awards, while challengers should race to state court to improve their odds of vacatur. In time, the judicial inconsistency that I document will undermine cost, efficiency, and time saving advantages of arbitration over court adjudications. (3) A moral hazard is created when losers at arbitration are tempted to renege on their contractual promise to submit to binding arbitration in order to pursue “do-over” adjudication. As more courts vacate awards, more disputes remain unresolved; and as the vacatur rate increases in state courts, this will lead to more award challenges. Congested court dockets will become a bigger problem if parties cannot rely on contractual promises for final and binding arbitration. Losing confidence in award finality, more parties will bypass arbitration and resort to filing more lawsuits. The Congress that passed the FAA sought a quick, efficient, and low-cost alternative to court adjudication. These lawmakers would be alarmed by empirical trends that depict the unbinding of arbitration.
# Table of Contents

I. **INTRODUCTION** .................................................. 1  
   A. Overview: Historical and Structural Flaws in the Federal Arbitration Act ........... 1  
   B. Organization of This Article .................................. 5  

II. **THE FAA’S FLAWED LEGISLATIVE HISTORY: THE JUDICIAL HOSTILITY MYTH** .... 8  
   A. Overview ...................................................... 8  
   B. Congressional Intent to End Judicial Hostility to Arbitration ............................ 10  

III. **CORRECTING THE RECORD: THE COMMON LAW REGULATION OF ARBITRATION** . 13  
   A. Overview ...................................................... 13  
   B. Judicial Regulation of Arbitration before the FAA .......................................... 14  
      1. Common Law Opposition to Arbitration ..................................................... 15  
      2. Common Law Support for Arbitration ....................................................... 19  
      3. Early Supreme Court rulings Mirrored the Common Law’s Mixed Approach to Arbitration .................................................. 22  

IV. **STATUTORY STANDARDS FOR JUDICIAL REVIEW OF ARBITRATION AWARDS** .... 24  
   A. The Federal Arbitration Act ...................................... 25  
   B. The Revised Uniform Arbitration Act of 2000 ............................................. 26  

V. **USING EMPIRICAL RESEARCH METHODS TO ANALYZE JUDICIAL CONFIRMATION**  
   OF ARBITRATION AWARDS ......................................... 29  
   A. Method for Creating the Sample .................................................. 29  
   B. Method for Comparing Reversal Rates by Courts ......................................... 31  

VI. **EMPIRICAL FINDINGS: QUANTITATIVE AND QUALITATIVE ASSESSMENTS** ........... 36  
   A. Statistical Findings and Assessment .................................................. 36  
   B. Case Analysis and Qualitative Assessments ................................................. 39  

VII. **CONCLUSIONS AND IMPLICATIONS** ......................................... 53  

VIII. **RESEARCH APPENDIX** ............................................. 59
I. INTRODUCTION

A. Overview: Historical and Structural Flaws in the Federal Arbitration Act

Congress created a policy that favors arbitration by enacting the U.S. Arbitration Act (USAA), now called the Federal Arbitration Act. FAA proponents convinced Congress that the law was needed to end judicial hostility to arbitration. This view was exaggerated, grounded in two English precedents from the 1700s that some American courts followed. English and American courts were not hardened opponents to arbitration. Many rulings preserved the autonomy of arbitration.

When lawmakers passed the FAA in 1925 they never learned that an English statute of 1697 authorized judicial enforcement of arbitration awards. Congress did not appreciate that as early as the 1600s English sentiment favored arbitration because court litigation wasted time and money. Lawmakers overlooked Lord Mansfield’s pivotal use

---

2 The Senate report emphasized that the effect of the bill would be to abolish the judicial reluctance to enforce arbitration agreements. S. REP. NO. 68-536, at 2-3 (1924). During Senate debate, Senator Thomas J. Walsh, explained: “In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced.” Remarks of Senator Walsh, 68 Cong. Rec. 984 (1924). The same point was raised during House debate. See Remarks of Congressman Graham, 68 Cong. Rec. 1931 (1924).
4 Infra notes 91 – 104.
5 9 & 10 William III c. 15 (1697). The preamble of the law stated: “for promoting trade and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters. . . .” John Locke’s role in formulating the statute is documented in Henry Horwitz & James Oldham, John Locke, Lord Mansfield and Arbitration during the Eighteenth Century, 36 THE HISTORICAL J. 137, 138-139 (1993).
6 E.g., Sir Josiah Child, A NEW DISCOURSE OF TRADE 141-144 (4th ed., 1745). His chapter, “A Court Merchant,” said that “this Kingdom will at length be blessed with a happy method, for the speedy, easy, and cheap deciding of differences between Merchants, Masters of Ships, and seamen by some Court or Courts of Merchant. . . .” Id. at 141. He complained that conventional litigation in courts of law entailed “tedious attendance and vast expenses” that tended to result in “empty purses and grey heads. . . .” Id. at 412. The preface of Sir Child’s book indicates that he wrote the treatise “long before the last session of Parliament, which commenced on 19th of October, 1669.” Id. at i. This suggests the possibility that his ideas influenced enactment of the arbitration statute.
of his court’s authority in the 1700s to foster commercial arbitration. To foster commercial arbitration.

These oversights would be academic but for the fact that Congress patterned the FAA after New York’s arbitration law, and New York based its legislation on English law. Somehow, Congress lost perspective of the American replication of English law. Amusingly, FAA sponsors acted as though they pioneered protection of arbitration from intrusive court review.

If the FAA was founded on historically faulty grounds—specifically, if the judicial hostility thesis was flawed eighty years ago—why does this problem matter today? Ironically, the FAA retarded the development of common law standards that were deferential to arbitration. Paradoxically, the FAA set into motion current state legislation that is leading to much greater vacatur of arbitration awards.

For this Article, I collected and analyzed employment arbitrations that were challenged by a losing party. My database has 426 federal and state court rulings from 1975-2007 that confirmed or vacated awards. These courts acquired jurisdiction of

---

7 C.H.S. Fifoot, Lord Mansfield 104-05 (1936):
The collaboration of judge and merchant, if it was to exercise its due influence upon the law, required adequate channels of communication. In the development of the special jury Lord Mansfield found the vital medium. . . . Lord Mansfield converted an occasional into a regular institution and trained a corps of jurors as a permanent liaison between law and commerce.

8 Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce, and a chief architect of the FAA, testified before a House committee on the virtues of the New York arbitration law. See Joint Hearings Before the Subcommittees of the Committees on the Judiciary, 68th Cong. 1st Sess., on S. 1005 and H.R. 646, at 13 (1924). The influential role played by the New York law is validated in Rosenthal v. Great Western Fin. Securities Corp., 14 Cal.4th 394, 406 (1996) (“In most important respects, the California statutory scheme on enforcement of private arbitration agreements is similar to the USAA; the similarity is not surprising, as the two share origins in the earlier statutes of New York and New Jersey.”). For a contemporaneous summary of the origins of the New York law, see Berkovitz v. Arbib & Houlberg, 130 N.E. 288, 289 (1921) (describing policy of section 2 of the law, which abolished the ancient rule against enforcement of arbitration agreements).


Infra notes 70 - 73.

11 An award is the arbitrator’s ruling or disposition of an issue. It functions like a court judgment.
arbitrator rulings because the FAA oddly allows parties to choose a federal or state forum, including the respective reviewing standards. Magnifying this anomaly, the FAA sets forth specific and narrow standards for federal court review of contested awards, but allows states to enact their own judicial review standards. For many years, state arbitration laws mirrored the FAA. In a key finding, however, my research shows that this parallelism is breaking down.

This is because states are enacting more intrusive reviewing standards. My data suggest that the Revised Uniform Arbitration Act (RUAA), a model law that expert commissioners drafted in 2000, plays a role in this development. RUAA was largely motivated by disturbing trends in the 1990s that raised questions about the fairness of arbitration. The growing use of mandatory arbitration fueled this concern. In the workplace, employers implemented arbitration procedures to enhance their advantage over individuals. They shifted large forum costs to employees, designated inconvenient venues, placed arbitrary remedial limits on arbitrator powers, shortened time bars to

---


13 *Infra* note 149.

14 *Infra* note 153.

15 *E.g.*, *infra* note 213 - 219.

16 *Infra* notes 154 – 155.

17 In mandatory arbitration, one party conditions a contractual benefit or entitlement— for example, employment or use of credit card— on the other party’s agreement to submit any dispute to arbitration, instead of a court. Because the arbitration clause is a non-negotiable condition for the contractual relationship, it is called mandatory.

18 See *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003), where the Sixth Circuit concluded: “Minimal research will reveal that the potential costs of arbitrating the dispute easily reach thousands, if not tens of thousands, of dollars, far exceeding the costs that a plaintiff would incur in court.”

19 *E.g.*, *Poole v. L.S. Holding, Inc.*, 2001 WL 1223748 (D.V.I. 2001) (court rejects contention by Virgin Islands employee that Massachusetts is a prohibitively expensive venue to arbitrate claim).

20 *E.g.*, *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 2000); and *Morrison v. Circuit*
file claims, and selected arbitrators without employee input. RUAA Commissioners stated in their prefatory note that their “new provisions are intended to reflect developments in arbitration law and to insure that the process is a fair one.”

My research does not assess whether post-RUAA arbitrations are more fair, but my statistical analysis shows a pernicious trend for arbitral finality—a finding that would surprise and chagrin the FAA Congress. Recall that lawmakers wanted minimal court interference with arbitration. My data from federal courts would reassure them. District judges confirmed 92.7% of these arbitrator decisions. But state trial judges confirmed only 78.8% of awards. This difference is statistically significant. The analysis for appellate courts produced a similar result—an 87.7% confirmation rate at the federal level, but only 71.4% level for state courts.

These results raise serious concerns because (a) there is now a measurable degree of judicial hostility to arbitration in state courts, (b) federal and state courts do not provide uniform or even similar results, (c) the FAA may be contributing to forum-shopping for the enforcement of arbitration awards, and (d) the increase level of judicial reversal of arbitration awards portends more time-consuming and expensive litigation—and re-litigation—of disputes, notwithstanding an underlying agreement by parties to resolve disputes with a final and binding award.

City Stores, Inc., 70 F.Supp.2d 815 (S.D. Ohio 1999) (although Title VII permits up to $300,000 in punitive damages, court upheld $162,000 limit imposed by arbitration agreement).

21 E.g., Louis v. Geneva Enterprise, Inc., 128 F.Supp.2d 912 (E.D. Va. 2001) (the 60-day filing limit in arbitration agreement drafted by the employer unlawfully conflicts with three year statute of limitations for FLSA claims); and Chappel v. Laboratory Corp. of America, 232 F.3d 719 (9th Cir. 2000) (because ERISA provides a four-year statute of limitations for an action to recover benefits under a written contract, plan administrator breached its fiduciary duty by adopting a mandatory arbitration clause that set a 60-day time limit in which to demand arbitration).

22 See Hooters of Am v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999), finding that the only possible purpose of the employer’s arbitration rules was “to undermine the neutrality of the proceeding.”

23 See The Revised Uniform Arbitration Act (first sentence in fourth paragraph of “Prefatory Note,” infra note 151.)
I conclude that these worrisome trends and possibilities are structurally rooted in the history and text of the FAA. Left alone, courts can be more trusted than state legislatures to preserve the finality of the arbitration process. But courts are increasingly subservient to state arbitration statutes that elevate arbitral fairness over finality. In the short term, higher rates of vacatur may mollify critics and skeptics who call attention to particularly unfair arbitration practices. But I suggest that the trend-line for vacatur implies serious costs for disputing parties. More arbitration proceedings are becoming lengthy and costly preludes to final disposition by courts. This implies that long queues at American courts grow as parties lose confidence in arbitral finality.

B. Organization of This Article

Part II.A shows that the Supreme Court and Congress believe that the FAA ended judicial hostility to arbitration. I trace the source of this faulty idea to an influential commercial lawyer who spearheaded lobbying for the FAA. Part II.B reports on


25 *Infra* note 55.

26 *Infra* notes 56 - 57.
congressional intent in the FAA. I also demonstrate how FAA sponsors overlooked caselaw that contradicted their sweeping condemnation of common law courts.

Part III examines common law treatment of arbitration before 1925, when the FAA was passed. Courts were divided in their support for arbitration. Part III.A explains why it is important to correct this historical record. The FAA substituted legislative for judge-made standards, so that now this private ADR process is susceptible to more political pressure compared to a purely judicial supervision. Part III.B.1 shows that some common courts opposed or interfered with arbitration, and Part III.B.2 presents caselaw that shows strong judicial support for arbitration. Part III.B.3 demonstrates that the Supreme Court added to this body of common law in the 1800s by taking a mixed approach to the autonomy of arbitration.

Part IV.A reports on the narrow statutory standards that federal courts use today in reviewing contested arbitration awards. Part IV.A also explains that the FAA creates parallel jurisdiction for states to review these awards under standards that their legislatures enact. Part IV.B reveals that a shift is occurring in the award review process, as more states adopt a model law called RUAA—Revised Uniform Arbitration Act. RUAA expands grounds for judicial review of awards. The law was proposed to improve fairness in arbitration, but I also suggest in Part IV.B that RUAA creates

---

27 Infra notes 65 - 76.
28 Infra notes 80 - 89.
29 Infra notes 90 - 144.
30 Infra manuscript page 18.
31 Infra notes 91 – 104.
32 Infra notes 105 - 131.
33 Infra notes 132 - 144.
34 Infra notes 145 - 150.
35 Infra notes 151 - 168.
36 Infra note 154.
37 Infra note 155.
potential to undermine the vital principle that awards are to be final and binding.\textsuperscript{38}

I put this theory to an empirical test. Part V.A reports my research methods to create a sample of 426 federal and state court decisions that ruled on an employment arbitration award.\textsuperscript{39} Part V.B is a framework for comparing my data to recent studies of court rulings that reversed a lower court or adjudicatory agency.\textsuperscript{40} Table 1 presents this research in a hierarchy that ranges from “extreme deference” to “no deference.”\textsuperscript{41}

Part VI.A reports my statistical results.\textsuperscript{42} Table 2 shows that federal district courts confirm about 92% of awards, compared to 78% for first-level state courts.\textsuperscript{43} Table 3 shows similar data for appellate courts. Federal courts confirm 87% of awards, compared to 71% for state courts.\textsuperscript{44} The results in both tables show that the wide difference in confirmation rates is unlikely due to chance. Next, I translate these results into three findings that compare the results to other empirical studies of court reversal rates.\textsuperscript{45}

Part VI.B elaborates on qualitative differences between federal courts that review awards under Section 10 standards in the FAA, and state courts that review awards under RUAA standards.\textsuperscript{46} Four issues appear to be causing federal and state courts to take different approaches in reviewing awards: (a) arbitrator disclosures to the parties,\textsuperscript{47} (b) the award of attorney’s fees,\textsuperscript{48} (c) the award of punitive damages,\textsuperscript{49} and (d) the legality of

\textsuperscript{38} \textit{Infra} notes 164 – 167, and related text.
\textsuperscript{39} \textit{Infra} notes 169 - 177.
\textsuperscript{40} \textit{Infra} notes 178 - 200.
\textsuperscript{41} \textit{Infra} manuscript page 33.
\textsuperscript{42} \textit{Infra} notes 209 - 226.
\textsuperscript{43} \textit{Infra} notes 201 – 207.
\textsuperscript{44} \textit{Infra}, manuscript page 37.
\textsuperscript{45} \textit{Infra} manuscript page 37.
\textsuperscript{46} \textit{Infra} notes 208 - 283.
\textsuperscript{47} \textit{Infra} notes 209 - 226.
\textsuperscript{48} \textit{Infra} notes 227 - 243.
\textsuperscript{49} \textit{Infra} notes 244 - 272.
the underlying agreement to arbitrate.\textsuperscript{50}

Part VII offers conclusions and implications of my historical and statistical research.\textsuperscript{51} Part VIII lists the state and federal cases that comprise my sample.\textsuperscript{52}

II. THE FAA’S FLAWED LEGISLATIVE HISTORY: THE JUDICIAL HOSTILITY MYTH

A. Overview

In a key 1991 decision, \textit{Gilmer v. Interstate/Johnson Lane Corp.},\textsuperscript{53} the Supreme Court explained that 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, and to place arbitration agreements upon the same footing as other contracts.”\textsuperscript{54} Certainly, Congress embraced this purpose when it said that American courts, influenced by English common law, had grown hostile to arbitration.\textsuperscript{55} But Congress did not do its own homework on this point, and adopted an erroneous view.

This mistake traces to an overzealous proponent of the FAA, a prominent

\begin{itemize}
\item \textsuperscript{50} \textit{Infra} notes 273 - 283.
\item \textsuperscript{51} \textit{Infra} notes 284 - 298.
\item \textsuperscript{52} \textit{Infra} manuscript page 33.
\item \textsuperscript{53} 500 U.S. 20 (1991).
\item \textsuperscript{54} \textit{Id.} at 24. The decision enforced a mandatory arbitration agreement, over the objections of an employee who filed an age discrimination lawsuit against his employer. The Gilmer majority rejected the employee’s contention that the arbitration agreement could not be enforced because he did not voluntarily consent to waive access to courts. Gilmer led to the widespread adoption of individual employment arbitration.
\item \textsuperscript{55} \textit{See} H.R. REP. No. 68-96, \textit{supra} note 3, at 1-2 (1924). This passage is quoted in its entirety because it is the most thorough account of the judicial hostility thesis that Congress embraced when it passed the FAA:

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.
\end{itemize}
commercial lawyer named Julius Henry Cohen, who published his views in a 1921 edition of *Yale Law Journal*. His categorical condemnation of American courts should have given pause for its lack of professional objectivity: “For over three hundred years, a dictum of Lord Coke has held sway over the minds of America. It is now on its fair way to a decent burial.” Cohen meant that American judges “had been inadvertently led into following an obsolete theory of the law” that blocked arbitration agreements.

If Cohen and the Congress investigated more carefully, they would temper their harsh judgment of courts. In a published case, *Brush v. Fisher* relied on an established line of precedent in the 1800s that upheld arbitration procedures. *Brush* explained that courts have narrow grounds for intruding upon arbitration when it said that “there is power in a court of equity to relieve against awards in some cases where there has been fraud and misconduct in the arbitrators, or they have acted under some manifest mistake (emphasis added). . . .” Stating the majority rule, *Brush* emphasized that “it is evident that there are greater objections to any general interference by courts with awards.”

*Brush* was decided near the end of the century, in 1888. An Alabama decision from earlier in the 1800s, *Tankersley v. Richardson*, came to the same conclusion: “This Court must, in accordance with a rule repeatedly laid down, . . . intend in favor of the award. . . .” *Campbell v. Western*, a New York case from 1832, similarly endorsed arbitration: “Awards are much favored, and the court will intend everything in their

---

57 Id.
58 38 N.W. 446 (Mich. 1888).
59 Id. at 447.
60 Id. at 448.
61 2 Stew. 130 (Ala. 1829), also available at 1829 WL 366, at * 1.
62 Id. at * 1.
63 3 Paige Ch. 124 (N.Y. 1832).
favor.”64 Read together, Brush, Tankersley, and Campbell mean that Cohen and other FAA supporters misjudged the role of American courts in arbitration disputes.

In the following research, I show that much evidence existed when the FAA was enacted to question the view that courts were hostile to arbitration. I also show that the FAA was almost entirely fashioned by corporate lawyers and businessmen. These FAA sponsors had legitimate concerns about improving enforcement of their arbitration agreements. They also had expressed concerns about costs and inefficiencies that they experienced in civil courts. However, their legal scholarship was flawed. They found it expedient to advance the judicial hostility thesis by stigmatizing a group who had no voice in this legislative proceeding—English and American common law courts.

B. Congressional Intent to End Judicial Hostility to Arbitration

In 1925, Congress enacted the United States Arbitration Act65—and renamed it the Federal Arbitration Act in 1947—to help businesses reduce expense and delay in resolving their legal disputes.66 Proposed by the American Bar Association and corporate lawyers, the law used arbitration statutes in New York and New Jersey as models.67 Congress wanted to make arbitration agreements enforceable in a court of law.68 Lawmakers proposed a national arbitration model based on federal jurisdiction.69

---

64 Id. at 128, n. 1.
66 S. REP. No. 68-536, supra note 2, at 2 (stating that the FAA was proposed to help businesses avoid “the delay and expenses of litigation”); and H.R. REP. No. 68-96, supra note 3, at 2 (showing that Congress believed the simplicity of arbitration would “reduce[e] technicality, delay, and [keep] expense to a minimum and at the same time safeguard the rights of the parties”).
67 See Rosenthal, supra note 8.
68 The bill was reintroduced in the 68th Congress with this heading: “To make valid and enforceable written provisions or arrangements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.” H.R. No. 646, 68th Cong., 1st Sess. (1923), at 1; and Sen. No. 1005, 68th Cong., 1st Sess. (1923), at 1.
69 Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the
Business leaders promoted the law by contending that lawsuits led to “ruinous litigation.” Court battles adversely affected consumers because the costs of litigation were hidden in prices. These costs were avoided when businesses voluntarily submitted their differences to arbitration. Arbitration offered “the best means yet devised for an efficient, expeditious, and inexpensive adjustment of . . . disputes.”

An attorney suggested to Congress that a state arbitration law had already discouraged contract-breaking behaviors, while creating “a spirit of conciliation and settlement.” But federal legislation was needed to improve arbitration. A party who agreed to arbitrate a dispute was free to revoke its submission at any time and not face a legal consequence. Too often, according to FAA sponsors, courts compounded this

---

70 Joint Hearings before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess, on S. 1005 and H.R. 646, at 6 (1924) (Statement of Charles L. Bernheimer, Chairman of Committee on Arbitration): 

I have made a study of the question of arbitration ever since the panic of 1907. The difficulties merchants then met with, that of having repudiations and other business troubles, resulting in much loss and expense outside of the costly and ruinous litigation, caused me to start on a study of the subject of arbitration, and the deeper I got into it the more I was convinced we should have legislation in State and Nation that would make arbitration a reality, that would cause an agreement or contract in writing providing for arbitration to be binding upon the parties and an irrevocable proposition.

71 Id., observing that “[t]he litigant’s expenses— that is, whatever is necessary to cover the annual outlay for litigation or the fear of litigation, consultations with lawyers, the possibility of cancellations, and so forth, eventually creeps into the selling price as well.”

72 Id. at 31 (Statement of Wilson J. Vance, Secretary of New Jersey State Chamber of Commerce): “there are very few cases that have actually come to trial in the arbitration tribunals . . . (because) business men have adopted the practice of getting together and settling their business differences.”

73 Id. (Statement of Thomas B. Paton, American Bankers Association).

74 Id. at 10 (Statement of W.H.H. Piatt, Chairman of the Committee on Commerce, Trade, and Commercial Law, American Bar Association).

75 Id. (Statement of Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce): “The difficulty is that men do enter into these such (arbitration) agreements and then afterwards repudiate the agreement. . . . You go in and watch the expression of the face of your arbitrator and you have a ‘hunch’ that he is against you, and you withdraw and say, ‘I do not believe in arbitration anymore.’“
withdrawal behavior by permitting a party to revoke a submission to arbitration.  

To this day, the Supreme Court has taken Cohen’s thesis as an article of faith. But the research he presented to Congress had no data or case law analysis. After describing judicial hostility to arbitration as “an unfortunate situation in the law,” Cohen offered a rambling and occasionally folksy justification for his position.

If Cohen checked sources available at that time, he would have found contrary evidence. An 1897 *Harvard Law Review* article by Addison C. Burnham demonstrated that common law courts were divided in their approach to enforcing arbitration agreements. With more digging, Cohen and Congress would have read an oft-cited English precedent from 1757, *Hawkins v. Colclough*, and its clear declaration: “Awards ought to be construed liberally and favorably.” Lord Mansfield left an indelible impression when he plainly “declared against critical niceties in scanning awards made by judges of the parties’ own choosing” — a point that was noticed 120 years later by

---

76 *Id.* at 14 (Statement of Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce): “... the difficulty has been that for over 300 years, for reasons that would take me too long to undertake to explain at this time, the courts have said that that kind of an agreement was one that was revocable at any time.”

77 The Court repeats its mantra that the FAA was enacted “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.” *E.g., Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 211 n.5 (1956)* (Frankfurter, J., concurring). *Also see* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20, 220 n. 6 (1985) (when Congress passed the FAA it was “motivated, first and foremost, by a congressional desire” to reverse long-standing judicial resistance to arbitration). The Court made the same point in *Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974)*: “English courts traditionally considered irrevocable arbitration agreements as ‘ousting’ the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act.”

78 *Id.* at 14.

79 *See S. 1005, supra* note 70 at 14 (1924).

80 Addison C. Burnham, *Arbitration as a Condition Precedent, 11 HARV. L. REV. 234 (1897).*

81 1 Burr. 274 (1757).

82 *Id.*

83 *See S. 1005, supra* note 70 at 14 (1924) at 14 (Statement of Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce): “... the difficulty has been that for over 300 years, for reasons that would take me too long to undertake to explain at this time, the courts have said that
the New Hampshire Supreme Court in *Truesdale v. Straw*.\(^{84}\) This court thought that Lord Mansfield’s rule was a settled point of law.\(^{85}\) If Cohen and Congress investigated, they would have found examples of extreme judicial deference to arbitration.\(^{86}\)

Truth lost to political expedience, however, when lawmakers concluded that “[t]he need for the law arises from an anachronism of our American law.”\(^{87}\) The House Report explained that “[s]ome centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.”\(^{88}\) The Report erroneously concluded that “[t]he courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.”\(^{89}\)

**III. CORRECTING THE RECORD: THE COMMON LAW REGULATION OF ARBITRATION**

**A. Overview**

I now consider the common law treatment of arbitration in the century leading up that kind of an agreement was one that was revocable at any time.”

\(^{84}\) 58 N.H. 207 (1877).

\(^{85}\) *Id.* at * 9 (“The books are full of the rule, and its application to particular cases, that voluntary arbitration is held by the common law in high estimation, and that the regularity of the proceedings and the validity of the award are to be presumed.”).

\(^{86}\) *See* Lord Jeffrey’s stunning statement in *Mitchell v. Cable*, 10 D.1297 (1848) that an arbitrator “may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power.”


\(^{88}\) *Id.*

\(^{89}\) *Id.*
to the FAA. Before proceeding, we should understand the significance of this historical research. Cohen’s overstated thesis had the effect of substituting statutory standards for judge-made regulation of arbitration. Even now, this shift in institutional control is not fully appreciated. I show that recent arbitration laws enacted by states—under the dual jurisdiction provisions of the FAA—threaten the independence of arbitration from court oversight. These recent laws are designed to make arbitration fairer to parties with weaker bargaining power who are forced into arbitration agreements. Courts are becoming the referees in post-arbitration disputes over these fairness issues. But the cost for this new arrangement is that binding awards are much less final.

The unbinding of arbitration is rooted in the judicial hostility thesis. By the time that Congress preempted common law regulation of arbitration, American courts spent more than a century protecting the bargain to arbitrate. By correcting this historical record, I suggest that courts are preferable to legislatures for regulating arbitration.

B. Judicial Regulation of Arbitration before the FAA

When arbitration supporters came to Congress for relief, they focused on judicial obstruction in the pre-award phases of arbitration. The underlying problem was that a party to an arbitration agreement reneged on the bargain. Some refused to submit a cause to arbitration, preferring to file a lawsuit. Others were unwilling to select an arbitrator, failed to appear at a hearing, or revoked the arbitrator’s authority to rule before a hearing ended. FAA sponsors expressed little concern about another important time when courts regulate arbitration—when an award is rendered, and a party refuses to accept it.

Again, history tells an informative story that the FAA Congress overlooked. A party who refused to pay on an arbitration award was imprisoned for his non-compliance.
The *Burrows’ Worcester Journal* reported a tense exchange between the prisoner and

Lord Chief Justice Mansfield in the Court of the King’s Bench on November 9, 1770:

A prisoner in the King’s Bench came into the court . . . and begged his Lordship to read the copy of his commitment, explain it to him, and point out what Authority the court had to deprive him of his liberty: his copy of causes being read, it appeared to be an attachment against the body, for the nonperformance of an arbitration bond, which the court calls a supposed contempt of court. The prisoner observed, if he had been guilty of any contempt, he looked on himself as bound by the laws of this free country, to pay implicit obedience; but if a thing imaginary, he hoped it was not sufficient to deprive a Briton of his Liberty . . . to this the court said, You have been ordered to pay a sum of money, and you must do it.90

The story reinforces the impression that courts were highly deferential in their enforcement of arbitration— to the point of using contempt powers to imprison people who did not comply with awards. In the following research, I correct the record on the American common law of arbitration show in the 1800s.

The FAA is partly correct in concluding that courts interfered with the autonomy of arbitration. I consider it an open question whether or not a majority of courts were guided by the following principles of interference in arbitrations. I show, however, that courts were divided over arbitration. For now, the record must show that some judges refused to enforce arbitration agreements, based on the following doctrines.

1. Common Law Opposition to Arbitration

• **Arbitration agreements are revocable.**91 Some judges applied the


91 This doctrine is traced to an English decision reported by Sir Edward Coke in 1609. See Vynior’s Case, 8 Coke (Reports), 7 James I (1609, Trinity Term) (available online at [http://oll.libertyfund.org/Home3/Book.php?recordID=0462.01](http://oll.libertyfund.org/Home3/Book.php?recordID=0462.01)), William Wilde and Robert Vynior had a disagreement over a bond, and both men agreed at the time of making the bond that William Rugge would serve as an arbitrator to resolve any dispute that should arise. Vynior alleged that Wilde breached terms of the bond, and received a favorable award from Rugge; but Wilde contended that he revoked Rugge’s authority before the award was made. Lord Coke’s decision allowed Wilde’s revocation of the submission
revocation doctrine to preserve a disputant’s access to courts. This allowed a party to withdraw from arbitration and sue in court. In the most common case, a person who agreed to arbitration could revoke his delegation of power to an arbitrator. Some courts allowed revocation until an award was rendered.

- 2. An arbitration agreement is against public policy. Judges ruled that public policy prohibits arbitration agreements from blocking access to courts. Otherwise,
private tribunals could not be held accountable under the law.\textsuperscript{95} 

**3. An arbitration agreement is a covenant to refer a dispute to private adjudication, but remains collateral to the main contract and therefore may be disregarded.**\textsuperscript{96} A party would need to sue for damages resulting from breach of the contract.\textsuperscript{97} Like the condition precedent doctrine (\textit{infra}), this principle said that an arbitrator could not decide a general question of liability, but the amount of damages.

**4. An arbitration agreement could not, as a matter of law, completely oust courts of their jurisdiction.** Some judges believed that no party had lawful authority to diminish the statutory powers of a court.\textsuperscript{98} This view—called the ouster doctrine because it states that courts cannot be ousted from their jurisdiction by a private contract—is attributed to two English cases, \textit{Scott v. Avery}\textsuperscript{99} and \textit{Kill v. Hollester}.\textsuperscript{100} Perhaps the Supreme Court has accepted Congress’s judicial hostility thesis because the Court reached a similar conclusion in an 1874 decision, \textit{Home Insurance Co. of New York v. Morse}.\textsuperscript{101} As early as 1897, however, a noted authority questioned whether American

\textsuperscript{95} The best explanation for the policy is in Greason v. Keteltas, 17 N.Y. 491, 496 (N.Y. 1858). The court observed that courts of equity would not entertain a suit to compel parties specifically to perform an agreement to submit to arbitration: “To do so, would bring such courts in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration already made.” \textit{Id.} The court explained:

This policy is founded in the obvious importance of securing fairness and impartiality in every judicial tribunal. Arbitrators being selected, not by law, but by the parties themselves, there is danger of some secret interest, prejudice or bias in favor of the party making the selection; and hence the opposite party is allowed, to the latest moment, to make inquiries on the subject.


\textsuperscript{97} See Munson v. Straits of Dover S.S. Co., 99 Fed. 787 (D.C.N.Y. 1900), \textit{aff’d} 102 Fed. 926 (1900).

\textsuperscript{98} \textit{Home Insurance Co. of New York v. Morse}, 87 U.S. 445, 451 (1874), declaring that “[a]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”

\textsuperscript{99} \textit{Scott v. Avery}, 8 Exch. 497 (1853), 5 House of Lords Cases.


\textsuperscript{101} \textit{Home Insurance}, \textit{supra} note 98, attributing the ouster doctrine to \textit{Kill v. Hollester}. \textit{Home Insurance} ruled that an individual cannot be compelled to waive his right to a judicial forum. In a passage that implied that pre-dispute arbitration agreements, the Court said, “Agreements in advance to oust the
courts properly understood these two English courts. Burnham’s *Harvard Law Review* article — which Congress overlooked— shows that there were two decisions in *Scott v. Avery*, the latter having *overturned* the oft-reported first case.\(^\text{102}\) The Supreme Court and Congress failed to understand that Lord Campbell opposed the ouster doctrine in the later decision.\(^\text{103}\) This correction by the English court in 1856 was virtually unnoticed. The first *Scott* decision is mainly responsible for the flawed thesis that underpins the FAA.

☼ 5. An *arbitration agreement is valid for the limited purpose of serving as a condition precedent to suit*. This doctrine is similar to the current idea of exhausting administrative procedures before suing. According to the condition precedent doctrine, an arbitration agreement could not prevent subsequent legal action, or determine the general question of liability, but could decide limited or collateral issues, such as damages.\(^\text{104}\)

---

\(^\text{102}\) Burnham, *supra* note 80, at 234-37, quoting at length from the *Scott v. Avery* decision of 1853 (8 Exch. 497 (1853)), and the *Scott v. Avery* decision of 1856 (5 H.L. Cas. 811 (1856)). The first decision stated the ouster doctrine. In that decision, Lord Coleridge wrote that “it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the courts of their jurisdiction, cannot be supported.” *Id.* at 235. A thorough and scholarly account of the appellate decision in *Scott v. Avery* appears in Delaware & H. Canal Co. v. Pennsylvania Coal Co., 5 Sickels 250, 50 N.Y. 265 (1872). Summarizing this pro-arbitration ruling, the New York court said: “The judge lays no stress upon the form of the contract, but regards the provision for determining the amount to be paid by arbitration as in legal effect postponing the right of action until *after the award is made* (emphasis added).” *Id.* at 268.

\(^\text{103}\) In reversing the first ruling, Lord Campbell explained why the ouster doctrine could not stand: “That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? . . . It is contended that it is against public policy; that it is rather a dangerous ground to go upon. . . . Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract.” *Id.* at 236.

\(^\text{104}\) See *Dugan v. Thomas*, 9 A. 354, 355 (1887): “Parties may by agreement impose conditions precedent with respect to preliminary and collateral matters, such as do not go to the root of the action. But men cannot be compelled even by their own agreements to mutually agree upon arbiters whose duties...
2. Common Law Support for Arbitration

Many American courts respected the autonomy of arbitration. Before I outline and catalog these nineteenth century authorities, two decisions are offered as an overview.

*Larkin v. Robbins*\(^{105}\) is a typical dispute between the opposing theories of ouster and liberty of contract. The latter principle led courts to conclude that parties had a right to enter into a contract for private dispute resolution procedures—like any other subject for a contract. *Larkin* was a liberty-of-contract court. Once a party agreed to arbitration, this discontinued a court’s jurisdiction to decide the matter *de novo*.\(^{106}\)

*Yates v. Russell*\(^ {107}\) is singled out because of the court’s pragmatic view of the underlying dispute. The matter dealt with damages from an adulterous affair.\(^ {108}\)

Upholding the arbitration agreement, *Yates* understood that the parties sought privacy to

---

\(^{105}\) 2 Wend. 505 (1829).

\(^{106}\) *Id.* stating: “The reason that the submission operates as a discontinuance, is not because the subject of the suit is otherwise disposed of than by the decision of the court in which it was prosecuted; but because the parties have selected another tribunal for the trial of it.” Giving preeminent effect to the parties’ contract, Larkin reasoned: “The court will not look to the proceedings of that tribunal to determine whether the suit is gone beyond its jurisdiction. It is sufficient that the parties have selected their arbitrators, and concluded their agreement to submit to them. It is this agreement which withdraws the cause from the court, and effects the discontinuance of the suit.” *Id.*

\(^{107}\) 17 Johns. 461 (N.Y. Sup. 1820).

\(^{108}\) *Id.* at 453, explaining that the adulterous affair factored into the decision to enforce the arbitration agreement. “There might be, and no doubt were, very good and sufficient reasons in the minds of the parties, for withdrawing from a public trial so painful and distressing an investigation as an action for adultery involves; and I see no good reason why the agreement of the parties to withdraw the trial from a jury to a more retired examination, before well selected referees, should be discountenanced or rejected.”
resolve their dispute.\textsuperscript{109} When \textit{Yates} and the judicial hostility thesis are read side-by-side, it is hard to agree that American courts were dogmatic foes of arbitration.

Many nineteenth century courts favored arbitration.\textsuperscript{110} When courts referred disputes to arbitration, they ended their jurisdiction.\textsuperscript{111} They enforced arbitration agreements.\textsuperscript{112} Judges considered the parties’ intentions to arbitrate.\textsuperscript{113} Arbitration agreements precluded courts from hearing a lawsuit that paralleled or duplicated the matter being arbitrated.\textsuperscript{114} Judges did not interfere with arbitration proceedings on technical grounds when a procedure varied from the strict requirements of the contract.\textsuperscript{115} Some courts refused to allow parties to revoke an arbitrator’s authority after the matter was referred to arbitration but before issuance of an award.\textsuperscript{116} Others refused pre-

\textsuperscript{109} \textit{Id.} at 454. Yates upheld the arbitrators’ ruling on the theory that this was what the parties originally intended: “It is not pretended there was any imposition or collusion in the case. It was an agreement made in good faith, and I think that good faith requires that it should be truly and accurately observed.” \textit{Id.} The court reasoned “that a party to that agreement must be held to be concluded by it, and that he cannot now allege, that the reference and judgment were not warranted by law. I think that it would be establishing a precedent that might be very pernicious in its consequences.” \textit{Id.}

\textsuperscript{110} Neely v. Buford, 65 Mo. 448, 451 (1877): “Courts are disposed to regard with favor these tribunals of the parties’ own selection.”

\textsuperscript{111} McKim v. Thompson, 1 Bland’s Ch. Rep. 150, 175 (Md. 1827): “By referring a case to arbitration, the court divests itself of its judicial power.”

\textsuperscript{112} Camp v. Root, 18 Johns. 22, 23 (N.Y.Sup. 1820): “The submission to arbitration was a discontinuance of the suit.” \textit{Also see} Pike v. Emerson, 5 N.H. 393, 393 (N.H. 1831): “We have no doubt, that an attorney has authority, by an (arbitration) agreement put upon file, in a cause, to bind his client, and that such an agreement may, in many cases, be specially enforced.”

\textsuperscript{113} Henry v. Porter, 29 Ala. 619, 620 (Ala. 1857): “Whether a submission to arbitration, or an award, will work the dismissal of a pending suit, must depend on the intention of the parties, to be gathered from the facts of each particular case. . . .”

\textsuperscript{114} Dederick’s Adm’rs v. Richley, 19 Wend. 108, 111 (N.Y.Sup. 1838): “The principle upon which the cases proceed seems to be this: if the parties agree to an unauthorized reference, it amounts to nothing more than an arbitration; the suit is at an end—the court has no longer any jurisdiction over the parties, and will take no further cognizance of the matter.”

\textsuperscript{115} Howard v. Conro, 2 Vt. 492, 494 (Vt. Jan 1829): “If [the parties] mutually agree to dispense with the attendance of one of the referees, and in pursuance of such agreement appear and submit to a hearing before the other two, . . . it is not competent for either party . . . to urge the absence of the third referee as an objection to the report.”

\textsuperscript{116} Bank of Monroe v. Widner, 11 Paige Ch. 529, 533 (N.Y.Ch. 1845): “[A]t the common law, it was competent for one of the parties to a submission to arbitration, to revoke the submission at any time before the award was actually made, and ready to be delivered to the parties. But the revised statutes have wisely provided that neither party, to a submission to arbitration, shall have power to revoke such
award revocations to protect the parties’ investment of time and costs in a hearing.\textsuperscript{117}

Courts were especially supportive of arbitrations after the process ran its full course and an award was issued. Judges believed that awards should be enforced.\textsuperscript{118} Awards were reviewed with more deferential standards than appellate courts used to review trial rulings.\textsuperscript{119} Courts emphatically rejected revocations after an award was rendered.\textsuperscript{120}

Courts treated awards as final and binding.\textsuperscript{121} They favored the procedural simplicity\textsuperscript{122} and efficiency\textsuperscript{123} in arbitration. Arbitrators could not withdraw their ruling.\textsuperscript{124} Where only two out of three arbitrators signed an award, courts enforced the

\textsuperscript{117} Paist v. Caldwell, 75 Pa. 161, 165 (Pa. 1874): “The parties agreed to consolidate these actions and try them before referees, who should render a final award whether the defendant should pay anything, and if any, how much. . . . Here valuable rights were released and acquired on each side, and the effect of the settlement on this basis was to put an end to litigation ruinous to both sides. . . . Under such circumstances, it was not in the power of the defendant at the last moment, and after the referees had gone far into the case, suddenly to give a notice of revocation, and avert a result.”

\textsuperscript{118} Garitee v. Carter, 16 Md. 309, 309 (Md. 1860), noting that “a more liberal and reasonable interpretation of awards is now adopted by the courts than formerly existed. Every reasonable intention will be made in their favor, and a construction given to them that will support them if possible. . . .”

\textsuperscript{119} Wilson v. Williams, 66 Barb. 209, 210 (N.Y. 1870): “[A]n agreement to arbitrate a pending suit operates as a discontinuance of the suit as an action but nevertheless if the agreement provides for a judgment to be entered in the action, such judgment may be entered, and stand as a judgment by consent, which cannot be set aside in the ordinary way by which errors are corrected.”

\textsuperscript{120} Rogers’ Heirs v. Nall, 25 Tenn. 29, 30 (Tenn. 1845): “But in this case the award was made and published to the parties before any attempt was made to revoke the authority of the arbitrators. It is manifestly absurd to assume that an authority already exercised can be countermanded. The attempt to revoke the submission in this case, therefore, comes too late.” Also see McGhee-en v. Duffield, 5 Pa. 497, 498 (Pa. 1847): “[T]he umpire had heard the parties and made his award before the defendants act of revocation. They were too late, as a submission cannot be revoked after award. . . .”

\textsuperscript{121} Tankersley v. Richardson, 2 Stew. 130 (Ala. 1829): “Awards are much favored, and the court will intend everything in their favor.”

\textsuperscript{122} Brush, supra note 58, at 448.

\textsuperscript{123} Campbell, supra note 63, at 138:

If every party who arbitrates, in relation to a contested claim, to save trouble and expense, is to be subjected to a chancery suit, and to several hundred dollars cost, if the arbitrators happen to err upon a doubtful question as to the admissibility of a witness, the sooner these domestic tribunals of the parties' own selection are abolished, the better. Such a principle is wholly inconsistent with common sense, and cannot be the law of a court of equity.

\textsuperscript{124} Patton v. Baird, 7 Ired.Eq. 255, 1851 WL 1283, * 4: “After an award is made, the arbitrators are ‘functi officio,’ and have no more power to alter it, than a jury has to change their verdict, after it is rendered, and they are discharged.”
ruling. Where parties authorized a panel of arbitrators to rule on their dispute, withdrawal by one arbitrator did not deprive the remaining arbitrators of authority to render an enforceable award. In one case, an award was enforced after it was amended to include payment of forum costs.

Courts enforced arbitration agreements that consented to judicial enforcement of the award. Courts believed they had authority to enforce arbitrator rulings, even erroneous ones. When awards were partially defective, courts enforced the valid portion of the arbitrator’s ruling.

3. Early Supreme Court Rulings Mirrored the Common Law’s Mixed Approach to Arbitration

---

125 Campbell, supra note 63, at 138, stating: “Submission to the arbitration of three or any two, two join in the award giving notice of the award concluded, and being about to be returned to the third, who does not join in it; held, that this is no objection to the validity of the award.”

126 Kile v. Chapin, 9 Ind. 150, 1857 WL 3569 at *1 (Ind. 1857): “Even when several arbitrators are appointed by the parties, and one refuses to act, the award of the other arbitrators will be valid. For the law will not put it in the power of one arbitrator to defeat the submission by withdrawing from the trust.”

127 Dudley v. Thomas, 23 Cal. 365, 367 (Cal. 1863): “The arbitrators have power to award costs, though no mention be made of costs in the submission, as it is a matter within the terms of a general reference.” The appeal contended when the arbitrators amended the award by billing costs of the arbitration, this was an amendment of the award. A common law rule provided that after an award was made and delivered, the arbitrators could not alter it, even to correct mistakes. But the Dudley court distinguished the award of costs, reasoning: “We are satisfied that the execution of this subsequent instrument did not vitiate the original award, which remained unaltered by the arbitrators.” Id. at 368.

128 Hughes v. Bywater, 4 Hill 551, 552 (N.Y.Sup. 1843): “[T]he stipulation in this instrument of submission (to arbitration) is the same thing as if it had expressly authorized the entry of judgment by an attorney. It is virtually saying to the plaintiff, ‘if the award be against me, I waive my right to insist on a special motion. . . .’ An agreement to arbitrate discontinues a cause.”

129 Green v. Patchin, 13 Wend. 293, 295 (N.Y.Sup. 1835): “Where a judgment has been entered according to the written agreement of the parties, without fraud, the court will permit the parties to enforce it, and will not interfere to set it aside, or examine its merits.” Also see Farrington v. Hamblin, 12 Wend. 212, 213 (N.Y.Sup. 1834): “The arbitrators were not officers of the court, but judges of the parties’ own choosing. The court had no control over them; and but for the stipulation to enter judgment, the court would not entertain any motion in relation to the subject.”

130 Winship v. Jewett, 1 Barb. Ch. 173, 179 (N.Y. Ch. 1845): “An award made in good faith, although erroneous, is conclusive. The dissent of one of the arbitrators subsequently to an award regularly made will not invalidate it.”

131 Brown v. Warnock, 5 Dana 492, 493 (Ky. 1837): “An award may be good in part, and void in part.” Also see Banks v. Adams, 23 Me. 259, 1843 WL 1152, * 3 (1843): “An award may be good for part and bad for part; and the part which is good will be sustained, if it be not so connected with the part which is bad, that injustice will thereby be done.”
My historical analysis closes with one more example of the FAA’s intellectual vacuum. The Supreme Court has *repeatedly* affirmed the judicial hostility thesis.\(^{132}\)

_Scherk v. Alberto-Culver Co._ informs us that “English courts traditionally considered irrevocable arbitration agreements as ‘ousting’ the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act.”\(^{133}\)

Oddly, the Court failed to contemplate its own nineteenth century experience with arbitration. Justices decided two arbitration cases in this period.\(^{134}\) Their mixed treatment of arbitration is consistent with the common law findings in Burnham’s 1897 study.

_Carnochan v. Christie\(^{135}\)_ reversed a lower court ruling that upheld a commercial arbitration award. Notably, the lower court enforced the arbitrator’s award. This outcome is counter to the inaccurate picture painted by Cohen and FAA supporters. Chief Justice Marshall’s opinion in _Carnochan_ reversed the award-confirmation ruling. However, he

\(^{132}\) The Court has repeatedly said that FAA was enacted “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.” _E.g._, Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring). _Also see_ Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20, 220 n. 6 (1985) (when Congress passed the FAA it was “motivated, first and foremost, by a congressional desire” to reverse long-standing judicial resistance to arbitration).


\(^{134}\) A third Supreme Court arbitration decision occurred soon after the nineteenth century ended. Colombia v. Cauca Co., 190 U.S. 524 (1903) is another example of pre-FAA judicial deference to arbitration. After a U.S. company became entangled in a contract dispute with the government of Columbia to build a railroad in that nation, a three-member arbitration panel was appointed. One arbitrator was appointed by the company, and another by Columbia. The governments of Columbia and the U.S. co-selected the third arbitrator. At the close of the hearings, Columbia withdrew its arbitrator and failed to appoint a replacement. The remaining arbitrators rendered an award for the company, prompting Colombia to argue that the resignation of its arbitrator made the award void. Justice Holmes’ decision confirmed the award, reasoning that when the two governments and company established the arbitration panel, “it was not expected that a commission made up as this was would be unanimous.” _Id._ at 527. Rather, the parties had “resolved, under the powers given to it in the agreement, that a majority vote should govern. Obviously that was the only possible way, as each party appointed a representative of its side.” _Id._ The Court concluded: “We are satisfied that an award by a majority was sufficient and effective.” _Id._

\(^{135}\) 24 U.S. 446 (1826).
ruled on narrow grounds, and found no fault with the arbitration *per se.*

Later, *Lutz v. Linthicum* strongly supported arbitration. The parties agreed to arbitrate a lease dispute. By court order, two arbitrators were appointed and the decree also authorized their selection of a third neutral. After the panel rendered an award for damages payable to the evicted lessee, a lower court entered judgment on the award.

*Lutz,* the losing party, raised several objections to the award. It was not final and definite; the appointment of the third arbitrator did not conform to the public policy of Maryland; and delivery of the award to the losing party did not conform to the strict requirements of statutory law. Citing treatises and common law precedents, Justice Story rejected these arguments in a thoroughly contemporary sounding decision.

The nineteenth century Supreme Court rulings vanished over time. Only four courts have cited *Carnochan* since 1925, the year that the FAA was enacted—and all are at the state level. Only three federal courts have cited *Lutz* since 1925. No Supreme Court decision in the post-FAA era has cited either decision. This disappearing lineage is sobering proof of the modern-day amnesia caused by the FAA’s judicial hostility thesis.

**IV. STATUTORY STANDARDS FOR JUDICIAL REVIEW OF ARBITRATION AWARDS**

---

136 *Id.* at 466. The Court ruled that the award was indefinite as to when a credit was due to one of the parties, and therefore, the arbitrators’ ruling was not final.

137 *Id.* The Court said that “the award ought itself to settle finally and conclusively the whole matter referred to them.”

138 33 U.S. 165 (1834).

139 *Id.* at 168.

140 *Id.* at 169.

141 *Id.* at 169 - 170.

142 *Id.* at 178- 179 (“But, prima facie the award is to be taken to have been regularly made, where there is nothing on its face to impeach it.”).


A. The Federal Arbitration Act

While Congress was pre-occupied with enforcing arbitration agreements, it gave little thought to standards for vacating an award. The 1924 House report stated: ‘The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.’ The 1924 Senate report stated that the award could be set aside where it was secured by corruption, fraud, or undue means; or if there was partiality or corruption on the part of the arbitrators; or in a situation where an arbitrator is guilty of misconduct or refuses to hear evidence or because of prejudicial misbehavior by the parties; or the arbitrator exceeds his or her powers. The Senate included a significant excerpt from a lawyer’s brief as its main evidence of intent on award enforcement:

The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.

Section 10 codifies these grounds to vacate an award. The FAA added a critical layer

---

145 See supra notes 69 & 76.
147 S. REP. NO. 68-536, supra note 2, at 4.
148 See supra note 70, Hearings on the Subject of Interstate Commercial Disputes, at 36 (Statement of W.W. Nichols, January 9, 1924). The legislative reports and debates said nothing as to whether post-award and state court litigation rules should be preempted by the new federal law.
149 See supra note 1, United States Arbitration Act, codified as amended at 9 U.S.C. § 10, authorizing courts to vacate an award where (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators; (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
of review by preserving dual and concurrent roles for state and federal courts—a feature that now complicates review of awards. Section 9, which specifies rules for reviewing awards, authorizes a reviewing role for state courts.¹⁵⁰

B. The Revised Uniform Arbitration Act of 2000

Forty-nine states have arbitration laws. Before 2000, 35 states adopted the Uniform Arbitration Act (UAA), while 14 adopted similar legislation.¹⁵¹ The UAA was proposed in 1955, supposedly to repeal state laws that obstructed arbitration agreements.¹⁵² Many state laws contain the four statutory standards in Section 10 of the FAA, and add a fifth ground for vacatur.¹⁵³

---

¹⁵⁰ *Id.* § 9, stating: “If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”


¹⁵² *Id.*

¹⁵³ The Uniform Arbitration Act is reproduced by the American Arbitration Association at [http://www.adr.org/sp.asp?id=29567](http://www.adr.org/sp.asp?id=29567). Section 12, “Vacating an Award,” states:

(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

UAA vacatur standards appear in Alaska (Ak. St. § 09.43.120, Vacating an Award); Arizona (A.R.S. 12-1512, Opposition to an Award); Arkansas (A.C.A. § 16-108-212, Vacating an Award); Idaho (I.C. § 7-912, Vacating an Award); Illinois (710 ILCS 5/12, Vacating an Award); Indiana (I.C. § 34-57-2-13, Vacation of an Award); Kansas (Ks. St. § 5-412, Vacating an Award); Kentucky (K.R.S. § 417.160, Vacating an Award); Maine (14 M.R.S.A. § 5938, Vacating Award); Massachusetts (M.G.L.A. 150C §12, Vacation of an Award); Minnesota (M.S.A. § 572-19, Vacating an Award); Missouri (V.A.M.S. 435.405, Vacating an Award).
This fairly uniform approach was fragmented after 2000, when RUAA was approved. In a recent survey of all state laws, the American Arbitration Association reports that 12 states adopted RUAA. The revised vacatur standards, appearing in RUAA Section 23, added a sixth element; and it made other amendments within the structure of the four FAA standards and the fifth standard in the UAA.

RUAA drafters identified 14 issues to resolve in contemporary arbitration.

---

Award); Montana (Mt. St. 27-5-312, Vacating an Award); Nebraska (Neb. Rev. St. § 25-2613, Vacating an Award); South Carolina (Code 1976, § 15-48-130); South Dakota (S.D.C.L. § 21-25A-24, Grounds for Vacation of an Award); Indiana (I.C. § 34-57-1-17, Grounds Against Rendition of Award on Judgment); Tennessee (T.C.A. § 29-5-213); Virginia (Va. Code Ann. § 8.01-581-010). Alaska and Colorado retain the UAA structure but also adopted the Revised Uniform Arbitration Act. See infra note 154.

The states are Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington.

The Revised Uniform Arbitration Act, supra note 151. In reproducing the vacatur provision, I italicize all additions to Section 10 of the FAA; and italicize and underline additions to Section 12 of the UAA:

SECTION 23. VACATING AWARD.
(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (1) the award was procured by corruption, fraud, or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator’s powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

Revised Uniform Arbitration Act, supra note 151, listing these issues: (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold pre-hearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a pre-award ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney’s fees, punitive damages or other exemplary relief; (11) when a court can award attorney’s fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award; and (13) which sections of the UAA would not be waivable; particularly when one party has significantly less bargaining power than another; and (14) the use of electronic information in the arbitration process).
They believed that courts must play a larger role to ensure fairness in arbitration. RUAA is premised on the belief that arbitration should be a consensual process. In addition, RUAA broke new ground by regulating arbitrator neutrality. The revised act expanded arbitrator powers by authorizing discovery and other protective orders, rulings on motions for summary judgment, pre-hearing conferences and other actions that manage the arbitration process. A new rule empowered courts, during the hearing phase, to enforce a pre-award ruling by an arbitrator.

Drafters regulated the remedial boundary that overlaps arbitration and courts. A new section prescribed arbitrator remedies, including attorney’s fees, punitive damages, and other exemplary relief. RUAA also allows courts to award attorney’s fees and costs to a prevailing party in an appeal of an arbitrator’s award.

RUAA drafters recognized the need for arbitral finality. The revised regulations were designed to facilitate “the relative speed, lower cost, and greater efficiency of the [arbitration] process.” In particular, they acknowledged that “in most cases parties intend the decisions of arbitrators to be final with minimal court involvement unless there

---

157 Id., Prefatory Note (“arbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness”).

158 Id., Section 12, Disclosure by Arbitrator.

159 Id., Section 17, Witnesses, Subpoenas, Depositions, Discovery.

160 Id., Section 18, Judicial Enforcement of Preaward Ruling.

161 Id., Section 21, Remedies; Fees and Expenses of Arbitration Proceeding.

162 Id., Section 21 (a) - (b).

163 Id., Section 25, Judgment on the Award; Attorney’s Fees and Litigation Expenses.

164 Id., Section 25, Comment (“Section 25(c) promotes the statutory policy of finality of arbitration awards by adding a provision for recovery of reasonable attorney’s fees and reasonable expenses of litigation to prevailing parties in contested judicial actions to confirm, vacate, modify or correct an award.”).

165 Id., Prefatory Note.
is clear unfairness or a denial of justice.”166

I close this discussion by suggesting that RUAA drafters cannot simultaneously improve fairness and finality in arbitration. Later, I present data to show that RUAA is significantly eroding award finality. For now, my discussion is confined to the assertion by drafters that “in most cases parties intend the decisions of arbitrators to be final with minimal court involvement unless there is clear unfairness or a denial of justice [emphasis added].”167 The italicized text underscores a major philosophical difference between RUAA drafters and the FAA Congress. The FAA was passed to make arbitration a quick, efficient, low-cost alternative to courts.168 RUAA drafters paid lip service to these values, but their overriding concern was to make arbitration fairer for parties who are vulnerable to overreaching by the scrivener of the arbitration agreement.

RUAA drafters cannot have it both ways—preserving award finality while ensuring that arbitration is free from “clear unfairness and denial of justice.” This is because “clear unfairness” and “denial of justice” lack objective tests.

RUAA drafters also underestimate the tendency by sore losers in arbitration to challenge the results of their private adjudication. The very limited judicial review standards in the FAA deter these challenges. But each fairness procedure in RUAA, acting in combination with expanded judicial review, increases the likelihood of involving courts in reviewing award challenges.

V. USING EMPIRICAL RESEARCH METHODS TO ANALYZE JUDICIAL CONFIRMATION OF ARBITRATION AWARDS

A. Method for Creating the Sample

166 Id.
167 Id.
I used research methods from my earlier empirical studies. The sample was derived from Westlaw’s internet service. Because Congress allowed parties to choose federal or state courts to contest awards, I used federal and state law databases. The search used keywords from terms in the FAA, RUAA and state arbitration laws.

The sample focused on employment arbitrations. To be included, a case involved a post-award dispute between an individual employee and the employer in which an arbitrator’s ruling was challenged by either party. Arbitration cases involving a union and employer were not included because these adjudications are no longer regulated under the FAA. Instead, court review occurs under Section 301 of the Labor-Management Relations Act. When judges review labor arbitration awards, they apply federal common law principles from three closely integrated decisions, now called the Steelworkers Trilogy.

The sample had no historical limit. The earliest decision was reported in 1975. Sampling ended in April 2007. After a potential case was identified, I read it to see if it met the inclusion criteria. For example, pre-arbitration disputes over enforcement of an arbitration clause were excluded. Cases were included, on the other hand, where

---


170 E.g., “PROCURED BY CORRUPTION,” or “EVIDENT PARTIALITY,” or “REFUSING TO POSTPONE THE HEARING,” or “ARBITRATORS EXCEEDED THEIR POWERS,” or “IMPERFECTLY EXECUTED.”


employees resisted arbitration, were compelled to arbitrate their claims, and were later involved in a post-award lawsuit.\textsuperscript{174} Some cases involved employees who preferred court to arbitration but prevailed in the private forum, leading the employer to seek vacatur.\textsuperscript{175}

Once a case met the criteria, it was checked against a roster of previously read and coded cases to avoid duplication.\textsuperscript{176} All cases are in Appendix I. Next, relevant data were taken from each case. Variables included (1) state or federal court, (2) first court ruling on motion to confirm or vacate an award, and (3) appellate ruling on motion to confirm or vacate an award. Other data were collected and analyzed for a companion study.\textsuperscript{177}

\textbf{B. Method for Comparing Reversal Rates by Courts}

My research is designed to measure vacatur rates by federal and state courts at the initial and appellate stages of judicial review. Unless these rates are extremely low or high, they are hard to interpret. As I conducted my empirical analysis, I also researched similar studies—other statistical measures of appellate courts that are petitioned to overturn a lower court or agency ruling. My analysis and those studies measure reversal rates in adjudications.

Comparative data improves my ability to assess whether judicial deference to

\begin{footnotesize}
\begin{footnotes}{\begin{footnotesize}
\textsuperscript{174} Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144 (2d Cir. 2004).
\textsuperscript{175} In Madden v. Kidder Peabody & Co., 883 S.W.2d 79 (Mo. App. 1994), an employee sued but was ordered by the court to arbitrate his claim. After he prevailed and was awarded $250,000, the employer sued to vacate the award, but the court denied the motion.
\textsuperscript{176} In rare cases, an award was challenged once and remanded to arbitration; and after arbitrators ruled again, the award was challenged a second time. These award-reviews were treated as separate cases, even though the parties and dispute were unchanged, because the awards differed. \textit{See} Sawtelle v. Waddell Reed Inc., 754 N.Y.S.2d 264 (2003).
\textsuperscript{177} Michael H. LeRoy & Peter Feuille, \textit{Happily Never After: When Arbitration Has No Fairy Tale Ending}, \textit{Harv. Negot. L. Rev.} (forthcoming, 2008) reporting on a recent spurt of award-review cases, exemplified by the finding that 64.9\% of federal district court award-review courts decisions occurred since 2000. This means that courts will likely face a growing docket of post-arbitration appeals as parties seek to re-litigate the claims that were privately adjudicated. This upsurge also suggests that employment arbitration serves too many masters—an uncoordinated array of legislatures and courts that regulate this process—despite the fact that the FAA appears to legislate uniform standards.
\end{footnotesize}\end{footnotes}
\end{footnotesize}
awards is insufficient, moderate, or excessive. This judgment can be partly made by understanding what a legislature intended for a scope of court review. The other part of this quantitative judgment is informed by considering the intent behind the FAA. Recalling my earlier discussion, Congress barely considered the issue of award enforcement. Still, it is reasonable to infer that Congress intended low vacatur activity. This is because the FAA was meant to end judicial hostility to arbitration.

But how low is low for a vacatur rate? Table 1 helps to answer that question by depicting appellate reversal rates in other studies, and arranging them by levels. I created a simple hierarchy for these studies: Courts review with extreme deference (reversal rate 8.0% or less), great deference (reversal rate 8.1% to 16.0%), high deference (16.1% to 24.0%), moderate deference (reversal rate 24.1% to 32.0%), slight deference (reversal rate 32.0% to 40.0%), and no deference (reversal rate 40.1% or more).
### Table 1

<table>
<thead>
<tr>
<th>Level of Deference by Appellate Court</th>
<th>Reversal Rate by Appellate Court</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Extreme Deference</strong>&lt;br&gt;Reversal Rate 8.0% or Less</td>
<td>6% Reversal of Employer Dismissals of Employment Discrimination Lawsuits (Clermont &amp; Eisenberg, 2002) 7.4% Reversal by U.S. Circuit Court of Appeals, 9th Circuit Lower Court Rulings 2005 (Catterson, 2006)</td>
</tr>
<tr>
<td><strong>Great Deference</strong>&lt;br&gt;Reversal Rate Between 8.1% and 16.0%</td>
<td>9.1% Reversal by All U.S. Circuit Courts of Appeals, 2005 (Catterson, 2006) 14.7% Reversal by Federal Appeals Courts of NLRB Rulings of Union Liability (Brudney, 1996)</td>
</tr>
<tr>
<td><strong>High Deference</strong>&lt;br&gt;Reversal Rate Between 16.1% and 24.0%</td>
<td>19.7% Reversal by Federal Appeals Courts of NLRB Rulings of Employer Liability (Brudney, 1996) 22.0% Reversal by Federal Appeals Courts of Jury Patent Rulings (Moore, 2000) 22.0% Reversal by Federal Appeals Courts of Judges’ Patent Rulings (Moore, 2000)</td>
</tr>
<tr>
<td><strong>Slight Deference</strong>&lt;br&gt;Reversal Rate Between 32.1% and 40.0%</td>
<td>33.6% Reversal by Federal Appeals Courts of Labor Arbitration Awards, 1991-2001 (LeRoy &amp; Feuille, 2001)</td>
</tr>
<tr>
<td><strong>No Deference</strong>&lt;br&gt;Reversal Rate of 40.0% and Above</td>
<td>56% Reversal of Employee Wins in Employment Discrimination Lawsuits (Clermont &amp; Eisenberg, 2002) 66% of Death Penalty Sentences Reversed in Nebraska (Baldus, et al., 2002)</td>
</tr>
</tbody>
</table>
Extreme Deference (Reversal Rate 8.0% or Less): A study by Kevin Clermont and Theodore Eisenberg examined appellate court reversal of lower courts in the federal system. In employment discrimination cases, appellate courts reversed less than 6% of wins by employers at trial. This is an extreme example of appellate court deference.

Cathy Catterson’s recent study of the Ninth Circuit Court of Appeals provides a second example of extreme judicial deference. The research was related to a study by the Commission on Structural Alternatives for the Federal Courts of Appeals. Chaired by retired Supreme Court Justice Byron White, the Commission studied the possibility of splitting this overburdened circuit. Catherson’s study showed that as the circuit’s caseload has mushroomed from 1945 to 2005, appellate courts have reversed far fewer rulings. The reversal rate in 2005, 7.4%, was due to diminishing judicial resources.

Great Deference (Reversal Rate Between 8.1% and 16.0%): Catherson’s study also measured the reversal rate for all federal appeals courts, and found that they reversed 9.1% of lower rulings in 2005. She suggested this was due to channeling of complex litigation—a prime subject of appeals and subsequent reversals—to ADR venues.

James Brudney analyzed 1224 National Labor Relations Board decisions that

---

179 Id. at 956. Clermont and Eisenberg interpreted this result to mean that appellate courts may have anti-plaintiff bias.
181 Id. at 291.
182 Id. at 291 (the reversal rate was 32.1% in 1945, 22.5% in 1955, 23.6% in 1965, 21.4% in 1975, 18.2% in 1985, and 9.3% in 1995).
183 Id. at 287. Appellate judgships rose from 13 in 1945 to 28 in 2005, while the caseload grew by 500%. Id. at 295.
184 Id. at 291 (tbl. 1) The reversal rate was 27.9% in 1945, 26.9% in 1955, 22.0% in 1965, 17.8% in 1975, 15.8% in 1985, and 9.3% in 1995. Id.
185 Id. at 294.
were appealed to federal courts. Over time, courts reversed fewer rulings. From 1960-1992, they enforced only 66.9% of NLRB orders. The rate varied, however.

Courts reviewed NLRB decisions with great deference in cases where a union violated the National Labor Relations Act. These rulings were reversed in only 14.7% of cases.

High Deference (Reversal Rate Between 16.1% and 24.0%): Brudney’s study found an area where courts were highly deferential, but reversed more NLRB rulings. When an employer violated the NLRA, courts reversed 19.7% of these cases.

Kimberly Moore’s study on appellate review of patent judgments from trial judges and juries is an example of moderately deferential review. Moore asked whether federal appeals courts were more inclined to overturn jury verdicts or judge rulings. She expected a higher reversal rate for jury verdicts but found that appeals courts affirmed at the same rate — 78% — for judge and jury verdicts. Table 1 converts the 78% affirmance rate to a 22% reversal rate.

Moderate Deference (Reversal Rate Between 24.1% and 32.0%): In two studies, Michael LeRoy and Peter Feuille analyzed 1,783 federal court rulings on labor arbitration awards rendered from 1960 through 2001. In the first study, award confirmation rates

---

187 Id. at 950. He attributed the declining rate of reversal to fewer doctrinal conflicts and disagreements in interpreting the NLRA.
188 Id. at 950, n. 93.
189 Id. (“it was below 60 percent in the 1960s, rose to 72% in the early 1970s before declining slightly to 65 percent in the early 1980s, and was above 75% from 1985-1992.”).
190 Id. at 950.
191 Id.
193 Id. at 379.
194 Michael H. LeRoy & Peter Feuille, The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond, 13 INDUS. REL. L.J. 78, 98 (1992). This research analyzed 1,148 federal district court decisions and 480 federal circuit court decisions that resulted in a court order
In a more recent study that examined court rulings from 1991-2001, LeRoy and Feuille observed very similar confirmation rates. District courts enforced 70.3% of all challenged awards, and appellate courts confirmed 70.5% of awards.\textsuperscript{196} As with the Moore study, Table 1 converts the award confirmation rate to a reversal vacatur rate.

\textit{Slight Deference (Reversal Rate Between 30.1\% and 40.0\%)}: LeRoy and Feuille’s 2001 study showed an example of slight judicial deference. Federal appeals courts confirmed 66.4\% of labor awards.\textsuperscript{197} Table 1 converts this to a 33.6\% reversal rate.

\textit{No Deference in Judicial Review (Reversal Rate 40.0\% or More)}: A Nebraska study of death penalty reversals provided an example of no appellate deference to lower court rulings.\textsuperscript{198} On appeal, courts vacated 19 of 29 death penalty sentences, or 66\%.\textsuperscript{199} The high reversal rate reflected the “arbitrariness and comparative injustice in the administration of the death penalty.”\textsuperscript{200}

\section*{VI. EMPIRICAL FINDINGS: QUANTITATIVE AND QUALITATIVE ASSESSMENTS}

\textbf{A. Statistical Findings and Quantitative Assessment}

\begin{itemize}
  \item which compelled or denied arbitration or which enforced or vacated an arbitrator’s award in whole or in part. These decisions were published after June 23, 1960 and before July 1, 1991. A follow-up study, Michael H. LeRoy & Peter Feuille, \textit{Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems}, 17 OHIO ST. J. DISP. RESOL. 19, 50 tbl.1 (2001), reported data for court review of awards from 1991-2001.\textsuperscript{195}
  \item \textit{The Steelworkers Trilogy and Grievance Arbitration Appeals, supra} note 194, at 102.
  \item LeRoy & Feuille, \textit{Private Justice in the Shadow of Public Courts, supra} note 194, at 49. The authors also found that southern circuits confirmed only 59\% of awards while courts in the rest of the nation confirmed 79\%. \textit{Id.} at 85-86.\textsuperscript{197}
  \item \textit{Id.} at 49.
  \item David C. Baldus, et al., \textit{Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)}, 81 NEB. L. REV. 486 (2002).\textsuperscript{198}
  \item \textit{Id.} at 503. Analyzing the 19 reversals, the study found that 68\% (13 out of 19) were decided by the Nebraska Supreme Court either on direct appeal or in post-conviction proceedings, while 32\% (6 out of 19) resulted from a federal court.\textsuperscript{199}
  \item \textit{Id.} at 489.\textsuperscript{200}
\end{itemize}
Table 2 shows that parties challenged 254 individual employment arbitration awards. Many challenges were appealed after a first court ruling. There were 150 federal district and 81 appeals court rulings, yielding a federal sample of 231 cases. States use different names for courts that conduct first review of awards (e.g., circuit court, or superior court). These tribunals are generically called first-level courts. The sample contained 104 first-level courts, and 91 appellate court rulings, yielding a state sample of 195 cases. Combing federal and state court rulings, the sample contained 426 cases.

<table>
<thead>
<tr>
<th>Table 2</th>
<th>Initial Court Rulings on Awards: Confirmation of Arbitrator Awards by Federal District Courts and First-Level State Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Confirm Award</td>
</tr>
<tr>
<td>Federal District Court Decisions</td>
<td>139/150 (92.7%)</td>
</tr>
<tr>
<td>State Court Decisions</td>
<td>82/104 (78.8%)</td>
</tr>
<tr>
<td>Total</td>
<td>221/254 (87.0%)</td>
</tr>
<tr>
<td>$\chi^2 = 11.220$, df 2 (Sig. .004)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Table 3</th>
<th>Appellate Court Rulings on Awards Confirmation of Arbitrator Awards Federal Appellate Courts and State Appellate Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Confirm Award</td>
</tr>
<tr>
<td>Federal Appellate Court Decisions</td>
<td>71/81 (87.7%)</td>
</tr>
<tr>
<td>State Appellate Court Decisions</td>
<td>65/91 (71.4%)</td>
</tr>
<tr>
<td>Total</td>
<td>136/172 (79.6%)</td>
</tr>
<tr>
<td>$\chi^2 = 7.709$, df 2 (Sig. .021)</td>
<td></td>
</tr>
</tbody>
</table>
Finding No. 1: Federal district and appellate courts review awards, respectively, with extreme deference and great deference. Federal district courts confirmed 139 awards in 150 cases. The 92.7% confirmation figure translates to a vacatur rate of 7.3%. This compares to the extreme deference of the Ninth Circuit in Catherson’s study.\textsuperscript{201} Federal appeals courts showed great deference but not extreme deference, confirming 71 awards in 81 cases. This translates to a 12.3% vacatur rate, similar to a finding in Brudney’s study.\textsuperscript{202} The highly deferential results are reflected in the language that federal courts use to describe the scope of review under the FAA: “[M]aximum deference is owed to the arbitrator’s decision and the standard of review of arbitration awards is among the narrowest known to law. Once an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily in favor of the award, and courts must exercise great caution when asked to set aside an award.”\textsuperscript{203}

Finding No. 2: State first-level and appellate courts review awards, respectively, with high deference and moderate deference. First-level state courts confirmed 82 awards in 104 cases. This 78.8% confirmation rate translates to a 21.2% vacatur rate. The figure is similar to the result in Moore’s study.\textsuperscript{204} State appellate courts were less deferential than their lower courts. They confirmed 65 of 91 awards for a confirmation rate of 71.4%. Converted to a vacatur rate of 28.6%, this result compares to the findings in LeRoy and Feuille’s study.\textsuperscript{205}

\textsuperscript{201} Catherson, \textit{supra} note 180.
\textsuperscript{202} Brudney, \textit{supra} note 186.
\textsuperscript{203} Durkin v. CIGNA Property & Cas. Corp., 986 F.Supp. 1356, 1358 (D. Kan. 1997), quoting ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462-63 (10th Cir. 1995). The Durkin court added: “Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited.” \textit{Id}.\textsuperscript{204} Moore, \textit{supra} note 192.
Finding No. 3: There was a statistically significant difference in federal and state award confirmation rates. First-level state courts confirmed 92.7% of awards compared to 78.8% for state counterparts. The difference in confirmation rates was 13.9%. This result was statistically significant at the .004 level. Appellate courts registered a wider difference, as federal courts confirmed 87.7% of awards compared to 71.4% of state courts. The difference in confirmation rates was 16.3%. Due to the smaller sample size, the strength of statistical significance was lower compared to first level courts. However, the difference was significant at the .02 level.

B. Case Analysis and Qualitative Assessment

The findings show that federal and state courts behave differently in enforcing employment arbitration awards. The data do not explain what causes these disparities. I suggest that substantive provisions in federal and state arbitration statutes—not judges or differences in state and federal courts—account for these disparities. Chart A (infra) highlights key differences in the text of the FAA and RUAA. I then explain how these differences are reflected in specific federal and state court rulings.

---

206 Chi-Square ($\chi^2$) 11.220, df = 2, p < .004.
207 Chi-Square ($\chi^2$) 7.709, df = 2, p < .021.
208 My results may reflect differences in federal and state judicial systems, or the decisional tendencies of judges. In the federal system judges are appointed by the president, approved by the Senate, and serve with life tenure. In contrast, many state judges are elected. Therefore, they may be subjected to more political pressure. Some studies suggest that the two judicial systems administer the same justice. E.g., Michael E. Solimine & James L. Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 Hastings Const. L.Q. 213 (1983) (empirical examination reveals that state and federal courts behave about the same in ruling in favor of constitutional claims). Other evidence suggests that federal and state judges behave differently. E.g., Mark C. Miller, A Legislative Perspective on the Ohio, Massachusetts, and Federal Courts, 56 Ohio St. L.J. 235 (1995) (Ohio courts, and especially Ohio Supreme Court, are seen as partisan actors in the state’s policymaking process.). Another analysis concludes that “the federal judiciary’s insulation from majoritarian pressures makes federal court structurally preferable to state trial court as a forum in which to challenge powerful local interests.” Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1112 (1977) (compared to state trial courts, federal district courts are more technically competent in resolving legal issues, more able to analyze complex and conflicting lines of authority, and accomplished in writing opinions).
<table>
<thead>
<tr>
<th>FAA Standards</th>
<th>RUAA Standards</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FAA (9 U.S.C. § 10):</strong> (1) the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators; (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. (The FAA has no substantive counterpart to RUAA Sections 12, 21, and 6, shown to the right.)</td>
<td><strong>RUAA (2000), Section 23:</strong> . . . (a) the court shall vacate an award made in the arbitration proceeding if: (1) the award was procured by corruption, fraud, or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator’s powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.</td>
</tr>
<tr>
<td><strong>Section 12: Disclosure by Arbitrator:</strong> (a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including: (1) a financial or personal interest in the outcome of the arbitration proceeding; and (2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator. (b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator. (c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under Section 23(a)(2) for vacating an award made by the arbitrator. (d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under Section 23(a)(2) may vacate an award. (e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Section 23(a)(2). (f) If the parties to an arbitration proceeding agree to the procedures of an...</td>
<td></td>
</tr>
</tbody>
</table>
arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a [motion] to vacate an award on that ground under Section 23(a)(2).

Section 21. Remedies: Fees and Expenses of Arbitration Proceeding

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney’s fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an award under Section 23.

(d) An arbitrator’s expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

Section 6: Validity of Agreement to Arbitrate

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.
Arbitrator Misconduct over Non-Disclosures of Past and Present Relationships:

The text in Section 23 of the RUAA provides broader grounds than the FAA in Section 10 to vacate awards. The first difference appears in a grammatical change in sub-section (a)(2). The FAA states a general standard, “where there was evident partiality or corruption by the arbitrators.” RUAA subdivides these components and adds more terms for a reviewing court to consider when it says: “there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.”

RUAA again mentions arbitrator misconduct in sub-section (a)(3) when it declares that an award may be vacated if “an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, [or] refused to consider evidence material to the controversy.” This repeats language in Section 10 of the FAA. The fact that arbitrator misconduct appears twice in RUAA must mean that this term differs in sub-section (2) compared to the repetition of the standard in sub-section (3). Otherwise, the repetition is an empty surplus.

In comments for the model act, RUAA drafters did not elaborate on the meaning of arbitrator misconduct in sub-section (a)(2)(C). Therefore, its meaning must be inferred by the grammatical change in the new law, as well as surrounding provisions in the statute. Misconduct cannot mean refusal to postpone a hearing or refusal to hear pertinent evidence— again, because these grounds are mentioned in sub-section (a)(3).

Likely, sub-section (a)(2)(C) refers to a broad new area of arbitrator conduct that is

---

209 See supra note 149, Section 10 of the FAA.
210 See supra note 155, Section 23 of RUAA.
211 Id.
regulated in RUAA Section 12. This regulates arbitrator disclosures to the parties by requiring an arbitrator to disclose a “(1) a financial or personal interest in the outcome of the arbitration proceeding; and (2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.”212

*Ovitz v. Schulman,*213 an important decision by the California court of appeals, is an example of how disclosure regulation contributes to the disparity between state and federal court confirmation of awards. The arbitration involved a wrongful termination claim by Cathy Schulman, former president of a major film company.214 During the proceedings, the arbitrator accepted another appointment in a separate arbitration involving the same movie company.215 After the arbitrator denied Schulman’s claims and awarded her former employer approximately $1.5 million in damages and $1.8 million in attorney fees and costs,216 Schulman invoked the disclosure law as grounds for vacating the award.217 The appellate court found merit in her argument and vacated the award.218

Two points are notable. First, Schulman did not prove or attempt to show bias or evident partiality. She simply made her case for vacatur on the arbitrator’s unwitting non-compliance with the disclosure law. Second, the FAA is silent on the subject. If Schulman had sued under this law, her prospects of vacating the award would have been highly doubtful.

212 Id.
214 Id. at 834.
215 Id. at 836.
216 Id. at 837.
217 Id.
218 Id. at 856. The court concluded that because the arbitrator failed to comply with standard 12(b), he was precluded from serving as an arbitrator in any other matter involving the parties or any lawyer for the parties until the Schulman arbitration was completed.
MISGUIDED FAIRNESS?

Consider an FAA case in point, *Bender v. Smith Barney, Harris Upham & Co., Inc.*,\(^{219}\) where another arbitrator made an incomplete disclosure that the losing party characterized as evidence of bias. The chair of that arbitration panel was terminated from his job in a prior and unrelated dispute by a company named W.H. Newbold.\(^{220}\) W.H. Newbold hired Sandra Bender, the complainant, after Smith Barney fired her.\(^{221}\)

Bender argued that the arbitrator was required to make this disclosure, reasoning that “‘the individual who was instrumental in the decision to employ [her] was the same party who had the distasteful duty of discharging [the arbitrator], thereby creating an inference of bias against [her].’”\(^{222}\) While the arbitrator disclosed his prior employment with W.H. Newbold, he failed to mention his adverse experience with this employer, and the fact that he disputed his termination to the point of arbitrating his own claim against W.H. Newbold.\(^{223}\) Bender’s motion to vacate the award was denied under the FAA’s evident partiality standard.\(^{224}\)

The cases show that RUAA and the FAA vary in their regulation of arbitrator disclosures. Under the FAA, a party seeking to vacate an award must prove “circumstances powerfully suggestive of bias.”\(^{225}\) Much less is needed under RUAA to cause a court to intervene: either technical non-compliance with a disclosure deadline, or failure to comply with an amorphous duty that includes “even an appearance of bias.”\(^{226}\)

*The Award of Attorney’s Fees:* These cases are significant because representation

---

\(^{220}\) *Id.* at 866.
\(^{221}\) *Id.*
\(^{222}\) *Id.*
\(^{223}\) *Id.*, n.2.
\(^{224}\) *Id.* at 866.
\(^{225}\) *Id.* at 867.
\(^{226}\) *Id.*
costs in arbitrations are increasing and arbitrators are now inclined to order this remedy.\textsuperscript{227} Nothing in the FAA precludes the award of attorney’s fees. More to the point, federal courts acting under the FAA have confirmed awards that order attorney’s fees.\textsuperscript{228} This mirrors the fact that courts routinely award attorney’s fees to prevailing plaintiffs.\textsuperscript{229} Thus, when the Supreme Court announced in \textit{Gilmer} that arbitration is simply a substitute forum for courts,\textsuperscript{230} this suggested that arbitrators should behave like judges who award these fees. The FAA is silent on whether an award should be vacated for providing this remedy. But given the autonomy that Congress conferred upon arbitrators, courts should reject challenges to awards that provide for attorney’s fees.

Section 21(b) of RUAA changes this presumption by stating that an “arbitrator may award reasonable attorney’s fees and other reasonable expenses of arbitration if such

\begin{footnotesize}
\textsuperscript{227} Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 751 So.2d 143 (Fla. Dist. Ct. App. 2000) (arbitrator ordered the employer to pay fired employee $300,000 in compensatory damages and also $160,000 in lawyer fees. Major arbitration services expressly authorize arbitrators to award attorney’s fees. See JAMS Employment Arbitration Minimum Standards of Procedural Fairness (Apr. 2003), http://www.jamsadr.com/rules/employment_arbitration_min_stds-2003.asp. Standard No. 1: “All remedies that would be available under the applicable law in a court proceeding, including attorneys fees and exemplary damages, must remain available in the arbitration. Post-arbitration remedies, if any, must remain available to an employee.”

\textsuperscript{228} E.g., DeGaetano v. Smith Barney, Inc., 983 F.Supp. 459 (S.D.N.Y.1997). A female employee filed a sex discrimination lawsuit after her employer ignored complaints that she was being sexually harassed by her boss. A federal judge denied her access to a trial by ordering arbitration. DeGaetano added a claim for attorney’s fees. The arbitration panel awarded her $90,355 in damages and interest to make her whole for loss of one year of pay, but denied her attorney fees. She recovered $146,053 in these fees only after she successfully sued in federal court.


\end{footnotesize}
an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding [emphasis added].”

The italicized language shows how RUAA’s qualified grant of this arbitrator power can actually lead to vacatur. In a recent case decided under Colorado’s RUAA statute, *Carson v. PaineWebber, Inc.*, an employee was ordered by an arbitrator to reimburse his employer for damages arising out of his failure to execute trades in behalf of clients. The arbitrator also ordered the employee to pay PaineWebber’s attorney fees. An appeals court ruled, however, that the arbitrator exceeded his powers under the newly revised arbitration statute. The court based its conclusion on § 13-22-212 of Colorado’s arbitration law, a provision that authorizes arbitrators to award attorney’s fees only if this power appears in the arbitration agreement. Because the agreement said nothing about this arbitrator power, the court vacated this remedy.

A similar case arose in *Moore v. Omnicare, Inc.* The company acquired David Moore’s shares in a pharmaceutical supply corporation and named him chief operating officer. Moore was terminated after the new company struggled financially, and he arbitrated numerous claims against Omnicare. In a complex series of interim and final

---

232 *Id.* at 1001.
233 *Id.*
234 *Id.* Also see supra note 154, *RUAA and UMA Legislation from Coast to Coast*, listing Colorado as a state that has adopted the revised arbitration statute.
235 *Id.* The language is italicized the highlight the fact that the terms from RUAA led to vacatur.
236 *Id.* at 1000 (“the arbitrator exceeded his powers by awarding attorney fees in the absence of an express agreement between the parties.”). The Colorado Uniform Arbitration Act provides: “Unless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award.” *Id.*, citing Section 13-22-212, C.R.S. 2001.
238 *Id.* at 813-814.
awards, Moore was granted $130,000 in attorney’s fees. Omnicare appealed to the state district court, and prevailed in its motion to vacate this part of the award.

The Idaho supreme court affirmed the vacatur ruling based on a state arbitration provision—which is similar to Section 21 of RUAA, and identical to language in Colorado’s RUAA. This law disallows the award of attorney’s fees by an arbitrator unless an agreement expressly authorizes this power. As if to underscore the core difference between the FAA and RUAA on this point, the Idaho supreme court wrote: “The Idaho UAA and not the FAA applied to the substantive law of the parties’ contract. With respect to the Judgment to vacate the arbitration panel’s award of attorney fees on Mednat’s Earnings Holdback claim, the judgment is affirmed.”

The Award of Punitive Damages: Section 21 in RUAA provides another opportunity to challenge an award where no explicit grounds exist under the FAA. The model law says that an “arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.” Emphasis is added because the law places a condition on this arbitrator power, thus limiting arbitrator discretion and creating a new ground for review.

The reasoning behind this provision is evident in another state arbitration case.

---

239 Id. at 814.
240 Id.
241 Id.
242 Id. at 816, citing I.C. § 7-910 (“Unless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award,”).
243 Id. at 820.
244 The Revised Uniform Arbitration Act, supra note 151.
Sawtelle v. Waddell & Reed, Inc.\textsuperscript{245} A fired securities broker alleged that his former employer maliciously attempted to sever his relationship with clients by defaming him.\textsuperscript{246} The arbitration was lengthy and expensive.\textsuperscript{247} The arbitrators awarded the broker, Sawtelle, $1.87 million in compensatory damages, and $25 million in punitive damages.\textsuperscript{248} Suing to vacate or modify the award, the firm failed to reduce its punishment before the first court to hear its challenge.\textsuperscript{249}

On appeal, however, a New York court vacated the punitive part of the award, and remanded the issue to the original arbitrators.\textsuperscript{250} The appellate justices concluded that “in awarding $25 million in punitive damages, the (arbitration) panel completely ignored applicable law, an error that provides a separate basis for vacating the award.”\textsuperscript{251} They also concluded that punitive damages violated the Supreme Court’s ruling on punitive damages in BMW of N.A. v. Gore.\textsuperscript{252} Also, the award manifestly disregarded the law.\textsuperscript{253}

On remand, the arbitrators accepted voluminous written submissions, held another hearing, and issued a second award.\textsuperscript{254} Then, they reissued the award with only one cosmetic change.\textsuperscript{255} Again, they awarded $25 million in punitive damages.\textsuperscript{256} When the matter was reviewed once more, the lower court vacated the punitive portion a second

\textsuperscript{245} 754 N.Y.S.2d 264 (2003).
\textsuperscript{246} Id. at 267 – 268.
\textsuperscript{247} Id. at 268.
\textsuperscript{248} Id. at 269.
\textsuperscript{249} Id. at 273.
\textsuperscript{250} Id. at 276.
\textsuperscript{251} Id. at 273.
\textsuperscript{252} Id. at 270 – 271, citing 517 U.S. 559 (1996).
\textsuperscript{253} Id. at 274.
\textsuperscript{255} Id. The only change that the panel made was to modify its finding that the employer “orchestrated a campaign of deception,” to the phrase that the company “orchestrated and conducted a horrible campaign of deception, defamation and persecution of Claimant.”
\textsuperscript{256} Id.
time because it was disproportionate to the compensatory damages.257

Concerned that another remand to the same panel would not change anything, the lower court ordered a third arbitration before a new panel.258 This prompted Sawtelle to ask the court to order remittitur for the excessive portion of the punitive award, and spare him the additional time and expense in re-arbitrating his case.259 The court conceded that Sawtelle’s “suggestion seems to make sense,”260 and that the “history of this arbitration undermines the very purpose of arbitration . . . to provide a manner of dispute resolution more swift and economical than litigation in court.”261 Still, the lower court refused the motion because no statute authorized the court to set a conditional remittitur of an arbitration award. The court, therefore, affirmed its earlier order for a new round of arbitration before different arbitrators.262

A federal court acting under the FAA provides a contrasting example. The brokerage firm in Acciardo v. Millennium Securities Corp.263 forced-out its director of compliance after he refused to participate in regulatory frauds.264 This attorney offered proof that the firm filed defamatory statements to the NASD, and thereby limited his employment prospects. Five former employees testified that they had observed regulatory violations at the firm, and three testified that when they left the firm their industry termination forms were marked with false and derogatory statements.265 The arbitrators

---

257 Id.
258 Id.
259 Id. at 859.
260 Id.
261 Id.
262 Id. at 860.
263 83 F.Supp.2d 413 (S.D.N.Y. 2000).
264 Id. at 415.
265 Id.
awarded $100,000 in punitive damages and $5,000 in compensatory damages.\textsuperscript{266}

The firm argued that this 20:1 ratio violated the company’s due process rights.\textsuperscript{267}

The court disagreed, reasoning that arbitrators could base their punitive award on testimony that proved that the firm engaged in repeated and malicious misuse of the NASD’s termination forms.\textsuperscript{268} In addition to finding no due process violation in the punitive award, the court considered whether the remedy manifestly disregarded the law.\textsuperscript{269} The firm contended that the law requires a fact-finder to determine a defendant’s ability to pay as a pre-condition for determining the amount of punitive damages. Acciardo concluded that even if the arbitrators ignored the firm’s financial standing, their error was “not so obvious or egregious as to require overturning the award.”\textsuperscript{270}

Sawtelle and Acciardo highlight differences in how state and federal courts review punitive awards. In theory, no difference should occur if the main rule is that courts strongly defer to arbitrator rulings. State courts, however, are more apt to judge the validity of a punitive award against recent due process guidelines set forth by the Supreme Court—guidelines that are law. This signifies the growing importance of RUAA Section 21, which allows an arbitrator to award punitive damages but only if a court would be authorized by law to order the same remedy based on the same evidence.

This is a new condition on this arbitral remedy, thereby limiting arbitrator discretion and creating a new ground for review. Moreover, when RUAA adds language about “the same evidence [in a] civil action involving the same claim (emphasis

\textsuperscript{266} Id. at 416-17.
\textsuperscript{267} Id. at 422.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id. at 423.
this invites a court to review arbitrator fact-finding. This new development conflicts with the Supreme Court’s recent and strongly worded admonition that reviewing courts should almost never disturb an arbitrator’s fact-findings.272

To be clear, the Sawtelle appeals court did not apply RUAA Section 21. But the decision is highlighted to show that state courts acting under this provision have more explicit grounds to vacate an excessive punitive award compared to an FAA court. The federal court in Acciardo court took a much more deferential approach because the judge realized the FAA severely limited the court’s review.

Validity of an Agreement to Arbitrate: A striking difference between the FAA and RUAA is the addition of RUAA’s fifth substantive grounds for vacating an award: “(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing.”273 RUAA drafters explained this change was made “to address the problem of contracts of adhesion in the statute while taking into account the limitations caused by federal preemption.”274 Their comments elaborated: “Because an arbitration agreement effectively waives a party’s right to a jury trial, courts should ensure the fairness of an agreement to arbitrate, particularly in instances involving statutory rights that provide claimants with important remedies.”275 Moreover, “[c]ourts should determine that an arbitration process is adequate to protect important rights.

271 The Revised Uniform Arbitration Act, supra note 151.
272 Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504 (2001). Garvey emphasized that “established law ordinarily precludes a court from resolving the merits of the parties’ dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator’s decision.” Id. at 511. Garvey sent a strong message to the federal judiciary: Do not overturn “the arbitrator’s decision because it disagree[s] with the arbitrator’s factual findings, particularly those with respect to credibility.” Id. at 510.
273 Id.
274 Id. at 423.
275 The Revised Uniform Arbitration Act, supra note 151.
Without these safeguards, arbitration loses credibility as an appropriate alternative to litigation.” 276

\textit{Scott v. Borg-Warner Protective Services} 277 is a dramatic illustration of how this fairness concept can lead to vacatur. Consider that the odds of vacatur are generally low. Also, let us assume that a \textit{pro se} appellant is at a disadvantage over a company who is represented by lawyers in a court. The fact that Scott overcame these steep odds demonstrates the potency of the fairness concept in RUAA.

The case came on for appeal in 2003 after Scott had been compelled to arbitrate an employment disability claim. 278 By this time, Hawaii had adopted RUAA and its supreme court had ruled broadly to deny enforcement to compulsory arbitration agreements that are the “result of coercive bargaining between parties of unequal bargaining strength.” 279 Applying this state law, the federal appeals court vacated the award because the employee was not bound by the arbitration agreement. 280 Using the reasoning behind RUAA’s fairness concerns, the court noted that Scott was given the arbitration agreement “to sign on a ‘take this or nothing basis’ and thus it was the result of coercive bargaining between parties of unequal bargaining strength.” 281 The court also noted that the agreement unfairly advantaged the employer in its substantive and procedural clauses. 282 Finding that the arbitration agreement was not valid in the first

\begin{itemize}
\item 276 \textit{Id.}
\item 277 55 Fed. Appx. 414 (9th Cir. 2003).
\item 278 \textit{Id.} at 416.
\item 279 \textit{Id.} (quoting a state court decision, \textit{Brown v. KFC National Management}, 921 P.2d 146 (Hawaii 1996)).
\item 280 \textit{Id.}
\item 281 \textit{Id.}
\item 282 \textit{Id.} The agreement provided that “only the company has standing to enforce this agreement to avoid piecemeal litigation.” In addition, Scott was required to submit his claims to binding arbitration within 60 days of Borg Warner’s request or be barred from future recourse. The court concluded that the
place, the court ruled that the arbitrator lacked the authority to resolve Scott’s claims; and therefore, the court vacated the award. 283

VII. CONCLUSIONS AND IMPLICATIONS

My research takes an unusually long view of the relationship of courts and arbitration— from 1697 to 2007. This provides exceptional perspective to evaluate the finality of arbitration awards. Quantitative analysis adds an important dimension to traditional research that infers trends from leading appellate decisions. With a sample of 426 cases, this study is large enough for significance testing. The result is an objective comparison of federal and state court tendencies to vacate awards.

Applied together, historical and statistical analysis leads to a reassessment of court review of awards. Since the time of Lord Mansfield, courts have taken a minimalist approach in reviewing arbitration awards. A more interventionist pattern is now evident. At first glance state judges appear to be the culprits. On closer inspection, state laws that prescribe broader reviewing standards are probably causing this change. As RUAA and similar state laws attempt to improve fairness in arbitration, courts perform a larger role in refereeing a process that the FAA intended to insulate from their interference.

There is irony in this development. The FAA created this dilemma by providing dual jurisdiction in federal or state courts. Amazingly, the federal law empowers states to legislate entirely different award review procedures compared to its minimalist approach.

The deeper problem is institutional. Are courts or legislatures best at preserving the autonomy of arbitration? For too long, courts have been portrayed as jealous competitors to arbitration. The FAA wrenched control of arbitration from these
supposedly untrustworthy courts. This shift occurred even as Congress ignored evidence that many common law courts reviewed awards with great deference. Paradoxically, instead of inventing their own standards, Congress adopted common law standards to review awards, though they had little or no idea about their origins. This institutional dilemma deepened as the FAA kept courts on a short leash for nearly 70 years. Judges were in no position to counteract questionable—even abusive—arbitration practices that employers began to adopt following the pro-arbitration decision in Gilmer in 1991. Employers were emboldened to implement arbitration procedures to enhance their advantage over individuals. They shifted large forum costs to employees, designated inconvenient venues, restricted the remedial powers of arbitrators, shortened time bars to file claims, and selected arbitrators without employee input.

Meanwhile, courts blindly accepted the judicial hostility thesis. As a result, they failed to oversee arbitrations with the pragmatism of common law courts. My study shows that these courts administered pro-arbitration doctrines that were flexible enough to allow for equitable principles to prevent miscarriages of justice in arbitration.

A third institution—large, private providers of arbitration services—recently

---

284 See supra notes 146 - 148.
285 See Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 669 (6th Cir. 2003), where the Sixth Circuit concluded: “Minimal research will reveal that the potential costs of arbitrating the dispute easily reach thousands, if not tens of thousands, of dollars, far exceeding the costs that a plaintiff would incur in court.”
287 E.g., Morrison v. Circuit City Stores, Inc., 70 F.Supp.2d 815 (S.D. Ohio 1999) (although Title VII permits up to $300,000 in punitive damages, court upheld $162,000 limit imposed by arbitration agreement).
289 See Hooters, supra note 22, at 938, finding that the only possible purpose of the employer’s arbitration rules was “to undermine the neutrality of the proceeding.”
290 See supra notes 146 - 148.
entered the picture in the 1990s by enacting their own procedural reforms. As Congress prepared to regulate securities industry employment, the National Association of Securities Dealers (NASD) revised its procedures.291 Another large ADR provider, the American Arbitration Association, heeded the concerns of the American Bar Association by adopting due process procedures and practices.292 As more balanced procedures were utilized, some employers abandoned arbitration in favor of trials.293 But these reforms did not slow the progress of idealistic drafters of RUAA. In the interest of making arbitration fairer, they created a larger supervisory role for state courts.

We now arrive at the core problem. Federal courts review awards narrowly under a statutory policy that promotes finality of arbitrator judgment, while state courts increasingly review awards under a statutory policy that promotes procedural fairness in arbitration. States that adopt RUAA or similar laws are sacrificing final and binding


292 Susan McGolrick, Arbitration: Revised AAA Procedures Reflect Due Process Task Force, DAILY LAB. REP. (May 28, 1996), No. 102 at D-6. The American Arbitration Association revised its procedures for mediation and arbitration of employment disputes to ensure due process for employees. The new rules resulted from AAA’s one-year pilot program in California, which implemented experimental rules developed by a committee of management and plaintiff attorneys, arbitrators, and retired judges. Also, the new rules incorporated due process suggestions from the ABA’s Task Force on Alternative Dispute Resolution in Employment. As part of this reform, AAA constituted a roster of employment arbitrators who must undergo a national training program that updates substantive and procedural issues. In addition, another leading arbitration service, JAMS/Endispute, adopted similar rules in January 1995. These due process reforms vested wide-ranging powers of discovery in arbitrators, provided individuals the right to representation, adopted the same burdens of proof as in courts, and granted arbitrators broad remedial powers, including authority to order attorneys’ fees. Moreover, arbitrators must be experienced in employment law, have no conflicts of interest, disclose all relevant information affecting neutrality, and be mutually acceptable to the parties.

293 Jane Spencer, Waiving Your Right To a Jury Trial, After Years of Requiring Arbitration, Companies Return to the Court System, but With Conditions, WALL ST. J. (Aug. 17, 2004), at 2004 WL-WSJ 56937955.
arbitration for fairer arbitrations that are subject to increased court review. The fairness principles in RUAA are laudable, but RUAA drafters seem to have ignored an ancient maxim of fairness—the *Magna Carta*’s injunction that justice delayed is justice denied.\(^{294}\) RUAA drafters never imagined that so many arbitrations at the state level are leaving the underlying arbitration agreements, which secure a promise for a final and binding award, in tatters—with an apparent winner in arbitration deprived of justice.

These recent developments are rooted in the transfer of institutional oversight of arbitration from courts to legislatures. Ultimately, this means that arbitration is more exposed to lobbying efforts by special interests who want to tailor ADR processes to suit their preferences. This development is pernicious, not only because it fragments a policy that was meant to be uniform, but also because the legislative process cannot be trusted as much as the common law to resist “quick fix” solutions. Legislators cannot be trusted to disregard political pressure from interest groups such as the insurance industry and the plaintiff bar when they consider specific RUAA amendments.

To illustrate, when Nevada adopted RUAA its version of the law excluded the model statute’s limited grant to empower arbitrators to award punitive damages. The insurance industry lobbied for this total exclusion, arguing that it gave arbitrators too much power.\(^{295}\) In Maryland, business groups blocked passage of the RUAA model act because they objected to a provision that would allow for class actions in arbitrations.\(^{296}\) On the liberal side of the political spectrum, consumer groups and the Attorney General’s

\(^{294}\) See Magna Carta of 1215, Clause 40: “To none will we sell, to none will we deny, to none will we delay right or justice (emphasis added),” in the English translation of “Nulli vendemus, nulli negabimus, aut differimus, rectum aut ustitiam,” available in the British Library, \[http://www.bl.uk/treasures/magnacarta/translation.html\].

\(^{295}\) 46 N.W. 446, 448 (Mich. 1888).

\(^{296}\) See supra note 154, *RUAA and UMA Legislation from Coast to Coast.*

\[^{Id.}\]
Consumer Division were concerned that the bill would expand mandatory arbitration clauses in consumer contracts.297

My data show that the U.S. has two different justice systems for enforcing arbitration awards— one that is minimalist, rooted in centuries of common law experience, and also devoid of political maneuvering— and another that naively promises more fairness in arbitration while subjecting this private process to state-by-state special deals that are worked out in obscure state legislative committees. Even if the common law approach had its flaws, its virtue was that a single misguided decision could not have the same effect as a statute. Other judges would consider whether a questionable decision was worthy to be cited as a precedent. There is no incremental check on a statute.

Against this bleak forecast for arbitration, present conditions are unsettled. The review that occurs in federal court is among the narrowest in the law, and finality is virtually assured. An award challenger has a 92% chance of losing in district court, and an 87% chance of losing again on appeal. Multiplying these odds, the award challenger has an 80.0% chance of losing in both rounds.

The same challenger in state court is much more likely to vacate an award. The 78% chance of losing in district court, multiplied by a 70% chance of losing again on appeal, means that the challenger has a 54.6% chance of losing in both rounds. This is specific evidence that intrusive state court review denies justice to arbitration winners.

State expansion of reviewing standards poses three additional problems:

(1) Foremost, this trend has broken the federal policy that favors arbitration. While the Federal Arbitration Act is nominally in place, the reality is that the FAA permits one federal policy and fifty separate state policies to regulate arbitration. When

297 Id.
Congress and the Supreme Court beat the drum to proclaim that the FAA provides a national arbitration policy, they are wrong.

(2) Congress could not have intended to create two different regimes for award enforcement—one very deferential, and the other more inviting for award challenges. The results imply that RUAA will promote forum shopping to vacate awards. Award winners should run to federal court to confirm their awards, while challengers should race to state court to greatly improve their odds of vacatur. This poses a threat to the cost, efficiency, and time-saving advantages of arbitration over court adjudications. Congress could never have intended this absurdity.

(3) A moral hazard is created when losers at arbitration are tempted to renge on their initial submission in order to pursue “do-over” adjudication. Consider the potential spillover effects for an already dysfunctional civil justice system.298 When courts vacate awards, disputes remain unresolved. Ironically, vacatur encourages court adjudications. Award challenges are inexpensive, summary judgment proceedings. The more that vacatur occurs, the more it stimulates award challenges. As courts overturn awards, winners at arbitration find that they are either too late to file an action in court, or must go to the back of a long line that has formed at most courts. In time, high vacatur rates will crash the arbitration system by destroying confidence in the finality of an award. Ironically, this is precisely what FAA lawmakers wanted to avert.

298 See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. of Empirical Legal Stud. 459 (2004), explaining that so few lawsuits result in a trial because “the architecture of the system . . . has capacity to give full treatment to only a minority of matters entitled to invoke it.” Id. at 515.
VIII. Research Appendix: Sample of Cases

Publication of the cases is at the discretion of the editors. The rationale for offering the list is to enable readers to verify our empirical findings, and to share a valuable resource for policy-makers, judges, scholars, practitioners, and students.

Appendix I: Table of Cases in the Empirical Database

Anthony v. Kaplan, 918 S.W.2d 174 (Ark. 1996)
Baravati v. Josephthal, 28 F.3d 704 (7th Cir. 1997)
Bender v. Smith Barney, Harris Upham & Co., Inc., 77 F.3d 291 (3d Cir. 1995)
Booth v. Hume Publishing Inc., 902 F.2d 925 (11th Cir. 1990)
Boyhan v. Maguire, 693 So.2d 659 (Fla.App. 4 Dist. 1997)
Brook v. Peak Int’l, Ltd., 294 F.3d 668 (5th Cir. 2002)
Brown v. ITT Consumer Financial Corp., 211 F.3d 1217 (11th Cir. 2000)
Buchignani v. Vining Sparks IBG, Inc., 208 F.3d 212 (6th Cir. 2000)
Bunzyl Distribution USA v. Dewberry, 16 Fed. Appx. 519 (8th Cir. 2001)
Caldor, Inc v. Thornton, 464 A.2d 785 (Conn. 1983)
Campbell v. Cantor Fitzgerald & Co., Inc., 205 F.3d 1321 (2d Cir. 1999)
Cardiovascular Surgical Specialists Corp. v. Mammana, 61 P.3d 210 (Okla. 2002)
MISGUIDED FAIRNESS?

Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, 751 So.2d 143 (Fl.App. 2000)
Chisholm v. Kidder, Peabody Asset Management, Inc., 164 F.3d 617 (2d Cir. 1998)
City of Hartford v. Casati, 2001 WL 1420512 (Conn.Super. 2001)
Collins v. Blue Cross Blue Shield of Michigan, 103 F.3d 35 (6th Cir. 1996)
Community Memorial Hospital v. Mattar, 165 Ohio App. 3d 49 (Ohio App. Dist. 2006)
Dean Witter Reynolds, Inc. v. Deisingler, 711 S.W.2d 771 (Ark. 1986)
Dexter v. Prudential Ins. Co. of America, 215 F.3d 1336 (10th Cir. 2000)
DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997)
Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978)
Eaton Vance Distributors, Inc. v. Ulrich, 692 So.2d 915 (Fla.App. 2 Dist. 1997)
Electronic Data Systems Corp. v. Donelson, 473 F.3d 684 (6th Cir. 2007)
Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512 (2d. Cir. 1991)
Florasynth, Inc. v. Pickholz, 750 F.2d 171 (2d Cir. 1984)
Ford v. Hamilton Investments, Inc., 29 F.3d 255 (6th Cir. 1994)
Gaffney v. Powell, 668 N.E.2d 951 (Ohio App. 1 Dist 1995)
Gardner v. Benefits Communications Corp., 175 F.3d 155 (D.C. Cir. 1999)
Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 882 (9th Cir.1993)
Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132 (6th Cir. 1996)
Glover v. IBP, Inc., 334 F.3d 471 (5th Cir. 2003)
Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144 (2d Cir. 2004)
Grambow v. Associated Dental Services, 546 N.W.2d 578 (Wis.App. 1996)
Green v. Ameritech Corp., 200 F.3d 967 (7th Cir. 2000)
Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998)
Harris v. Parker College of Chiropractic, 286 F.3d 790 (5th Cir. 2002)
Harris-Baird v. Anthony, 124 F.3d 1309 (D.C. Cir. 1997)
Henneberry v. ING Capital Advisors, LLC, 27 A.D.3d 353 (N.Y. 2007)
In re Heritage Organization LLC, 2006 EL 2642204 (N.D.Tex. 2006)
Herrendeen v. Daimler Chrysler Corp., 2001 WL 304843 (Ohio App. 6 Dist. 2001)
Hilliard v. Saul, 2007 WL 433241 (M.D. Tenn. 2007)
Hughes Training Inc. v. Cook, 254 F.3d 588 (5th Cir. 2001)
In regard to Arb. between Lanier Prof. Svvs. and Cannon, 2001 WL 303285 (S.D. Ala. 2001)
Jenkins v. Prudential-Bache Securities, Inc., 847 F.2d 631 (10th Cir. 1988)
Johnston, Lemon & Co., Inc. v. Smith, 84 F.3d 1452 (D.C. Cir. 1996)
Kanuth v. Prescott, Ball & Turban, Inc., 949 F.2d 1175 (D.C. Cir. 1991)
Keil-Koss v. CIGNA, 211 F.3d 1278 (10th Cir. 2000)
Kiernan v. Piper Jaffray Companies, Inc., 137 F.3d 588 (8th Cir. 1998)
Lancaster v. West, 891 S.W.2d 357 (Ark. 1995)
LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702 (D.C. Cir. 2001)
Lovell v. Harris Methodist Health, 235 F.3d 1339 (5th Cir. 2000)
Luong v. Circuit City Stores, Inc., 368 F.3d 1109 (9th Cir. 2004)
Manion v. Nagin, 392 F.2d 294 (8th Cir. 2004)
Martinez v. Univision Television Group, 2003 WL 21470103 (Cal.App. 1 Dist.)
Mathewson v. Aloha Airlines, Co., 919 P.2d 969 (Hawaii 1996)
Matter of Standard Coffee Service Co., 499 So.2d 1314 (La.App. 4 Cir. 1986)
May v. First National Pawn Brokers, 887 P.2d 185 (Mont. 1994)
Maze v. Prudential Securities, Inc., 47 F.3d 1157 (2d Cir. 1995)
Mendes v. Commercial Credit Corp., 189 F.3d 478 (10th Cir. 1999)
Merrill Lynch, Pierce, Fenner & Smith v. Lambros, 214 F.3d 1354 (11th Cir. 11th Cir. 2000)
McDonald v. Wells Fargo Investments LLC, 2005 WL 2562993 (N.D. Ind. 2005)
McGrann v. First Albany Corp., 424 F.3d 743 (8th Cir. 2005)
McKenzie v. Seta Corp., 283 F.3d 413 (4th Cir. 2000)
Millenium Validation Services, Inc. v. Thompson, 3159821 (D.Del. 2006)
Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456 (11th Cir. 1997)
Montez v. Prudential Securities, Inc., 260 F.3d 980 (8th Cir. 2001)
Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1999)
Owen-Williams v. Merrill Lynch, Pierce, Fenner & Smith, 103 F.3d 119 (4th Cir. 1996)
Ngeime v. NEC Electronics, Inc., 25 F.3d 1437 (9th Cir. 1994)
Neary v. Prudential Insurance Co. of America, 63 F.Supp.2d 208 (D. Conn. 1992)
Norton v. AMIBUS St. Joseph Hosp., 155 F.3d 1040 (8th Cir. 1998)
PaineWebber, Inc. v. Agron, 49 F.3d 347 (8th Cir. 1995)
Patti v. Rockwell Int'l Corp., 2001 WL 1631483 (9th Cir. 2001)
Pfizer, Inc. v. Uprichard, 422 F.3d 124 (3d Cir. 2005)
Private Healthcare Systems, Inc. v. Torres, 278 Conn. 291 (Conn. 2006)
Prudential-Bache Securities v. Tanner, 72 F.3d 234 (11th Cir. 1995)
Rauh v. Rockford Products, Corp., 574 N.E.2d 636 (Ill. 1991)
Remax Right Choice v. Aryeh, 100 Conn. 373 (Conn. App. 2007)
Renny v. Port Huron Hospital, 398 N.W.2d 327 (Mich. 1986)
Rollins v. Prudential Ins. Co. of North America, 2001 WL 537775 (9th Cir. 2001)
Rosenbloom v. Mecom, 478 So.2d 1375 (La.App. 4 Cir. 1985)
Schoch v. InfoUSA, Inc., 341 F.3d 785 (8th Cir. 2003)
Schoonmaker v. Cummings and Lockwood of Connecticut, 747 A.2d 1017 (Conn. 2000)
Scott v. Borg-Warner Protective Services, 2003 WL 23315 (9th Cir. 2003)
Selby General Hospital v. Kindig, 2006 WL 2457436 (Ohio App. 4 Dist. 2006)
Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310 (7th Cir. 1981)
Shearson Lehman Brothers, Inc. v. Hedrich, 639 N.E.2d 228 (1994)
Sheppard v. Lightpost Museum Fund, 52 Cal.Rptr.3d 821 (2006)
Smith v. Rush Retail Centers, Inc., 360 F.3d 504 (5th Cir. 2004)
Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698 (2d Cir. 1985)
St. John’s Medical Center v. Delfino, 414 F.3d 882 (8th Cir. 2005)
Syncor Intern. Corp. v. McLeland, 120 F.3d 262 (4th Cir. 1997)
Thomas v. Bear Stearns & Co., Inc., 196 F.3d 1256 (5th Cir. 1999)
Tinder v. Pinkerton Sec., 305 F.3d 728 (7th Cir. 2002)
Trotlo v. Big Sandy Band of Western Moro Indians, 2007 WL 853040 (Cal. App. 2007)
Welch v. A.G. Edwards & Sons, Inc., 677 So.2d 520 (La.App. 4 Cir. 1996)
Weiss v. Carpenter, Bennett & Morrisey, 672 A.2d 1132 (N.J. 1996)
Williams v. Cigna Financial Advisors Inc., 197 F.3d 752 (5th Cir. 1999)
Yorulmazoglu v. Lake Forest Hospital, 359 Ill.App. 3d 554 (Ill.App. 1 Dist. 2005)
Young v. Community Hosp. & Nursing Home of Anaconda, 304 Mont. 400 (Mont. 2001)
Zandford v. Prudential-Bache Securities, Inc., 112 F.3d 723 (4th Cir. 1997)