

October 8, 2008

# Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review

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**CROWNING THE NEW KING:  
THE STATUTORY ARBITRATOR AND THE DEMISE OF JUDICIAL REVIEW**

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**Fall 2008**

**Manuscript: 61 Pages (Without Appendix)**

**67 Pages (Including Appendix)**

**Word Count: 26,618 (Including Footnotes and Appendix I)**

### *Summary*

Judicial review of arbitration awards is highly deferential— but when does it become rubber stamping? Using original data, I find that federal courts vacated only 4.3 percent of 162 disputed awards. Nearly the same result was observed for a sub-sample of 44 employment discrimination awards under Title VII. By comparison, federal appeals courts in 2006 reversed 12.9 percent of 5,917 rulings made by civil court judges on the merits of legal claims.

Why are the rulings of Article III judges scrutinized more than the awards of citizen-arbitrators? What does this mean when companies can avoid Article III court rulings by requiring employees to arbitrate their claims? Judicial review of awards based on statutory claims is inadequate, and undermines the constitutional role of federal courts.

I explore these empirical findings from a historical perspective. English kings and merchants helped to fashion modern arbitration. Nearly 700 years ago, small merchants traded goods at fairs that operated under a royal franchise. Arbitrators improved the efficiency of these markets by adjudicating transactional disputes. This role was codified by the Statute of the Staple of 1353, where the king delegated his sovereign power to ensure the success of the fair.

I point to two prominent junctures— in 1698, and again in 1925— when lawmakers in England and the U.S. believed that court litigation hampered commerce. They enacted similar statutes to authorize courts to confirm disputed awards, unless these private rulings resulted from corruption or misconduct. This deference grew out of practical considerations. The parties had chosen the arbitrator, agreed to the private process, and bound themselves to an industry norm.

Courts deferred so heavily to awards because William III wanted these merchant tribunals to be autonomous. His law, the 1698 Arbitration Act, did not allow courts to vacate awards for fact finding or legal errors. Great deference in its reviewing standards reflected the king's infallibility.

My textual research shows that the FAA's reviewing standards descended from William III. I suggest that our law crowns today's statutory arbitrator with the king's mantle of infallibility. But this deference is too extreme for awards that rule on statutory claims. In *Gilmer v. Johnson/Interstate Lane Corp.*, the Supreme Court ignored the commercial history of arbitration when it broadly approved a theory of forum substitution. *Gilmer* said that arbitrators may decide statutory claims, even if one disputant objects to the forum and wishes, instead, to be heard by a court. The result is that the ruling of the arbitrator is subject to a narrower standard for review than an Article III judge's order. Epitomizing this regal deference, a contemporary court said: "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." In textual and empirical analysis, I show that statutory arbitrations enjoy a presumption of royal infallibility. I conclude with two solutions for aligning the review of rulings by statutory arbitrators and Article III judges.

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## I. INTRODUCTION

A. *Overview: Arbitration and Courts*

Do arbitrations help courts reduce their caseloads; or do they usurp a constitutional role by empowering private citizens to exercise an unchecked governmental power? Trials are vanishing.<sup>1</sup> Federal judgeships remain vacant.<sup>2</sup> Case filings leveled off in 1985.<sup>3</sup> Meanwhile, arbitration is booming. Caseloads rival the litigation volume in federal courts.<sup>4</sup> Private adjudication is growing even though arbitration fees are costly.<sup>5</sup>

But courts do not perceive arbitration as an institutional threat. They create demand for private judges in decisions that foster arbitration.<sup>6</sup> Migration of Article III trials to arbitration relieves congested dockets. Arbitrators give disputants a better chance of receiving a hearing.<sup>7</sup> Disputants may enjoy process advantages compared to a trial—

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<sup>1</sup> 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) (the number of civil trials per federal district court judge fell from 22.3 in 1987 to 7.4 in 2002).

<sup>2</sup> E. Stewart Moritz, “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL. 341, 374-75 (2006). October vacancies during the Reagan, Bush I, and Clinton presidencies were, respectively, 115 of 642 (17.9%), 57 of 731 (7.8%), and 122 of 811 (15.0%).

<sup>3</sup> Marc Galanter, *The Hundred Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1264, n.23. Civil trials peaked in 1985, when the number of filings reached 273,056. It stayed essentially level thereafter: for example, in 2002, there were 274,711 filings.

<sup>4</sup> Williams S. Fiske, *Should Small and Medium-Size American Businesses “Going Global” Use International Commercial Arbitration?* 18 TRANSNAT’L LAW. 455, 461 (2005), reporting that the American Arbitration Association handled the largest number of arbitrations globally, 198,491 in 2001.

<sup>5</sup> E.g., *Scovill v. WSYX/ABC*, 425 F.3d 1012 (6<sup>th</sup> Cir. 2005), affirming a district court’s findings of arbitration forum costs as follows: filing fee, \$3,250; and case service fee and daily rate for arbitrator fees, \$1,260. Overall, the district court found that the minimum arbitration costs would be \$15,310 for a four day arbitration and pre-hearing motions and conferences, and arbitrator study time.

<sup>6</sup> E.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 521 U.S. 79, 90 (2000), stating a presumption to enforce arbitration agreements that impose cost-sharing obligations on poor individuals: “To invalidate the agreement on that basis would undermine the liberal federal policy favoring arbitration agreements. It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration (citations omitted).” *Also see* *Circuit City Stores, Inc. v. Adams*, *infra* note 217, ruling that all employment arbitration agreements are enforceable under the FAA, except a small sliver of agreements that cover transportation workers.

<sup>7</sup> Marc Galanter, *The Hundred Year Decline of Trials and the Thirty Years War*, 57 STAN.

less cost and a quicker ruling.<sup>8</sup>

The wholesale privatization of justice raises questions, however, about the administration of justice. Many arbitrations result from compulsory agreements, where a powerful entity, such as an employer, requires a weaker party to waive any right to a trial as a condition for entering into an economic relationship.<sup>9</sup> To some observers, this amounts to a coerced bargain.<sup>10</sup> The power imbalance in mandatory arbitration agreements may undermine fairness in the resulting adjudication.<sup>11</sup>

My empirical research Article examines a crucial interface between public and private spheres of dispute resolution. Our constitutional system is based, of course, on checks and balances. I theorize that a landmark 1991 decision, *Gilmer v.*

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L. REV. 1255, 1264, n.23 (the high point in the number of civil trials was in 1985, when there was approximately the same number of filings (273,056) as in 2002 (274,711)).

<sup>8</sup> Richard A. Bales, *Normative Considerations of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 343 (2006); and David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L.REV. 1557, 1578 (2005).

<sup>9</sup> 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. For an example in this study's sample, see *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734 (7<sup>th</sup> Cir. 2002), where the former employee contended that the contract was illusory and unilaterally imposed. Compare to voluntary arbitration agreements, such as the contract in *Window Concepts, Inc. v. Daly*, 2001 WL 1452790 (R.I. Super. 2001).

<sup>10</sup> Examples include Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (2006); Judith Resnik, *Uncovering, Disclosing, and Discovering How The Public Dimensions of Court-Based Processes Are At Risk*, 81 CHI.-KENT L. REV. 521 (2006); Miriam A. Cherry, *Whistling In the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029 (2004); Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857 (1999); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999); and Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

<sup>11</sup> Gayle Cinquegrani, *Arbitration: Subcommittee Gives Favorable Report to Bill Limiting Arbitration Clauses in Job Contracts*, EMPLOYMENT POL'L & L. DAILY (BNA), July 16, 2008, at d17, reporting on the progress of Arbitration Fairness Act (H.R. 3010). Rep. Hank Johnson (D-Ga.), the bill's principal sponsor, complained that arbitration, which was used primarily in contracts between parties who were on an equal footing, are now imposed by businesses on unwilling individuals, such as employees. He charged that “[b]ig business has used its substantial muscle” to expand mandatory arbitration. In a hearing on a companion bill in the Senate (S. 1782), Sen. Russ Feingold (D. Wis) agreed, stating that mandatory arbitration is “slowly eroding the constitutional rights of Americans.”

*Interstate/Johnson Lane Corp.*,<sup>12</sup> minimizes the role of Article III courts in performing judicial review.

Consider identical employment discrimination claims that are separately tried before a federal court and arbitrated before a private citizen. In both cases, suppose that the judge and arbitrator mistakenly apply the remedy provision under Title VII of the 1964 Civil Rights Act.<sup>13</sup> Court judgments are subject to broader review than arbitration awards.<sup>14</sup> The court's legal error is more correctable than the arbitrator's mistake.<sup>15</sup> As more employment discrimination cases are arbitrated, this implies that Article III courts correct fewer legal errors. My study puts this theory to an empirical test.

Judicial review is a vital constitutional function. Not only does it correct legal errors; it also provides guidance when the law is unclear, and promotes uniform interpretation.<sup>16</sup> When arbitrators decide claims that arise under federal statutes, they exercise the same kind of power as an Article III trial judge. Unlike a court judgment, the

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<sup>12</sup> 500 U.S. 20 (1991).

<sup>13</sup> An example appears in *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). The 1991 Civil Rights Act amended Title VII by allowing discrimination victims to recover up to \$300,000 in compensatory damages. This supplemented the strong remedial provisions in Title VII. In this case, after the district court found that a female worker experienced flagrant discrimination, the court awarded her \$300,000 in compensatory damages. The trial court said that it wanted to award more in compensatory damages under the Civil Rights Act of 1991—based on the fact that Sharon Pollard could not return to her former job because of a severe and continuing hostile work environment— but declined to award future damages because the court believed that the law's cap on "future pecuniary loss" also applied to front pay. The Supreme Court ruled, however, that front pay did not count against the \$300,000 limit. On remand, the trial court awarded Pollard approximately \$2.2 million in compensatory damages (for back pay, front pay and infliction of emotional distress) and \$2.5 million in punitive damages on the emotional distress claim. See *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657 (6<sup>th</sup> Cir. 2005).

<sup>14</sup> *Infra* notes 251 - 263.

<sup>15</sup> *Infra* note 253.

<sup>16</sup> See *American Trucking Associations v. Smith*, 496 U.S. 167, 213 (1990):

Unlike a legislature, we do not promulgate new rules of constitutional . . . procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.

arbitrator's ruling is reviewed with extreme deference.<sup>17</sup> The award is not alterable; however, Article III court rulings may be modified and corrected.<sup>18</sup>

This constitutional dichotomy surfaced only recently.<sup>19</sup> In 1991, *Gilmer* said that the Federal Arbitration Act (FAA) ended longstanding judicial hostility to arbitration.<sup>20</sup> The FAA directed courts to enforce the arbitration process in two respects— by ordering a recalcitrant party to an arbitration agreement to submit to that private process,<sup>21</sup> and by confirming arbitrator rulings.<sup>22</sup> My historical research shows that the Sixty-Eighth Congress in 1925,<sup>23</sup> and King William III and Parliament in 1698,<sup>24</sup> responded to similar concerns from business about the high cost of litigation. Businesses wanted a simpler, cheaper, and internally administered justice system to resolve their common law claims. When English and American arbitrators adjudicated these contract and related claims over the centuries, they rarely applied or interpreted a national statute. These private judges were common law arbitrators but not statutory arbitrators.

Congress, in passing the FAA, assumed that common law arbitrators would continue to hear the same types of merchant and commercial cases that had been

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<sup>17</sup> *Infra* notes 266 - 270.

<sup>18</sup> *Infra* note 253.

<sup>19</sup> See Sen. Russell D. Feingold, *Mandatory Arbitration: What Process is Due*, 39 HARV. J. ON LEG. 281, 288 (2002) (“One reason that mandatory, binding arbitration has become so troubling is because it threatens a fundamental principle of our justice system: the constitutional right to take a dispute to court.”).

<sup>20</sup> *Gilmer*, *supra* note 12, at 24, observing that the purpose of the FAA 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.”

<sup>21</sup> United States Arbitration Act, *infra* note 202, at Section 4, authorizing courts to order parties to arbitrate their dispute, provided that a valid agreement exists.

<sup>22</sup> *Id.* at Section 10 (authorizing courts to vacate an award).

<sup>23</sup> *Infra* notes 207 - 210.

<sup>24</sup> *Infra* note 118.

arbitrated for the preceding 300 years.<sup>25</sup> My empirical research shows, however, that following the landmark *Gilmer* decision in 1991, arbitrators often rule on statutory discrimination claims.<sup>26</sup> The problem is that the FAA blindly equates common law and statutory arbitrations. Thus, courts review statutory awards with too much deference.

This unplanned transition to statutory arbitration raises disquieting questions under the separation of powers doctrine. When arbitrators hear statutory cases that ordinarily arise under federal jurisdiction, are they bound like Article III judges to apply statutory terms and judicial precedents? If the arbitration agreement alters terms of an anti-discrimination law such as Title VII of the 1964 Civil Rights Act— by limiting remedies, class actions, or filing periods— are arbitrators bound by the contract or the discrimination statute? Are arbitrator rulings reversed less frequently by courts under the FAA than trial court judgments? If so, what are the implications for Article III courts?

### *B. Organization of This Article*

Part II contends that arbitrators who hear statutory claims are inferior to federal judges who rule in identical disputes.<sup>27</sup> In Part II.A, I explain why many employers began to require their workers to arbitrate legal disputes.<sup>28</sup> The next part shows how arbitration procedures deviate from those in lawsuits,<sup>29</sup> while Part II.C describes how arbitrators lack the powers and qualifications of federal judges.<sup>30</sup> Showing how *Gilmer* errs in assuming that arbitration is a valid substitute for trials involving statutory claims, Part II.D explains

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<sup>25</sup> *Infra* note 211.

<sup>26</sup> *Infra* Table 3 (26.3% of federal cases involved arbitration of Title VII claim).

<sup>27</sup> *Infra* notes 48 - 99.

<sup>28</sup> *Infra* notes 48 - 62.

<sup>29</sup> *Infra* notes 63 - 76.

<sup>30</sup> *Infra* notes 77 - 87.

that recent reforms have not brought arbitration up to par with trials.<sup>31</sup>

The picture differs for common law arbitrations—private tribunals that adjudicate contract and other commercial claims. Part III shows how common law arbitration is superior to courts.<sup>32</sup> Arbitration emerged many centuries ago to resolve commercial disputes.<sup>33</sup> English policy makers in the 17<sup>th</sup> century believed that arbitration helped businesses avoid enervating lawsuits (Part III.B).<sup>34</sup> The next part demonstrates how an English law in 1698 sets forth judicial review standards that appear in the FAA.<sup>35</sup> Part III.D refutes an idea, held by American lawmakers in 1925, that English courts were hostile to arbitration.<sup>36</sup> In reality, English courts adhered to the 1698 law by applying deferential reviewing principles.<sup>37</sup> Part VI.F explains that early American courts followed the English approach of sparingly vacating awards.<sup>38</sup>

Part IV translates my historical research into a simple empirical test. Part IV.A<sup>39</sup> postulates that if *Gilmer* is right about forum substitution, then federal courts should vacate awards, and reverse trial court rulings, at the same rate—because arbitrations are simply alter egos for courts. Part IV.B<sup>40</sup> considers an opposing view: federal courts should not overturn awards and judgments with the same frequency because the FAA’s language and legislative history show an intention to shield awards from the usual amount of scrutiny. *Gilmer* cannot have it both ways: It cannot posit forum substitution—

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31 *Infra* notes 88 - 99.  
32 *Infra* notes 100 - 188.  
33 *Infra* notes 100 - 104.  
34 *Infra* notes 105 - 117.  
35 *Infra* notes 118 - 129.  
36 *Infra* notes 130 - 140.  
37 *Infra* notes 141 - 172.  
38 *Infra* notes 173 - 188.  
39 *Infra* notes 189 - 201.  
40 *Infra* notes 202 - 225.

while extinguishing the right to sue on the notion that arbitration provides the same justice as courts— and also forgo the usual standard of review for court rulings on grounds that arbitrations are more special than courts and deserve greater deference.

The remainder of the Article has a simple organization. Part V.A describes my research methods,<sup>41</sup> and is followed by my empirical results.<sup>42</sup> Part VI interprets the results in light of constitutional theory and practice.<sup>43</sup> I contend, in Part VI.A,<sup>44</sup> that constitutional framers did not intend Article III powers to be delegated to citizen arbitrators. Next, I demonstrate the difference between the FAA’s reviewing standards, and federal civil procedure rules for reviewing court rulings.<sup>45</sup> The two parts add more evidence to my view that *Gilmer* falsely equates the justice provided by arbitrations and trials. In my conclusion— in Parts VII.A<sup>46</sup> and VII.B<sup>47</sup> — I show, respectively, textual evidence from current court opinions that treat arbitration with an aura of royal infallibility, and I propose two modest but practical ideas to address this problem.

## II. STATUTORY ARBITRATIONS: THE INFERIORITY OF ARBITRATORS TO ARTICLE III JUDGES IN ADJUDICATING DISCRIMINATION CLAIMS

### A. *Employers Prefer Arbitration to Trials for Adjudicating Statutory Claims*

Title VII of the 1964 Civil Rights Act was enacted to eradicate discrimination in the workplace.<sup>48</sup> Recent Supreme Court decisions highlight the crucial role that federal

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<sup>41</sup> *Infra* notes 226 - 234.

<sup>42</sup> *Infra* notes 235 - 241.

<sup>43</sup> *Infra* notes 242 - 264.

<sup>44</sup> *Infra* notes 242 - 251.

<sup>45</sup> *Infra* notes 252 - 264.

<sup>46</sup> *Infra* notes 265 - 271.

<sup>47</sup> *Infra* notes 272 - 284.

<sup>48</sup> Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255, 42 U.S.C. §§ 2000e to 2000e-17 (2005). This explicit purpose appears in the legislative history for Title VII, when Congress stated that “the failure of our society to extend job opportunities to the Negro is an economic waste.” 1964 U.S.Code Cong. & Admin.News, at 2515. *Also see* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), noting: “The

judges play in clarifying the law.<sup>49</sup>

The impact of these decisions is potentially blunted by the growing privatization of public law. In *Gilmer* the Supreme Court enforced a mandatory arbitration agreement in the securities industry. This meant that *Gilmer* waived his right to sue under the Age Discrimination in Employment Act.<sup>50</sup> Subsequent rulings broadened *Gilmer*'s narrow holding, denying most employees access to court and compelling arbitration of their claims.<sup>51</sup> In a critical passage, the *Gilmer* majority proclaimed its trust in forum substitution—the idea that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>52</sup>

*Gilmer* was decided at a critical time. Employers were alarmed by two major employment laws, the 1991 Civil Rights Act,<sup>53</sup> and Americans with Disabilities Act in 1992.<sup>54</sup> Employment discrimination lawsuits in federal courts doubled in five years, as filings soared from 8,273 in 1990 to 19,059 in 1995.<sup>55</sup>

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objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.” *Id.* at 429-30.

<sup>49</sup> In *Burlington No. & Santa Fe Ry. Co. v. White* 548 U.S. 53 (2006), the Court broadened the meaning of retaliatory discrimination, while *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006), guided courts in evaluating racially-tinged epithets, such as a supervisor’s use of “boy” in referring to African-American employees.

<sup>50</sup> *Gilmer*, *supra* 12, at 26.

<sup>51</sup> *Gilmer* dealt with a securities industry arbitration provision that happened to arise in the context of an employment dispute. *Gilmer* did not decide, therefore, whether Section 1 of the FAA—which defined contracts that are excluded from the Act’s coverage—applied to all employees, or only a narrow class. *See Gilmer* at 24, n.2, stating that “it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment.” The Court removed this ambiguity in *Circuit City Stores*, *infra* note 217, by ruling that all employment arbitration agreements are enforceable under the FAA, except agreements that cover transportation workers.

<sup>52</sup> *Gilmer*, *supra* note 12, at 26.

<sup>53</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>54</sup> American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

<sup>55</sup> Administrative Office of the U.S. Courts (2006), *U.S. District Court Cases, Judicial Facts and Figures, Civil Cases Filed By Nature of Suit*, tbl. 4.4, at 2 (see Employment, under the heading

To put this trend in perspective, consider that employment claims, including those under Title VII of the 1964 Civil Rights Act, comprised about 52% of all civil rights cases filed in federal courts in 1995.<sup>56</sup> The 1991 amendments expressly allowed discrimination victims to recover up to \$300,000 in punitive damages.<sup>57</sup> This supplemented already strong remedial provisions in Title VII.<sup>58</sup>

Even if these trends caused employers to worry about increased liability and costs, Congress believed it was more important to strengthen this anti-discrimination law. *Gilmer*, however, offered employers an easy way out of this rising litigation tide.

Hoping to lower the cost of employment disputes, many employers used arbitration agreements to bypass courts.<sup>59</sup> In a late-1990s national survey, most *Fortune* 1000 companies reported that they use employment arbitration.<sup>60</sup> Ninety percent said that they adopted an ADR method as a “critical cost technique.”<sup>61</sup> Commentators concluded that arbitration enabled employers to limit litigation risks and costs.<sup>62</sup>

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Civil Rights, at Line 3), available at <http://www.uscourts.gov/judicialfactsfigures/2006/Table404.pdf>.

<sup>56</sup> *Id.* There were 36,600 “Civil Rights” cases in federal courts in 1995. This figure included 19,059 “Employment” cases.

<sup>57</sup> See 42 U.S.C. § 1981(a)(1), (b)(3) (specifying the compensatory and punitive damages available under Title VII).

<sup>58</sup> The expansion of Title VII remedies is explained in *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001), at 848-52.

<sup>59</sup> See *Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management*, DAILY LAB. REP’T, (No. 93) May 14, 2001, reporting an employment lawyer’s view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits. David Copus also notes that the biggest financial risk for employers in termination lawsuits— tort claims in which a single plaintiff can be awarded millions of dollars— is controlled by arbitration agreements that cap damages.

<sup>60</sup> See Bureau of National Affairs, *Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, DAILY LABOR REPORT (May 14, 1997), at A-4 (79% of the 530 responding firms said that they use employment arbitration).

<sup>61</sup> *Id.*

<sup>62</sup> Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1301 (1998); David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, 54 DISP. RESOL. J. 66, 66-71 (1999); also Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 2 (1997) (“For many employers, managing this risk of liability is a vital part of their human resources mission and an important part of their general corporate cost-control program.”).

*B. Arbitration Procedures Deviate from Civil Court Procedures*

*Gilmer* approved mandatory arbitration as forum substitution, implying that the process would be scrupulously neutral. But some employers manipulate arbitration procedures to enhance their chances of defeating claims. Companies write arbitration agreements that allow them to manage risk by eliminating jury trials, class actions, and large attorney's fees.<sup>63</sup>

Also, arbitration agreements require workers to waive their right to sue,<sup>64</sup> and replace a court with arbitration.<sup>65</sup> Often, workers cannot bargain over this forum.<sup>66</sup> Even when employers provide voluntary arbitration, it may be illusory because workers must promptly exercise an opt-out clause or acquiesce to the arbitration provision.<sup>67</sup>

Companies create their own justice rules to shield themselves from stricter enforcement.<sup>68</sup> Risk control tactics include limits on discovery,<sup>69</sup> shorter periods to file claims,<sup>70</sup> selection of arbitrators without employee input,<sup>71</sup> and inconvenient venues.<sup>72</sup>

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<sup>63</sup> Scott Baker, *A Risk-Based Approach To Mandatory Arbitration*, 83 OR. L. REV. 861, 862 (2005). Also see David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (2003), contending that employers use arbitration as a risk-management device.

<sup>64</sup> *E.g.*, *Baldeo v. Darden Rest., Inc.*, 2005 WL 44703 (E.D.N.Y. 2005), at \* 2.

<sup>65</sup> *E.g.*, *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 146 (2d Cir. 2004).

<sup>66</sup> *E.g.*, *Brennan v. Bally Total Fitness*, 198 F.Supp.2d 377, 381 (S.D.N.Y. 2002).

<sup>67</sup> *E.g.*, *Legair v. Circuit City Stores, Inc.*, 213 Fed.Appx. 436 (6<sup>th</sup> Cir. 2007).

<sup>68</sup> See DAVID B. LIPSKY ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT* (2003).

<sup>69</sup> See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1478 (D.C. Cir. 1997).

<sup>70</sup> *E.g.*, *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1 (1<sup>st</sup> Cir. 2005) (ruling that arbitrator had authority to rule on validity of sixty-day filing requirement); *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 (9<sup>th</sup> 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).

<sup>71</sup> See *Hooters of America v. Phillips*, 173 F.3d 933, 938 (4<sup>th</sup> Cir. 1999), finding that the only possible purpose of the employer's arbitration rules was "to undermine the neutrality of the proceeding."

One method not only bars access to courts, but deters employee access to arbitration by requiring individuals to pay large forum fees.<sup>73</sup> Once the arbitrator has been appointed and the hearing commences, there may be more deviations from ordinary judicial process. Some arbitration agreements bar class actions,<sup>74</sup> include remedial limits on statutory claims,<sup>75</sup> and limit punitive damages in awards.<sup>76</sup>

### *C. Title VII Arbitrators Lack the Qualifications and Powers of Article III Judges*

There are other reasons to question whether arbitration offers employees the same outcomes that they could expect from a court. *Gilmer*'s forum substitution implies that arbitrators are private judges who are similar in ability and outlook to Article III judges.

However, since the advent of employment arbitration, arbitrator qualifications have come under fire. A few arbitrators have been exposed as biased and incompetent.<sup>77</sup> More often, employment arbitrators have lacked subject-matter expertise and diversity. The GAO conducted a comprehensive analysis of employment arbitration soon after *Gilmer* was decided.<sup>78</sup> Focusing on the securities industry, the study estimated that a

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<sup>72</sup> *E.g.*, *Poole v. L.S. Holding, Inc.*, 2001 WL 1223748 (D.V.I. 2001) (rejecting contention by Virgin Islands employee that Massachusetts is a prohibitively expensive venue to arbitrate claim).

<sup>73</sup> *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6<sup>th</sup> Cir. 2003), ruling 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.”

<sup>74</sup> *E.g.*, *Adkins v. Labor Ready, Inc.*, 185 F.Supp. 2d 628 (S.D. W.Va. 2001).

<sup>75</sup> *E.g.*, *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4<sup>th</sup> Cir. 2000); and *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).

<sup>76</sup> *E.g.*, *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 225 (3d Cir. 1997). For an example of biased employment arbitrators, *see Hooters of America v. Phillips*, 173 F.3d 933, 938 (4<sup>th</sup> Cir. 1999), describing how employers unilaterally select arbitrators.

<sup>77</sup> *E.g.*, *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998). In its ruling to vacate an award that denied a broker's age discrimination claim, the Second Circuit court remarked: “In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both.” *Id.* at 204.

<sup>78</sup> *See* EMPLOYMENT DISCRIMINATION—HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES (March 30, 1994, GAO/HEHS 94-17). The GAO study reported that only eighteen employment discrimination arbitrations occurred in the securities industry between August 1990

typical arbitrator for the New York Stock Exchange was a white, 60 year-old male.<sup>79</sup> The report reached the same conclusion for NASD arbitrators.<sup>80</sup>

During a key lawsuit that alleged structural bias in these arbitration panels, a female plaintiff found through discovery that only one member of the NASD's National Arbitration Committee had experience in employment law.<sup>81</sup> The GAO Report raised a similar concern, while also explaining that nearly 90% of securities industry arbitrations involved commercial disputes.<sup>82</sup> Academic commentary also questioned whether an employment discrimination claimant can receive a fair hearing.<sup>83</sup>

A fundamental problem is that employers— typically, the party who drafts the arbitration agreement— fashion the selection process and define the arbitrator's powers. To highlight a key difference, in Title VII trials judges are authorized to order attorney's fees to prevailing plaintiffs.<sup>84</sup> But some states prohibit this remedy,<sup>85</sup> or deny this power to the arbitrator and require the arbitration winner to go to court to secure this remedy.<sup>86</sup> When the law does not regulate this power, the award of attorney's fees is sometimes

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and December 1992.

<sup>79</sup> *Id.* At the time, 89 percent of the NYSE's 726 arbitrators were males.

<sup>80</sup> *Id.*

<sup>81</sup> *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F.Supp. 190, 210, n. 24 (Deposition of Deborah Masucci).

<sup>82</sup> *See* EMPLOYMENT DISCRIMINATION, *supra* note 78, observing that from January 1991 through December 1992, 1,886 NASD cases were arbitrated. Most cases— 1,626 (86%)— involved disputes between customers and brokerage firms, while only 260 cases (14%) dealt with employment issues. Among these, only two cases involved discrimination.

<sup>83</sup> *See* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration An "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 569 (1990) ("The same industry experience and expertise that makes a private arbitrator attractive as an alternative to a judge for economic claims arising under ERISA, the securities laws, and RICO may render the arbitrator in a discrimination case subject to the very biases that the Title VII plaintiff is seeking to remedy.").

<sup>84</sup> 42 U.S.C. § 2000e-5(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fees . . ."

<sup>85</sup> *E.g.*, *Carson v. PaineWebber, Inc.*, 62 P.3d 996 (Colo. App. 2002).

<sup>86</sup> *E.g.*, *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So.2d 143, 147 (Fla. Dist. Ct. App. 2000) ("our court's long-established policy has been to exclude the resolution of attorney's fee demands from the arbitrators' authority; Florida defers instead to the expertise of trial judges").

vacated on grounds that the arbitration agreement did not authorize this power.<sup>87</sup> The fact that these limitations do not apply to Article III judges raises doubts about *Gilmer*'s theory of forum substitution.

#### *D. A Patchwork of Reforms Fail to Equalize Arbitrators to Article III Judges*

Several reforms in the past decade have significantly improved arbitration. In the late 1990s, major arbitration services enacted procedural reforms. As Congress prepared to regulate securities industry employment, the National Association of Securities Dealers (NASD) revised its procedures.<sup>88</sup> The American Arbitration Association followed a similar course by adopting due process procedures.<sup>89</sup>

In 2000, a national panel of experts approved a model arbitration law for states, the Revised Uniform Arbitration Act.<sup>90</sup> The RUAA drafters identified numerous issues that required updating in contemporary arbitration.<sup>91</sup> Many of these provisions were

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<sup>87</sup> *E.g.*, *Moore v. Omnicare, Inc.*, 141 Idaho 809 (2005).

<sup>88</sup> In December 1998, the Securities and Exchange Commission amended NYSE Rules 347 and 600 "to exclude claims of employment discrimination, including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen." See SEC Release No. 34-40858, *Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration Rules* (January 7, 1999), 64 FR 1051-01.

<sup>89</sup> 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 incorporated due process suggestions from the ABA's Task Force on Alternative Dispute Resolution in Employment.

<sup>90</sup> The Revised Uniform Arbitration Act (Prefatory Note), <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>.

<sup>91</sup> *Id.* The RUAA list includes: (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

aimed at endowing arbitrators with the attributes and powers of a judge. The model law broke new ground by regulating arbitrator neutrality.<sup>92</sup> It expanded arbitrator powers to order discovery, rule on summary judgment motions, conduct pre-hearing conferences, and manage arbitration processes.<sup>93</sup> Also, it authorized courts to enforce a pre-award ruling.<sup>94</sup>

Drafters also regulated arbitrator remedies.<sup>95</sup> A new section prescribed arbitrator powers to order attorney's fees, punitive damages, and other exemplary relief.<sup>96</sup> The RUAA also allowed courts to award attorney's fees and costs to a prevailing party.<sup>97</sup> In addition, the RUAA strengthened arbitral finality.<sup>98</sup>

Taken together, these reforms put arbitration on a more even footing with Article III courts. Still, there is no reason to believe that arbitrators appointed by the American Arbitration Association or the NASD are as qualified as Article III judges. Even if they were, Article III judges often preside over jury trials, where peers of the litigants play a fundamental role in administering justice. Under ideal conditions, arbitration cannot provide this due process enhancement. In any event, only 12 states have adopted the RUAA, thus limiting its reforms.<sup>99</sup>

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waivable; particularly when one party has significantly less bargaining power than another; and (14) the use of electronic information in the arbitration process.

<sup>92</sup> *Id.* Section 12, Disclosure by Arbitrator.

<sup>93</sup> *Id.* Section 17, Witnesses, Subpoenas, Depositions, Discovery.

<sup>94</sup> *Id.* Section 18, Judicial Enforcement of Preaward Ruling.

<sup>95</sup> *Id.* Section 21, Remedies; Fees and Expenses of Arbitration Proceeding.

<sup>96</sup> *Id.* Section 21(a)-(b).

<sup>97</sup> *Id.* Section 25, Judgment on the Award; Attorney's Fees and Litigation Expenses.

<sup>98</sup> *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.").

<sup>99</sup> See *RUAA and UMA Legislation from Coast to Coast*, DISPUTE RESOLUTION TIMES, in <http://www.adr.org/sp.asp?id=26600>. The states are Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington.

### III. COMMON LAW ARBITRATIONS: ARBITRATORS ARE SUPERIOR TO ARTICLE III JUDGES IN ADJUDICATING CONTRACT CLAIMS

In Part III, I show how common law arbitrations separately evolved from statutory arbitrations. In this brief overview, I explain how Part III relates to my constitutional thesis.

The following historical materials cannot be found in current arbitration studies, leading court opinions, or the legislative history of the FAA. This omission skews our understanding of the law's judicial review standards. When judges apply these standards today, they realize that Congress enacted these terms, and meant to preserve the autonomy of arbitration from interfering courts.

But their understanding is superficial. Lacking the original context, judges can only apply these words mechanically. This is a problem because the FAA borrowed standards that evolved from over 200 years of common law arbitrations, where merchants and businesses entered into arm's length arbitration agreements. Courts adopted very deferential reviewing standards as a pragmatic response to merchants and businesses that persuasively argued for independence from judicial interference.

This commercial context differs from statutory arbitration of public rights — rights that are usually the subject of federal court proceedings. A trial judge's rulings are subject to broader review than the same ruling by an arbitrator. Appellate review enables Article III courts to ensure that laws are enforced as Congress intended. However, when the same statutory claim is arbitrated and then reviewed by a court, the standard changes—and it becomes exceedingly deferential. This transformation upsets the checks and balances between the Article III courts and Congress.

Conversely, this constitutional problem does not arise in common law

arbitrations. At times, the underlying legal rights originate in doctrines that first surfaced in arbitrations centuries ago. Common law courts gave these private rights a more public character by adopting privately adjudicated commercial doctrines. In these cases, it is therefore appropriate for courts to use a more deferential review.

In the following discussion, I show that the FAA's Section 10 results from a complex evolution. (1) Arbitration emerged as a commercial dispute resolution process. (2) English policy makers in the 17<sup>th</sup> century believed that arbitration improved their economy by allowing businesses to avoid expense and delay from commercial lawsuits. (3) An English statute in 1698 set forth part of the text of Section 10 in the FAA. (4) Contrary to congressional belief when lawmakers passed the FAA in 1925, English courts were not hostile to arbitration. (5) English courts adhered to the 1698 arbitration statute by applying deferential principles in reviewing disputed awards. (6) Early American courts— from the 1820s and later— followed the English approach of confirming disputed awards, and only vacated awards on very narrow grounds.

#### *A. Arbitration Emerged as a Commercial Dispute Resolution Process*

Arbitration was common in medieval England. Trade, which was irregular due to primitive roads and social isolation, took place at seasonal fairs under the king's auspices.<sup>100</sup> While issuing a franchise to hold a fair, kings authorized the creation of merchant courts to adjudicate commercial disputes.<sup>101</sup>

Commercial arbitration as we know it today grew out of this royal tradition. The Statute of the Staple, enacted in 1353, allowed merchants to choose impartial peers to

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<sup>100</sup> See William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and The United States*, 25 U. CHI. L. REV. 445, 447 (1958).

<sup>101</sup> *Id.*

adjudicate their dispute.<sup>102</sup> Over centuries, merchants developed a specialized body of mercantile law to resolve their own disputes. As trade increased and became more routine in the Age of Reason, merchants entered into arbitration agreements.

Near the turn of the seventeenth century, there were few published arbitration cases. But in 1610, *Baspole's Case*<sup>103</sup> set the tone for judicial deference to arbitration rulings. The court considered whether an award that ruled on one aspect of a debt effectively resolved all collateral issues, even though the ruling was silent on these matters: “it appears by the award that it was made ‘*de proemissis proced in conditone proced specificat,*’ which words imply, that he had made an arbitratment of all that which was referred to him, and so shall it be intended until the contrary be shewed. . . .”<sup>104</sup>

*B. King William III Believed that Arbitration Would Improve England's Economy*

In seventeenth century England, arbitration was occasionally used to resolve commercial disputes. Josiah Child, an economist who authored *A New Discourse of Trade*<sup>105</sup> in 1669, lamented that business disputes were too often litigated. In a chapter titled “A Court Merchant,” Sir Child noted 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.”<sup>106</sup>

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<sup>102</sup> *Id.* at 449, quoting The Statute of the Staple: “. . . the merchants stranger shall chus two merchants strangers, whereof the one towards the south, and the other towards the north, shall be assigned to sit with the mayor and constaples of the staple . . . to hear the plaints touching merchants alien.”

<sup>103</sup> 8 Co. Rep. 97 b (copy on file with the author).

<sup>104</sup> *Id.* (providing alternative methods of incorporating the arbitration agreement in “in their Submission or Promise or Condition of their respective Bonds. . . .”).

<sup>105</sup> SIR JOSIAH CHILD, *A NEW DISCOURSE OF TRADE* 141-144 (4<sup>th</sup> ed., 1745). The preface of Sir Child’s book indicates that he wrote the treatise “long before the last session of Parliament, which commenced on 19<sup>th</sup> of October, 1669.” *Id.* at i. This statement suggests two interesting possibilities—Child anticipated that some of his ideas might lead to legislation, and that his advocacy of arbitration may have paved the way for William III’s approval of the arbitration act 30 or more years after Child published the first edition of his treatise.

<sup>106</sup> *Id.* at 141.

Conventional litigation in courts of law caused “tedious attendance and vast expenses” that tended to result in “empty purses and grey heads.”<sup>107</sup>

Toward the close of the 1600s, there was growing recognition that England’s economy was hindered by litigation. Public policy was necessary to support private commercial tribunals. In 1698, King William III and Parliament enacted a law that authorized courts to enforce arbitration agreements and awards.

John Locke—the same Locke who influenced constitutional framers—helped to shape this statute.<sup>108</sup> He recognized that arbitration was valuable for resolving trade disputes.<sup>109</sup> But arbitration needed legal reform to be effective. In his view, the process needed to be “decisive without appeal.”<sup>110</sup> His word choice has a contemporary meaning, equating to our society’s common usage of the terms “final and binding” arbitration.

In 1697, Locke drafted two legislative proposals to strengthen the functioning and autonomy of arbitration. One proposal made private arbitration agreements enforceable in courts.<sup>111</sup> A “submission”—a private agreement to submit a dispute to arbitration—would operate like a court reference, a process by which courts ordered arbitration.<sup>112</sup> He also proposed language to subject a defaulting party to judicial process.<sup>113</sup>

Locke’s proposals joined a wider effort to enact an arbitration statute. William III commissioned a board of trade to reform business practices.<sup>114</sup> Members recommended

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<sup>107</sup> *Id.* at 142.

<sup>108</sup> Henry Horwitz & James Oldham, *John Locke, Lord Mansfield and Arbitration during the Eighteenth Century*, 36 *THE HISTORICAL J.* 137, 138 (1993).

<sup>109</sup> *Id.* at 139.

<sup>110</sup> *Id.* at 138.

<sup>111</sup> *Id.* at 142.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 143.

Locke's ideas.<sup>115</sup> By February 1698, its arbitration proposals were taken up by the House of Lords.<sup>116</sup> The king signed the law on May 16, 1698.<sup>117</sup>

*C. An English Statute Provided the Antecedents for Section 10 in the FAA*

The Arbitration Act of 1698, formally called "An Act for Determining Differences by Arbitration,"<sup>118</sup> changed the relationship between courts and arbitration. It dealt with two types of arbitration disputes: (1) cases in which a party wanted to withdraw from an arbitration agreement, or refused to participate in the bargained-for hearing, and (2) cases where a party challenged the finality of an award, or sought to compel a recalcitrant award-loser to comply with the arbitrator's ruling.

By applying to disputes involving "merchants and traders,"<sup>119</sup> the act adopted a commercial purpose. But the law also applied to other parties with "controversies."<sup>120</sup> It provided a final and binding method to resolve disputes in arbitration.<sup>121</sup> To accomplish this purpose, parties entered into an arbitration agreement.<sup>122</sup> They agreed to submit a dispute to one or more persons who were empowered to render an award.<sup>123</sup>

Arbitration relied on a royal connection. The arbitration agreement authorized "any of His Majesties Courts of Record which the Parties shall choose" to enter a rule

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 144.

<sup>117</sup> *Id.* at 142.

<sup>118</sup> William III, 1697-8, An Act for Determining Differences by Arbitration, ch. xv. Rot. Parl. Gul. III n.5, STATUTES OF THE REALM (Vol. VII, John Raithby, ed. 1820), available online at <http://www.british-history.ac.uk/report.aspx?compid=46901&strquery=arbitration>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (Parties are "obliged to submit to the Award . . . for promoting Trade and rendering the Awards of Arbitrators the more effectual in all Cases for the final Determination of Controversies referred to them.").

<sup>122</sup> *Id.* The law applied to "Merchants and Traders & others desiring to end any Controversie Suit or Quarrel Controversies Suits or Quarrels" who "agree that their Submission of their Suit to the Award or Umpirage of any person or persons should be made a Rule of any of His Majesties Courts of Record which the Parties shall choose and to insert such their Agreement. . . .").

<sup>123</sup> *Id.* (referring to submission to "any person or persons").

upon the award.<sup>124</sup> Alternatively, if the parties specified these conditions in a bond that was made part of the arbitration agreement, a court had jurisdiction of the contract.<sup>125</sup>

Important to note, the law dealt severely with a person who failed to submit to arbitration, or abide by an award. These parties were subject to a contempt ruling.<sup>126</sup> The act, therefore, used public courts to enforce private arbitration agreements.<sup>127</sup>

By statute, courts had limited grounds to deny enforcement to an award, as when “the Arbitrators or Umpire misbehaved themselves and that such Award Arbitration or Umpirage was procured by Corruption or other undue Means.”<sup>128</sup> The law also allowed courts to void awards that were “unduly procured.”<sup>129</sup> These terms reappeared when Congress enacted the judicial review standards in the FAA.

#### *D. English Courts Were Not Hostile to Arbitration*

The Arbitration Act of 1698 fulfilled Josiah Child’s and John Locke’s vision of using public law to enforce mercantile arbitration. This was accomplished by judges who implemented the policy preferences of Parliament and William III.

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (providing alternative methods of embedding the arbitration agreement in “in their Submission or Promise or Condition of their respective Bonds. . .”).

<sup>126</sup> *Id.* (stating the arbitration agreement would subject the parties “to all the Penalties of contemning a Rule of Court when hee is a Suitor or Defendant in such Court. . .”).

<sup>127</sup> *Id.* (authorizing the Court to “issue Processe accordingly which Processe shall not be stopt or delayed in its Execution by any Order Rule Co[m]mand or Processe of any other Court either of Law or Equity. . .”).

<sup>128</sup> *Id.* (allowing for enforcement of the agreement or award to be stopped if “it shall be made appeare on Oath to such Court that the Arbitrators or Umpire misbehaved themselves and that such Award Arbitration or Umpirage was procured by Corruption or other undue Means.”).

<sup>129</sup> *Id.* Section II was titled “Arbitration unduly procured, void” and stated:

And be it further enacted by the Authority aforesaid That any Arbitration or Umpirage procured by Corruption or undue Means shall be judged and esteemed void and of none Effect and accordingly be sett aside by any Court of Law or Equity so as Complaint of such Corruption or undue Practise be made in the Court where the Rule is made for Submission to such Arbitration or Umpirage before the last Day of the next Terme after such Arbitration or Umpirage made and published to the Parties Any thing in this Act contained to the contrary notwithstanding.

In the following analysis, I contradict the Supreme Court’s view that early courts were hostile to arbitration. On the one hand, some of these courts balked at enforcing arbitration agreements. Occasionally, they intervened before the arbitration process ran its full course. Judges invoked the ouster doctrine, which “allowed a party to an arbitration to put an end to it at any time before an award was given, even though his action involved a breach of covenant.”<sup>130</sup>

But the modern view overestimates this activity. On balance, courts did more to support arbitrations. The current— and erroneous— view is in the legislative history of the FAA, which traces judicial hostility to a 1746 ruling, *Kill v. Hollister*.<sup>131</sup> The English court declared that arbitration agreements could not divest a court’s jurisdiction.<sup>132</sup>

But the modern view distorts *Kill*’s influence. The case was nothing more than a garden variety insurance decision, *written in a single paragraph*,<sup>133</sup> and rarely cited by other courts in the 1700s. This is not material for setting a major judicial doctrine.

Nearly a century later, an oft-cited decision, *Scott v. Avery*,<sup>134</sup> revived the ouster doctrine. The case involved a strikingly contemporary use of arbitration. An insurance

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<sup>130</sup> SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 190 (XIV, 1964).

<sup>131</sup> *Kill v. Hollister*, 1 Wils. K.B. 129, 95 Eng. Rep. 532 (1746).

<sup>132</sup> *Id.* at 129. Known as the ouster doctrine, the rule said the pre-dispute arbitration agreement in an insurance contract “cannot oust this Court.”

<sup>133</sup> To support my contention that *Kill*’s influence is significantly overstated, I reproduce the entire case in this short footnote. I call attention to its brevity and narrowness, and its lack of doctrinal elaboration on the so-called ouster doctrine:

This is an action upon a policy of insurance, wherein a clause was inserted, that in case of any loss or dispute about the policy it should be referred to arbitration; and that plaintiff avers in his declaration that there has been no reference. Upon the trial at Guildhall the point was reserved for consideration by the Court, whether this action is well laid before a reference had been made? And by the whole Court—if there had been a reference depending, or made and determined, it might have been at Bar, but the agreement cannot oust this Court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

<sup>134</sup> The two initial *Scott v. Avery* decisions are found in *Scott v. Avery* (*Scott I*), (1853) 8 Exch. 487, 155 Eng. Rep. 1442 (1853), and *Avery v. Scott* (*Scott II*), (1853), 8 Exch. 497, 155 Eng. Rep. 1447. After the Exchequer ruled for the plaintiff in *Scott I*, that judgment was overturned in *Scott II* on a writ of error in the Exchequer Chamber.

policy required the policy holder to submit any loss claim to arbitration instead of court.

On appeal, *Avery v. Scott*<sup>135</sup> ruled that an arbitration agreement could not preclude a court from hearing the matter. Lord Coleridge declared: “[I]t 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.”<sup>136</sup>

Crucial to note, but overlooked by the drafters of the FAA’s legislative history, the case was reversed on a second appeal, called *Scott v. Avery*.<sup>137</sup> In this key decision, Lord Campbell *opposed* the ouster doctrine:

[I]s the contract illegal? . . . It is contended, that it is contrary to public policy: that 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.<sup>138</sup>

Lord Campbell added, “I cannot see the slightest ill consequences that can flow from such an agreement, and I see great advantage that may arise from it. Public policy, therefore, seems to require that effect should be given to the contract.”<sup>139</sup>

The point is that English courts did not allow the ouster doctrine to enervate the 1698 arbitration act. *Wellington v. Mackintosh* typified the main approach taken by eighteenth century courts. Implicitly rejecting the ouster doctrine, *Wellington* approvingly said in dictum: “Persons might certainly have made such an agreement as would have ousted this court of jurisdiction.”<sup>140</sup>

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<sup>135</sup> 8 Exch. 497 (1853), 5 House of Lords Cases.

<sup>136</sup> *Id.* at 500.

<sup>137</sup> *Scott v. Avery* (Scott III), (1856) 5 H.L.C. 811, 10 Eng. Rep. 1121, wherein the House of Lords affirmed Scott II, but on different grounds. Ultimately, the House of Lords did not support Lord Coleridge’s view of the ouster doctrine. However, they did not explicitly reject the doctrine. *Id.* at 1137-39.

<sup>138</sup> *Id.* at 1138.

<sup>139</sup> *Id.*

<sup>140</sup> 2 Atk. 570, 26 Eng. Rep. 741 (1743).

*E. English Courts Deferred to Awards in Applying the Arbitration Act of 1698*

The 1698 arbitration act insulated awards from court interference. Judges complied with the law by stating deferential principles for reviewing disputed awards. Lord Mansfield set this pattern in the much-cited 1757 case, *Hawkins v. Colclough*,<sup>141</sup> when he declared: “Awards are now considered with greater latitude and less strictness than they were formerly. And it is right that they should be liberally construed; because they are made by the parties own choosing. And this is often . . . in cases of small consequence, where the play is not worth the candle.”<sup>142</sup>

But arbitration was not just for small claims. Arbitrators decided large controversies, and occasionally ordered parties to pay damages that the disputants believed were beyond their means. Courts backed these arbitrations, using contempt powers to enforce an award that required monetary payment by a recalcitrant party.

Take the dramatic case of this unnamed arbitration loser who, after refusing 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.<sup>143</sup>

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<sup>141</sup> 1 Burr. 274, 97 Eng. Rep. 311 (1757).

<sup>142</sup> 1 Burr. at 277.

<sup>143</sup> John Brewer, *The Wilkites and the Law, 1763-64: A Study of Radical Notions of Governance*, in *AN UNGOVERNABLE PEOPLE* (EDS. J. BREWER & J. STYLES, 1980), at 168-169, quoting

This severe approach was not isolated. A published case from 1797, *Hicks v. Richardson*,<sup>144</sup> showed that courts were willing to issue personal attachments against individuals who refused to comply with awards in arbitration bonds. This was an extreme measure because the attachment meant imprisonment for the recalcitrant party without any judicial process to challenge the award. Freedom came by complying with the award.

It is hard to imagine greater judicial deference to arbitration. To illustrate, Richardson paid the arbitrator's entire expenses and then sued on the award in order to recover Hicks' share of the arbitrator's costs.<sup>145</sup> Hicks objected, contending that Richardson could not go beyond the express terms of the award—which called for an equal division of costs. Hicks contended that Richardson could not seek reimbursement by petitioning a court to imprison Hicks until he paid for his share of the arbitrator's fee.<sup>146</sup> Chief Justice Eyre had no sympathy for Mr. Hicks' literalistic argument, stating:

[I]f we are satisfied that the Plaintiff has refused to pay his moiety of the costs . . . [s]hall we oblige the arbitrator to bring an action? I cannot but think it was the better course to be taken in this case for the arbitrator to get the whole costs from the Defendant by withholding the award, who may redress himself by one attachment, than for the Defendant to have an attachment against the Plaintiff for not obeying the award as far as concerned him and then for the arbitrator to have an attachment against him for the moiety of the costs of the arbitration. What a scene of litigation, expense and vexation might this strictness produce? . . . I think the attachment should issue.<sup>147</sup>

Courts rarely found it necessary to imprison people for failing to comply with an award. By the turn of the nineteenth century, arbitration was an entrenched institution. English case law on arbitration proliferated in the period. Thus, the clearest picture on

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BURROWS' WORCESTER JOURNAL (Nov. 15, 1770); also see Horwitz & Oldham, *supra* note 108, at 137.

<sup>144</sup> 1 Bos & Pul 93, 126 Eng. Rep. 796 (1796).

<sup>145</sup> *Id.* at 93.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 93-94.

judicial review of awards appears in leading treatises of the period. These commentaries—running from the mid-1700s to early 1800s—show that English and American colonial courts were neither hostile nor blindly deferential to arbitration. They steered a moderate course of reasonable deference to awards.

Courts intervened when arbitrators made unreasonable use of their powers. An award could not reserve an issue for future disposition.<sup>148</sup> Nor could arbitrators “reserve to themselves the power of altering the whole, or part, of the award,”<sup>149</sup> or compel an impossible action.<sup>150</sup> An award had to be “certain and definite,”<sup>151</sup> and could not go beyond the submission of issues.<sup>152</sup>

Still, courts would not inquire into the merits of an award, believing that “the arbitrator is a judge from whose sentence there is no appeal and that no other tribunal can inquire into the equity of his decision.”<sup>153</sup> Stewart Kyd, in his seminal work, *A Treatise on the Law of Awards*, explained: “The submission to the litigating parties, to the decision of an individual, arises from the confidence they repose in his integrity and skills, and is merely personal to him.”<sup>154</sup>

Thus, English law borrowed from an ancient Roman view, holding that “a person cannot be an arbitrator, who, by nature or accident, has not discretion.”<sup>155</sup> When disputants chose an arbitrator, the law respected this selection: “Everyone whom the law supposes capable of judging, whatever may be his character for integrity or wisdom, may

<sup>148</sup> Holdsworth, *supra* note 130, at 191.

<sup>149</sup> STEWART KYD, *A TREATISE ON THE LAW OF AWARDS* (1808), at 122, citing 2 Rol. Rep. 189.

<sup>150</sup> Holdsworth, *supra* note 130, at 192.

<sup>151</sup> Kyd, *supra* note 149, at 128.

<sup>152</sup> *Id.* at 145-6.

<sup>153</sup> *Id.* at 147.

<sup>154</sup> *Id.* at 127.

<sup>155</sup> *Id.* at 147.

be an arbitrator or umpire; because he is appointed by the choice of the parties themselves, it is their folly to choose an improper person.”<sup>156</sup>

Blackstone’s *Commentaries*<sup>157</sup> observed that courts embraced arbitration for its power to redress personal wrongs.<sup>158</sup> He noted the “great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted at a trial at law.”<sup>159</sup> But awards could “be set aside for corruption or other misbehaviour in the arbitrators or umpire.”<sup>160</sup> Blackstone also noted that “it is now become considerable part of the business of superior courts to set aside such awards when partially or illegally made.”<sup>161</sup>

The rudiments of the FAA’s reviewing standards are most clearly revealed in Joseph Chitty’s volume, *A Treatise on the Law of Commerce*.<sup>162</sup> When courts denied enforcement to awards, they did so on very narrow grounds, such as when arbitrators were “partial and unjust, or had mistaken the law.”<sup>163</sup> The same result occurred when “arbitration or umpirage was procured by corruption or undue means,”<sup>164</sup> or the award did “not follow the submission, or (was) too extensive or too limited,<sup>165</sup> or the arbitrator “exceeded his authority, or had no authority to make the award, or that his authority was

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<sup>156</sup> *Id.* at 70.

<sup>157</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS (III) (Geogre Sharswood, ed. 1908).

<sup>158</sup> *Id.* at 15.

<sup>159</sup> *Id.* at 16.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> JOSEPH CHITTY, A TREATISE ON THE LAWS OF COMMERCE AND MANUFACTURES (III, 1824), available online at <http://books.google.com/books?id=TJ4yAAAAIAAJ&pg=RA1-PA661&dq=chitty+on+awards+and+attachment#PPR1.M1>.

<sup>163</sup> *Id.* at 665.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

revoked.”<sup>166</sup> An award was not confirmed if it had procedural “irregularity, as want of notice of the meeting,”<sup>167</sup> or was produced by “collusion or misbehavior of the arbitrators.”<sup>168</sup>

My historical research reveals the original sources of judicial review standards that eventually appeared in the FAA. I show that the FAA adopted standards from centuries of common law arbitrations, which in turn were the product of the Arbitration Act of 1698.

I conclude by noting that my research disclosed evidence that contradicts my thesis. A few courts did, in fact, review statutory arbitrations. The evidence appears in the 1835 publication of *Bacon’s Abridgement*.<sup>169</sup> Bacon reported that courts enforced arbitrator rulings even when the awards conflicted with the law: “If the parties choose to refer a distinct question of law, and nothing else, to the decision of an arbitrator instead of the court, his award, though not agreeable to the law, cannot be impeached.”<sup>170</sup> Bacon noted that arbitrators could decide issues of statutory law, and “[w]here the submission was in pursuance of an act of the legislature, it was held that the award could not be impeached, unless the arbitrators had exceeded their powers or executed them imperfectly.”<sup>171</sup>

But this phenomenon was rare. And when they reviewed statutory awards, some colonial courts overturned them.<sup>172</sup> Important to add, the cases did not report that the

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<sup>166</sup> *Id.* at 666.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW WITH LARGE ADDITION AND CORRECTIONS (Henry Gwillim & Charles E. Dodd, eds., 1831).

<sup>170</sup> *Id.* at 363.

<sup>171</sup> *Id.*

<sup>172</sup> Citing *Cornforth v. Green*, 2 Vern. 705, Bacon also observed: “Where, however, it

arbitration agreement was imposed on one of the parties, as is the case in *Gilmer* arbitrations.

*F. U.S. Courts Followed the English Approach of Confirming Arbitration Awards*

Throughout the nineteenth century, American courts closely followed the English approach to arbitration. Overall, they favored arbitration.<sup>173</sup> Judges admired its simple procedures<sup>174</sup> and efficiency.<sup>175</sup> When courts referred disputes to arbitration, their jurisdiction ended.<sup>176</sup> Rulings supported arbitrations after the process ran its full course and ended with an award. Thus, courts enforced arbitration agreements that consented to judicial enforcement of the award.<sup>177</sup> Seeing practical utility in arbitration,<sup>178</sup> judges ruled that they had authority to enforce arbitrator rulings<sup>179</sup>— even erroneous ones.<sup>180</sup> When

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appears on the face of the award that the arbitrator has decided contrary to the law, the courts are bound to take notice of the objection, and to set aside the award.” *Id.* at 365.

<sup>173</sup> Neely v. Buford, 65 Mo. 448, 451 (1877): “Courts are disposed to regard with favor these tribunals of the parties’ own selection.”

<sup>174</sup> Brush v. Fisher, 38 N.W. 446, 448 (Mich. 1888).

<sup>175</sup> Campbell v. Western, 3 Paige Ch. 124, 138 (N.Y. 1832):

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.

<sup>176</sup> 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.”

<sup>177</sup> 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.”

<sup>178</sup> 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 intendment will be made in their favor, and a construction given to them that will support them if possible. . . .”

<sup>179</sup> 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.”

<sup>180</sup> 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

awards were partially defective, courts enforced the valid part of the arbitrator's award.<sup>181</sup>

Courts rejected revocations after an award was rendered.<sup>182</sup> In confirming awards, they used more deferential standards than appellate courts used to review trial rulings.<sup>183</sup>

Thus, awards were treated as final and binding.<sup>184</sup> Arbitrators could not withdraw their ruling.<sup>185</sup> Where only two out of three arbitrators signed an award, courts enforced the

ruling.<sup>186</sup> If 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.<sup>187</sup> In one case, an award was enforced after it was amended to include

payment of forum costs.<sup>188</sup>

made will not invalidate it.”

<sup>181</sup> 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.”

<sup>182</sup> 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* McGheehen 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. . . .”

<sup>183</sup> 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* [emphasis added].”

<sup>184</sup> Tankersley v. Richardson, 2 Stew. 130 (Ala. 1829): “Awards are much favored, and the court will intend everything in their favor.”

<sup>185</sup> 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.”

<sup>186</sup> Campbell, *supra* note 175, 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.”

<sup>187</sup> 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.”

<sup>188</sup> 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 appellant contended that the arbitrators amended the award by billing costs of the arbitration. 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

IV. JUDICIAL REVIEW OF STATUTORY ARBITRATIONS: FEDERAL COURTS SHOULD EQUALLY VACATE AWARDS AND REVERSE TRIAL COURT JUDGMENTS

A. *Should Federal Courts Equally Vacate Statutory Arbitration Awards and Reverse Civil Court Judgment? Gilmer Forum Substitution Theory Answers “Yes”*

I now explain how the historical relationship between courts and arbitrations can be put to an empirical test. My thesis is that the FAA’s extreme deference to awards evolved from common law arbitrations that were protected from court interference by William III. I contend, however, that *Gilmer* created a new form of adjudication when it approved mandatory arbitration of statutory rights. Congress created these rights— not the contracting parties— and Congress intended that these rights would be enforced by Article III courts, not citizen arbitrators. This new form of arbitration does not warrant the FAA’s great deference to common law arbitrations.

Furthermore, I contend that *Gilmer*’s theory of forum substitution means that federal courts should equally vacate awards and court judgments. Robert Gilmer argued that the mandatory arbitration procedures were inferior to judicial process otherwise afforded to him under the Age Discrimination in Employment Act (ADEA). The Supreme Court broadly rejected Gilmer’s contention.

Gilmer argued that Congress intended for the ADEA not only “to address individual grievances, but also to further important social policies.”<sup>189</sup> The majority opinion dismissed this concern,<sup>190</sup> finding no conflict in the ADEA’s prohibition of age discrimination and the FAA’s public policy that favors arbitration of disputes.<sup>191</sup>

Equating arbitrations to trials, the opinion reasoned: “It is true that arbitration focuses on

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are satisfied that the execution of this subsequent instrument did not vitiate the original award, which remained unaltered by the arbitrators.” *Id.* at 368.

<sup>189</sup> Gilmer, *supra* note 12, at 27.

<sup>190</sup> *Id.* at 27-28.

<sup>191</sup> *Id.* at 28.

specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes.”<sup>192</sup> They added that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>193</sup>

Gilmer challenged a variety of arbitration procedures, viewing them as inadequate to enforce rights under the ADEA.<sup>194</sup> Broadly dismissing this idea, the Court reasoned that “generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.”<sup>195</sup> The majority rejected Gilmer’s arguments that arbitration panels would be biased,<sup>196</sup> and that discovery in arbitration would be less fruitful for complainants compared to trials.<sup>197</sup>

Also, Gilmer contended that securities arbitrators do not issue written opinions, thereby depriving him effective appellate review.<sup>198</sup> The Court sidestepped this argument, noting that NYSE arbitrations required a written decision.<sup>199</sup> The Court also ignored the terse nature of these private rulings. Finally, Gilmer challenged the narrower scope of review of an award as compared to a judgment.<sup>200</sup> But the majority relegated this issue to a small footnote, in a feeble rejection.<sup>201</sup>

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*Id.*

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*Id.*

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*Id.* at 28-34.

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*Id.* at 30.

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*Id.* at 30-31.

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*Id.* at 31-32.

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*Id.* at 31-32.

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*Id.* at 32.

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*Id.* at 32, n.4

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*Id.* The majority concluded: “We have stated, however, that although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.”

In sum, the *Gilmer* majority did not expressly rule on award reviewing standards in the FAA. Nonetheless, the opinion made sweeping assumptions that equated mandatory arbitration of similar claims. By this logic, judicial review of awards on statutory claims should be vacated to the same extent as court rulings on the same claims.

*B. Should Federal Courts Equally Vacate Statutory Arbitration Awards and Reverse Civil Court Judgments? FAA's Text and Legislative History Answers "No"*

In formulating my empirical test, I also consider an alternative theory that explains why federal courts should vacate a smaller percentage of awards compared to judicial rulings made in Article III proceedings on the same claims.

When Congress enacted the FAA in 1925,<sup>202</sup> lawmakers wanted to help businesses reduce expense and delay in resolving legal disputes.<sup>203</sup> Echoing the rationale for the Arbitration Act of 1698, business leaders in the 1920s contended that lawsuits led to “ruinous litigation.”<sup>204</sup> They told Congress that consumer prices rose because of the high cost of litigation.<sup>205</sup> Arbitration helped, however, to reduce these costs.<sup>206</sup>

Recall that the Statute of the Staple of 1353 and the Arbitration of 1698 responded to merchant concerns. Similarly, business leaders in the early 1920s worried about the

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<sup>202</sup> United States Arbitration Act, ch. 213, 43 Stat. 883 (1925), codified as amended at 9 U.S.C. §§ 1-16 (2000), renamed the Federal Arbitration Act in 1947. *See* Act of Feb. 12, 1925, ch. 213, § 1, 43 Stat. 883, amended by Act of July 30, 1947, ch. 392, 61 Stat. 669.

<sup>203</sup> S. REP. NO. 68-536, 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, 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”).

<sup>204</sup> *Joint Hearings before the Subcommittees of the Committees on the Judiciary*, 68<sup>th</sup> Cong. 1<sup>st</sup> Sess., on S. 1005 and H.R. 646, at 6 (1924) (Statement of Charles L. Bernheimer, Chairman of Committee on Arbitration).

<sup>205</sup> *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.”

<sup>206</sup> *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.”

harmful effects of lawsuits. They therefore advocated a national arbitration law to minimize judicial interference in their private attempts to settle their disputes.

A leading proponent of the FAA, Charles L. Bernheimer, explained to lawmakers that he had studied arbitration since the panic of 1907,<sup>207</sup> and found that the merchants' problems could have been abated by greater use of arbitration.<sup>208</sup> In another historical parallel, businesses in the 1920s echoed merchant complaints that courts enabled a party to break its promise to arbitrate.<sup>209</sup>

There are interesting parallels between Julius Henry Cohen's and John Locke's rationale for legislating judicial enforcement of arbitration agreements. Recall that Locke helped to draft the 1698 arbitration law, in a role like Cohen's. Locke came into this role after observing that courts rescued parties who lost at arbitration.<sup>210</sup> Locke and Cohen believed that public authority was needed to make arbitration more effective.

Second, when Cohen advocated passage of the FAA before Congress, he believed that courts had been hostile to arbitration for 300 years.<sup>211</sup> My historical study casts

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<sup>207</sup> *Joint Hearings before the Subcommittees of the Committees on the Judiciary*, 68<sup>th</sup> Cong. 1<sup>st</sup> 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.

<sup>208</sup>

*Id.*

<sup>209</sup>

*See* JOINT HEARINGS BEFORE THE SUBCOMMITTEES OF THE COMMITTEES ON THE JUDICIARY, 68<sup>TH</sup> CONG. 1<sup>ST</sup> SESS, ON S. 1005 AND H.R. 646, at 14 (1924). Congress was persuaded by Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce, who testified: "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.'" *Id.*

<sup>210</sup>

Horwitz & Oldham, *supra* note 108, at 138.

<sup>211</sup>

Cohen's advocacy was likely shaped by his earlier scholarship in Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L. J. 147, 147 (1921) ("For over

serious doubt on Cohen’s blanket condemnation of courts over 300 years. Indeed, if courts were so hostile to arbitration, how did arbitration manage to survive? But that is beside the more important point: The U.S. Supreme Court never questioned Cohen’s broadside of courts. The Court repeatedly adopted Cohen’s exaggerated account of the relationship of courts and arbitrations, which Congress blindly accepted in its legislative history for the FAA.

Compare the following Supreme Court assessments of this relationship with the historical evidence I presented in Part III (*supra*). In *Bernhardt v. Polygraphic Co. of Am., Inc.*,<sup>212</sup> the Court said 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.”<sup>213</sup> *Dean Witter Reynolds, Inc. v. Byrd* stated that when Congress passed the FAA it was “motivated, first and foremost, by a congressional desire”<sup>214</sup> to reverse long-standing judicial resistance to arbitration. The Court made the same point in *Scherk v. Alberto-Culver Co.*<sup>215</sup>

More recently, *Gilmer* repeated these historical distortions, stating 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.”<sup>216</sup> Again, in

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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.”).

<sup>212</sup> 350 U.S. 198 (1956).

<sup>213</sup> *Id.* at 211, n.5 (Frankfurter, concurring).

<sup>214</sup> 470 U.S. 213, 219-20, 220 n. 6 (1985).

<sup>215</sup> 417 U.S. 506, 510 n.4 (1974), observing:

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.

<sup>216</sup> *Gilmer*, *supra* note 12, at 24.

*Circuit City Stores, Inc. v. Adams*,<sup>217</sup> the Court erred, stating that “the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice.”<sup>218</sup>

In short, the FAA was built on a flawed understanding of the historical relationship between courts and arbitration. Be that as it may, when the Sixty-Eighth Congress passed the original FAA, and Parliament passed the 1698 Arbitration Act, they had similar intentions: to strengthen the autonomy of arbitration as a means for promoting the economic interests of businesses, merchants, and traders.

The evidence shows that the FAA is a direct descendent of the 1698 Arbitration Act, a law that was designed for *commercial parties* who wanted to use arbitration as an effective alternative to courts. I summarize this evidence in Chart A. The chart compares the text of the Arbitration Act of 1698 and the FAA. When the text is placed side-by-side, the case for legislative ancestry is clear. The terms trade, merchants, and maritime are highlighted because these words show English and American lawmakers enacted arbitration laws specifically to benefit these sectors of the economy. Arbitration laws were designed to allow mature industry tribunals great latitude in working out problems among commercial peers, with little interference from judges who were generally ignorant of business practices.

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<sup>217</sup> 532 U.S. 105 (2001).

<sup>218</sup> *Id.* at 111.

<b>Chart A: Enforcing Arbitration Agreements                      Comparing the Commercial Scope of the 1698 Arbitration Act                      and Federal Arbitration Act of 1925</b>	
<b>1698 Arbitration Act</b> <sup>219</sup>	<b>Federal Arbitration Act</b> <sup>220</sup>
<p><b>Section 1: Recital that References made by Rule of Court have contributed to the Ease of the Subject</b></p> <p><i>Merchants</i>, &amp;c., where Remedy only by Personal Action or Suit in Equity, may agree that Award may be made a Rule of Court, and may insert the same in their Submission. Whereas it hath been found by Experience That References made by Rule of Court have contributed much to the Ease of the Subject in the determining of Controversies because the Parties become thereby obliged to submit to the Award of the Arbitrators under the Penalty of Imprisonment for their Contempt in case they refuse Submission Now <i>for promoting Trade</i> and rendering the Awards of Arbitrators the more effectual in all Cases for the final Determination of Controversies referred to them. <i>Merchants and Traders or others concerning Matters of Account or Trade</i> or other Matters Be it enacted . . . . <i>Itt shall and may be lawfull for all Merchants and Traders</i> &amp; others desiring to end any Controversie Suit or Quarrel Controversies Suits or Quarrels . . . by Arbitration to agree that their Submission of their Suit to the Award or Umpirage of any person or persons should be made a Rule of any of His Majesties Courts of Record which the Parties shall choose and to insert such their Agreement in their Submission or the Condition of the Bond or Promise whereby they oblige themselves respectively to submit to the Award or Umpirage of any Person or Persons which Agreement being so made and inserted in their Submission or Promise or Condition of their respective Bonds shall or may upon producing an Affidavit thereof made by the Witnesses thereunto or any one of them in the Court of which the same is agreed to be made a Rule &amp; reading and filing the said Affidavit in Court be entred of Record in such Court and a Rule shall thereupon be made by the said Court that the Parties shall submit to &amp; finally be concluded by the Arbitration or Umpirage which shall be made concerning them by the Arbitrators or Umpire pursuant to such Submission . . . .</p>	<p><b>Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate</b></p> <p>A written provision in any <i>maritime transaction or a contract evidencing a transaction involving commerce</i> to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.</p>

While Chart A compares how the English and American arbitration statutes similarly enforced promises to arbitrate disputes, Chart B (*infra*) traces the origins of FAA judicial review standards to English statutory and common law sources. While

<sup>219</sup> *Supra* note 118.

<sup>220</sup> *Supra* note 202.

Congress was mostly concerned with enforcing arbitration agreements,<sup>221</sup> 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.”<sup>222</sup> 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.<sup>223</sup> The Senate included a lengthy excerpt from a lawyer’s brief as its intent on award enforcement.<sup>224</sup> Section 10 codified these grounds to vacate an award.<sup>225</sup>

Chart B provides clear evidence of the origins of key judicial review standards in Section 10 of the FAA. The chart links the FAA standards to such disparate sources as the 1698 Arbitration Act, and common law treatises by Blackstone, Chitty, and Kyd.

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<sup>221</sup> *Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the Judiciary*, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 6 (Statement of Charles L. Bernheimer, January 9, 1924). The House Report stated: “The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction o[f] admiralty, or which may be the subject of litigation in the Federal courts.” H.R. REP. NO. 68-96, *supra* note 203, at 3.

<sup>222</sup> H.R. REP. NO. 68-96, *supra* note 203, at 2.

<sup>223</sup> S. REP. NO. 68-536, *supra* note 203, at 4.

<sup>224</sup> *Hearings on the Subject of Interstate Commercial Disputes*, *supra* note 221, at 36 (Statement of W.W. Nichols, January 9, 1924):

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.

<sup>225</sup> *See supra* note 202, Section 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 arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Chart B shows, in the emphasized expressions, that Section 10(1) of the 1925 FAA took nearly verbatim reproductions of these early statutory and common law sources.

<b>Chart B: Judicial Review of Arbitration Awards Comparing English Law (Late 1600s-Early 1800s) and Federal Arbitration Act (1925) Standards for Reviewing Awards</b>	
<b><u>English Common Law (Late 1700s-Early 1800s)</u></b>	<b><u>Federal Arbitration Act</u></b>
<p style="text-align: center;"><b><u>1698 Arbitration Act</u></b></p> <p style="text-align: center;"><b>Section 1: Recital that References made by Rule of Court have contributed to the Ease of the Subject</b></p> <p>... And in case of Disobedience to such Arbitration or Umpirage the Party neglecting or refusing to performe and execute the same or any part thereof shall be subject to all the Penalties of contemning a Rule of Court when hee is a Suitor or Defendant in such Court and the Court on Motion shall issue Processe accordingly which Processe shall not be stopt or delayed in its Execution by any Order Rule Co[m]mand or Processe of any other Court either of Law or Equity unlesse it shall be made appeare on Oath to such Court that the Arbitrators or Umpire misbehaved themselves and that <b>such Award Arbitration or Umpirage was procured by Corruption or other undue Means.</b></p> <p style="text-align: center;"><b>WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS (III) (Geogre Sharswood, ed. 1908)</b></p> <p>Awards could “be set aside for corruption or <b>other misbehaviour</b> in the arbitrators or umpire.”</p> <p style="text-align: center;"><b>JOSEPH CHITTY, A TREATISE ON THE LAWS OF COMMERCE AND MANUFACTURES (III, 1824)</b></p> <p>Courts denied enforcement to awards when arbitrators were “<b>partial</b> and unjust, or had mistaken the law,” or the award did “not follow the submission, or (was) too extensive or too limited,” or “the arbitrator <b>has exceeded his authority</b>, or had no authority to make the award, or that his authority was revoked,” or there was procedural “irregularity, as want of notice of the meeting,” or the award was flawed due to “collusion, or misbehaviour of the arbitrators.”</p> <p style="text-align: center;"><b>STEWART KYD, A TREATISE ON THE LAW OF AWARDS (1808)</b></p> <p>Kyd: “it was held that the award could not be impeached, unless the arbitrators had exceeded their powers or <b>executed them imperfectly.</b>”</p>	<p style="text-align: center;"><b>Section 10 authorizes courts to vacate an award:</b></p> <p>(1) where the award <b>was procured by corruption, fraud, or undue means;</b></p> <p>(2) where there was <b>evident partiality</b> or corruption by the arbitrators;</p> <p>(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 <b>other misbehavior</b> by which the rights of any party have been prejudiced; or</p> <p>(4) where the arbitrators <b>exceeded their powers</b>, or so <b>imperfectly executed</b> them that a mutual, final, and definite award upon the subject matter submitted was not made.</p>

## V. EMPIRICAL RESEARCH METHODS AND STATISTICAL RESULTS

*A. Method for Creating the Sample*

I used research methods from my earlier empirical studies.<sup>226</sup> The sample was derived from Westlaw's internet service. Federal and state databases were searched for cases because employers and individuals are allowed a choice of forum to contest awards. Keywords were derived from terms in the FAA, RUAA and state arbitration laws.<sup>227</sup>

Cases were limited to arbitrations involving an individual and employer. Each case involved a post-award dispute in which an arbitrator's ruling was challenged by either an employee or employer. Arbitration cases involving unions and employers were excluded because they involve unique characteristics of labor-management relations.<sup>228</sup>

The sample began with a 1975 decision,<sup>229</sup> and ended with cases from February 2008. 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 employees resisted arbitration, were compelled to arbitrate their claims, and were later involved in a post-award

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<sup>226</sup> E.g., Michael H. LeRoy & Peter Feuille, *As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 STAN. L. & POL'Y REV. 191, 202-03 (2007). Also see Michael H. LeRoy & Peter Feuille, *Reinventing the Enterprise Wheel Court Review of Punitive Awards in Labor and Employment Arbitrations*, 10 HARV. NEGOT. L. REV. 199, 230-34 (2006); and Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RES. 19, 45-48 (2001).

<sup>227</sup> E.g., "PROCURED BY CORRUPTION," or "EVIDENT PARTIALITY," or "REFUSING TO POSTPONE THE HEARING," or "ARBITRATORS EXCEEDED THEIR POWERS," or "IMPERFECTLY EXECUTED."

<sup>228</sup> See *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960), finding that the arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. . . . He is rather part of a system of self-government created by and confined to the parties."

<sup>229</sup> *McClure v. Montgomery County Community Action Agency*, 1975 WL 181652 (Ohio App. 2 Dist. 1975).

lawsuit.<sup>230</sup> Some cases involved employees who preferred court to arbitration but prevailed in the private forum, leading the employer to seek vacatur.<sup>231</sup>

Once a case met the criteria, I checked it against a roster to avoid duplication.<sup>232</sup> Relevant data were recorded. Variables included (1) party who won the award, (2) state or federal court, (3) first court ruling on motion to confirm or vacate an award, and (3) appellate ruling, where appropriate. Other data were analyzed for companion studies.<sup>233</sup>

The data sheet had a long list of grounds for a party to challenge an award. There were four FAA options, five options under state Uniform Arbitration Acts and a sixth possibility for the Revised Uniform Arbitration Act, five *Trilogy* standards, and five separate federal common law standards.<sup>234</sup> The list also included miscellaneous grounds for punitive awards, awards with excessive remedies, and unconstitutional awards.

### *B. Empirical Results*

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<sup>230</sup> Gold, *supra* note 65.

<sup>231</sup> 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.

<sup>232</sup> The roster appears in Appendix I. In rare cases, an award was challenged once and remanded to arbitration; and after arbitrators ruled again, the award was challenged a second time. I treated these award challenges as separate cases, even though the parties and dispute remained the same, because the awards differed. See *Sawtelle v. Waddell Reed Inc.*, 754 N.Y.S.2d 264 (2003).

<sup>233</sup> Michael H. LeRoy & Peter Feuille, *Happily Never After: When Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 205 (2008) reporting on a recent spurt of award-review cases, exemplified by the finding that 62% of federal district award-review courts decisions occurred since 2000. Another companion study is Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551 (2008). Using an earlier database, this study concluded that states are expanding arbitration reviewing standards.

<sup>234</sup> In rank order of their frequency, the issues were: (1) Manifest Disregard of the Law (Non-Trilogy Common Law Standard), (2) Exceed Powers or Imperfectly Execute Award (9 U.S.C. § 10(4) or State UAA Equivalent), (3) Partiality (9 U.S.C. § 10(2) or State UAA Equivalent), (4) Award Violated a Public Policy (Trilogy Common Law), (5) Misconduct (9 U.S.C. § 10(3) or State UAA Equivalent), (6) Lacks Jurisdiction Due to Timeliness Requirements (9 U.S.C. § 12/State Equivalent), (7) Arbitrator Committed A Fact-Finding Error (Trilogy Common Law), (8) Arbitrary & Capricious, Irrational, or Gross Error (Non-Trilogy Common Law Standard); (9) Arbitrator Exceeded Authority (Trilogy Common Law), (10) Award Procured by Corruption, Fraud, or Undue Means (9 U.S.C. § 10(1) or State UAA Equivalent), (11) Award Did Not Draw Its Essence from the Agreement (Trilogy Common Law); (12) Remedy Was Punitive, Excessive, or Unauthorized (Non-Trilogy Common Law Standard), and (13) Unconstitutional or Due Process (Non-Trilogy Common Law Standard).

My database consists of 291 arbitration awards that involved a legal claim asserted by an employee or employer. At the conclusion of these arbitrations, one or both parties challenged the award. As a result, 170 federal district courts and 121 first-level state courts made a ruling to enforce, or partially enforce, or vacate the award. In 90 federal cases, and 102 state cases, appellate courts ruled on these lower court judgments— again, enforcing, partially enforcing, or vacating the awards. Altogether, the database has 483 court rulings that reviewed disputed employment arbitration awards.

This study also reports comparable data from federal courts. Thus, Table 1 compares two federal court metrics. The data in Rows 1-4 come from my database. Row 5 shows data shows from the Administrative Office of U.S. Courts.<sup>235</sup> Both data sources measure how often a federal court overturns a lower tribunal’s ruling. Rows 1-4 show the vacatur rate for arbitration awards.

Row 5 is the reversal rate for lower court rulings. This metric provides a good comparison to the reversal rate for arbitration awards— and thereby tests Robert Gilmer’s contention that that judicial review of arbitration decisions is too limited to vindicate the public policy purposes behind laws that combat employment discrimination.<sup>236</sup>

In Table 1, federal courts in my database vacated an extremely small percentage of awards. Row 1 shows that district courts vacated awards in 7 out of 152 cases (4.3 percent). In Row 2, the percentage was the same for the subset of awards involving only Title VII claims (2 out of 42, or 4.5 percent). The only deviation from extreme deference

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<sup>235</sup> Administrative Office of the U.S. Courts (2006), *Statistical Tables for the Federal Judiciary December 31, 2006, U.S. Courts of Appeals— Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending December 31, 2006*, tbl. B-5, at 12 (see All Circuits, Other Private Civil, at Line 6), available at <http://www.uscourts.gov/stats/dec06/B05Dec06.pdf>.

<sup>236</sup> Recall that the Gilmer, *supra* note 12 at 32, confidently predicted “that although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.”

to awards involving appellate review of all arbitrator rulings (Row 3), where 9 out of 73 awards were vacated (10.7 percent). However, the pattern of extreme deference to awards reappeared for Title VII arbitrations. In Row 4, appellate courts vacated only 1 out of 21 of these arbitrator rulings (4.8 percent).

Table 1 shows how federal appellate courts ruled on judgments that were appealed from district courts. In Row 5, the courts terminated 5,917 cases on the merits, and in doing so they reversed 764 judgments. This led to a reversal rate of 12.9 percent.

At first glance, all the figures appear similar. Federal courts reverse arbitrators and judges infrequently. But on closer scrutiny, it is clear that the vacatur rate for arbitrators is much lower—about three times lower—than for all civil court judgments. Important to note, the 4.3 percent vacatur ruling by district courts for all awards is exactly one-third of the 12.9 percent figure for all court judgments reversed by appellate courts. Clearly, federal courts treat statutory awards with much more deference than their own rulings for identical claims.

<b>Table 1<sup>237</sup></b> <b>Federal Courts</b> <b>Judicial Review of Arbitration Awards and Analogous Civil Court Rulings</b>				
	Confirm Arbitrator Award or Affirm Court Judgment	Partly Confirm Award or Dismiss, Remand, Other Judgment	Vacate Arbitrator Award or Reverse Court Judgment	Total
<b><u>District Courts</u></b>				
<b>Row 1</b> Review All Awards	152 Arbitrator Awards (93.8%)	3 Arbitrator Awards (1.9%)	<b>7 Arbitrator Awards</b> ▶ (4.3%)	162 Arbitrator Awards
<b>Row 2</b> Review Subset of Title VII Awards	42 Arbitrator Awards (95.5%)	0	<b>2 Arbitrator Awards</b> ▶ (4.5%)	44 Arbitrator Awards
<b><u>Appellate Courts</u></b>				
<b>Row 3</b> Review Award	73 Arbitrator Awards (86.9%)	2 Arbitrator Awards (2.4%)	<b>9 Arbitrator Awards</b> ▶ (10.7%)	84 Arbitrator Awards
<b>Row 4</b> Review Subset of Title VII Awards	20 Arbitrator Awards (95.2%)	0	<b>1 Arbitrator Award</b> ▶ (4.8%)	21 Arbitrator Awards
<b>Row 5</b> Review Civil Court Ruling	4,679 Trial Court Judgments (79.0%)	474 Trial Court Judgments (8.1%)	<b>764 Trial Court Judgments</b> (12.9%)	5,917 Trial Court Judgments

<sup>237</sup>

Administrative Office of the U.S. Courts, *supra* note 235.

Table 2 puts the forgoing data in broader perspective. By way of background, my research is designed to measure vacatur rates by federal and state courts at the initial and appellate stages of judicial review. Unless these percentages are extremely low or high, they are hard to interpret. As I conducted my empirical analysis, I also researched similar studies. They provide comparable metrics for appellate courts that review an adjudicatory ruling.<sup>238</sup> The goal is to relate my results to studies that examine appellate court rulings that reverse tribunals.

Table 2 compares my findings to reversal rates in other studies. This improves my ability to assess whether federal court deference to awards is insufficient, moderate, or excessive. I also note that there is a theoretical basis for this comparison. It tests *Gilmer*'s conclusion that judicial review of arbitration is sufficient to ensure enforcement of employment discrimination laws.

Table 2 ranks appellate reversal rates in other studies. 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).

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<sup>238</sup> Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002); Cathy Catherson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287 (2006); James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C.L. REV. 939 (1996); Kimberly A. Moore, *Judges, Juries, and Patent Cases— An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365 (2000); 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); Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. DISP. RESOL. 19 (see 50 tbl.1, (2001)); and David C. Baldus, et al., *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).

Level of Deference by Appellate Court	Reversal Rate by Appellate Court
<i>Extreme Deference</i> <i>Reversal Rate 8.0% or Less</i>	<p>► <b>4.3% Vacatur in 7/152 of All Arbitrator Awards in Sample Appealed to U.S. District Court</b></p> <p>► <b>4.5% Vacatur in 2/42 of Title VII Arbitrator Awards in Sample Appealed to U.S. District Court</b></p> <p>6% Reversal of Employer Dismissals of Employment Discrimination Lawsuits (Clermont &amp; Eisenberg, 2002)</p> <p>7.4% Reversal by U.S. Circuit Court of Appeals, 9<sup>th</sup> Circuit Lower Court Rulings 2005 (Catterson, 2006)</p>
<i>Great Deference</i> <i>Reversal Rate Between 8.1% and 16.0%</i>	<p>9.1% Reversal by All U.S. Circuit Courts of Appeals, 2005 (Catterson, 2006)</p> <p>14.7% Reversal by Federal Appeals Courts of NLRB Rulings of Union Liability (Brudney, 1996)</p>
<i>High Deference</i> <i>Reversal Rate Between 16.1% and 24.0%</i>	<p>19.7% Reversal by Federal Appeals Courts of NLRB Rulings of Employer Liability (Brudney, 1996)</p> <p>22.0% Reversal by Federal Appeals Courts of Jury Patent Rulings (Moore, 2000)</p> <p>22.0% Reversal by Federal Appeals Courts of Judges' Patent Rulings (Moore, 2000)</p>
<i>Moderate Deference</i> <i>Reversal Rate Between 24.1% and 32.0%</i>	<p>28.2% Reversal by Federal District Courts of Labor Arbitration Awards, 1960-1991 (LeRoy &amp; Feuille, 2001)</p> <p>29.5% Reversal by Federal Appeals Courts of Labor Arbitration Awards, 1961-1991 (LeRoy &amp; Feuille, 2001)</p> <p>29.7% Reversal by Federal District Courts of Labor Arbitration Awards, 1991-2001 (LeRoy &amp; Feuille, 2001)</p>
<i>Slight Deference</i> <i>Reversal Rate Between 32.1% and 40.0%</i>	<p>33.6% Reversal by Federal Appeals Courts of Labor Arbitration Awards, 1991-2001 (LeRoy &amp; Feuille, 2001)</p>
<i>No Deference</i> <i>Reversal Rate of 40.0% and Above</i>	<p>56% Reversal of Employee Wins in Employment Discrimination Lawsuits (Clermont &amp; Eisenberg, 2002)</p> <p>66% of Death Penalties Reversed in Nebraska (Baldus, et al., 2002)</p>

Table 2 paints a clear picture: No published finding shows as much deference to an adjudicator's ruling as the present study's data on federal court review of employment arbitration awards. District courts—the first layer of review for awards under the FAA—vacated 4.3 percent of all awards, and 4.5 percent of all Title VII awards. This exceeds by three percentage points the extreme deference of Ninth Circuit appellate courts in Catherson's study.<sup>239</sup>

Similarly, my finding shows that courts vacated a much smaller percentage of Title VII employment awards— 4.5 percent— compared to reversing 6.0 percent of dismissal rulings in favor of *employers* in Title VII lawsuits in the Clermont and Eisenberg study. Also, I note that in the Clermont and Eisenberg study, appellate courts were the antithesis of deferential in reviewing *employee* wins in discrimination lawsuits. These courts reversed 56 percent of these lower court rulings. Overall, the appellate courts in Clermont and Eisenberg's did not defer to lower court rulings.

Looking at all the other studies in Table 2 reinforces my conclusion that federal court review of employment arbitration awards is extraordinarily deferential. The fact that there is no comparable finding in any other empirical study suggests that my study reports an extreme phenomenon.

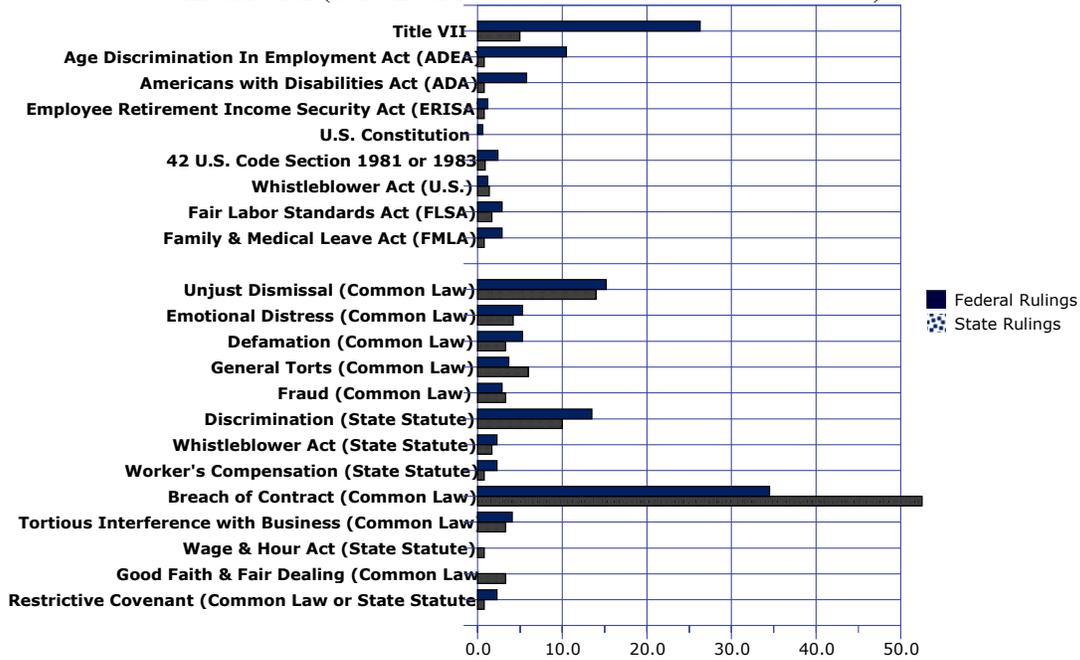
In Tables 3 and 4, I delve deeper into my database to further explore statutory and common law arbitrations.

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<sup>239</sup>

Catherson, *supra* note 238.

**Table 3: Federal & State Court Rulings on Award Challenges by Type of Legal Issue in Arbitration (Percent of Federal Court and State Court Cases)**



	Federal Rulings	State Rulings
Restrictive Covenant (Common Law or State Statute)	2.3	0.8
Good Faith & Fair Dealing (Common Law)	3.5	3.3
Wage & Hour Act (State Statute)	1.8	0.8
Tortious Interference with Business (Common Law)	4.1	3.3
Breach of Contract (Common Law)	34.5	52.5
Worker's Compensation (State Statute)	2.3	0.8
Whistleblower Act (State Statute)	2.3	1.7
Discrimination (State Statute)	13.5	10.0
Fraud (Common Law)	2.9	3.3
General Torts (Common Law)	3.7	6.0
Defamation (Common Law)	5.3	3.3
Emotional Distress (Common Law)	5.3	4.2
Unjust Dismissal (Common Law)	15.2	14.0
Family & Medical Leave Act (FMLA)	2.9	0.8
Fair Labor Standards Act (FLSA)	2.9	1.7
Whistleblower Act (U.S.)	1.2	1.4
42 U.S. Code Section 1981 or 1983	2.4	0.9
U.S. Constitution	0.6	0.0
Employee Retirement Income Security Act (ERISA)	1.2	0.8
Americans with Disabilities Act (ADA)	5.8	0.8
Age Discrimination In Employment Act (ADEA)	10.5	0.8
Title VII	26.3	5.0

Table 3 illustrates my reason for focusing on Title VII and breach of contract claims. It shows the various legal issues that arbitrators decided, and arranges them by frequency. Each legal issue has two bars: respectively, the dark blue bar, and the shaded bar, respectively represent federal and state court review of these awards.

Notice, too, that the bar graphs are divided in top and bottom parts. The top shows court rulings on awards that involved federal employment statutes. The bottom shows how courts ruled on awards that involved state common law claims.

Using Table 3, I determined that Title VII was the most frequently arbitrated statute in the federal court subset, comprising 26.3% of all award-review cases.<sup>240</sup> In state cases, 52.5% involved an award that ruled on a contract claim. These findings, in turn, informed my analysis for Table 4.

In Table 4, I focused on the sub-sample of 65 federal court rulings on Title VII awards, and compared this result to the 115 state court rulings on breach of contract awards. In the state law contract cases, first-level courts enforced 73.0 percent of the awards and vacated 23.8 percent of the awards. The remaining 3.2 percent were partially confirmed. Crucial to note, state courts vacated a much higher percentage of breach-of-contract awards compared to federal district courts that vacated 4.5 percent of Title VII awards. At the federal and state appellate court levels, the findings were similar.

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<sup>240</sup>

*See* the last data-entry in the data table near the bottom of Chart A.

<b>Table 4</b>				
<b>Comparing Federal Court Review of Arbitration Awards with Title VII Claims and State Court Review of Breach of Contract Awards</b>				
	Confirm Award	Partly Confirm Award	Vacate Award	Total
<b>FEDERAL COURT</b>				
Federal District Court Rulings on Title VII Awards	42 95.5%	0	2 4.5%	44
Federal Appellate Court Rulings on Title VII Awards	20 95.2%	0	1 4.8%	21
<b>STATE COURT</b>				
State First-Level Court Rulings on Breach of Contract Awards	46 73.0%	2 3.2%	15 23.8%	63
State Appellate Court Review on Breach of Contract Awards	35 67.3%	6 11.5%	11 21.2%	52

Taken together, what do the statistics show? Arbitrator rulings on statutory discrimination claims are more insulated from court review than comparable rulings by federal judges. The level of deference is so extreme that it verges on rubber stamping. Oddly, when courts review arbitrator rulings on common law claims, they go to the other extreme, and vacate too many awards—at least when compared to reversal rates in other circumstances.<sup>241</sup> *Gilmer* has blinded federal courts to the shift in context from common

<sup>241</sup> See LeRoy, *Misguided Fairness*, *supra* note 233, at 602 (state standards for reviewing awards are more conducive to vacating these private rulings).

law to statutory awards. Seeing no difference in the role that arbitrators play in these very different contexts, federal courts automatically defer to the arbitrator's judgment.

VI. JUDICIAL REVIEW OF STATUTORY RULINGS  
BY CITIZEN ARBITRATORS AND ARTICLE III JUDGES

A. *Constitutional Framers Did Not Envision the Delegation of  
Article III Powers to Citizen Arbitrators*

Constitutional framers would abhor the idea of delegating Article III powers to private citizens. They created Article III power to do more than resolve disputes. As I now show, *Gilmer* forum substitution disregards basic constitutional assumptions by pretending that citizen arbitrators are substitutes for federal judges.

To begin, the qualifications of arbitrators and federal judges are too different to support forum substitution. Anticipating the role of Article III judges, *Federalist No. 78* expected Congress to pass a voluminous code of laws.<sup>242</sup> Judges were bound by strict rules and precedents.<sup>243</sup> They needed “long and laborious study to acquire a competent knowledge”<sup>244</sup> of the laws.

The portrait of arbitrators is much different. Since the ancient Statute of the Staple, they have been selected as citizen experts in commercial codes or industry mores. While their experience and judgment mattered, they were not expected to know about legislation. Paying scant attention to arbitrator qualifications, *Gilmer* ignores prior Supreme Court decisions that evinced a contextual understanding of the arbitrator's role—for example, the role of labor arbitrators.

The Court tacitly implied that these private judges are not chosen because of their knowledge of laws. Rather, labor arbitrators bring their “informed judgment to bear in

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<sup>242</sup> THE FEDERALIST NO. 78, 469 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>243</sup> *Id.* at 471.

<sup>244</sup> *Id.*

order to reach a fair solution of a problem.”<sup>245</sup> The “labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.”<sup>246</sup> These citizen judges understand the intricacies of unionized work.<sup>247</sup>

Furthermore, arbitrators and federal judges derive their legitimacy from different sources. Over centuries, arbitrators were legitimated by the special confidence that disputants reposed in them.<sup>248</sup> But the framers were not concerned about the public’s view of judges. They wanted judges to be perpetually insulated from the whims of legislators and executive officers.

Thus, judges hold their office as long as they adhere to standards of good behavior. *Federalist No. 79* explained that political considerations should never be a disciplinary factor for dismissing a judge: “Any attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good.”<sup>249</sup>

Pay is another important criterion for comparing Article III judges and arbitrators. The *Federal Papers* defended the policy that protects judges from pay cuts. Hamilton

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<sup>245</sup> United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

<sup>246</sup> United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, at 582.

<sup>247</sup> Enterprise Wheel, *supra* note 245, at 596, n.2. Notably, the Court used a constitutional metaphor in explaining that the arbitrator “is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept . . . . *He is rather part of a system of self-government created by and confined to the parties (emphasis added).*” Warrior & Gulf, *supra* note 246, at 581. The Court added that “the labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.” *Id.* at 582.

<sup>248</sup> Enterprise Wheel, *supra* note 245, at 599, explaining that the agreement by unions and employers to submit disputes to labor arbitrators is founded in their confidence in this neutral’s abilities.

<sup>249</sup> THE FEDERALIST NO. 79, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

explained that “a power over a man’s subsistence amounts to a power over his will.”<sup>250</sup>

Arbitrator pay varies, but some are likely to be compensated better than federal judges.<sup>251</sup>

Judges and arbitrators differ by roles, sources of authority, qualifications, and pay. These differences have implications for judicial review of awards. For centuries, courts treated awards with great deference because they recognized the utility in having citizen experts adjudicate business disputes. Since disputants selected their arbitrators, it was natural for the FAA to insulate awards from vacatur. This regime of deference cannot be uprooted, however, from its royal provenance and common law foundation, and transplanted to mandatory arbitrations of statutory claims. In a word, arbitrators cannot substitute for federal judges.

*B. Judicial Review Standards under the FAA Are More Deferential to Arbitration Awards than FRCP Standards for Federal District Court Judgments*

Appellate review of federal district court judgments is governed by Rule 52(a) of the Federal Rules of Civil Procedures (FRCP). This permits a finding of fact to be

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<sup>250</sup> Thus, Hamilton spoke of the need to pay judges at pre-determined times, in fixed amounts that the legislature could never reduce. Recognizing that the value of a set salary could diminish over time due to inflation, he also explained that the Congress would be authorized to raise the salaries of judges. In sum, “this provision for the support of the judges . . . together with the permanent tenure of their offices” afforded the best prospect for maintaining judicial independence. *Id.*

<sup>251</sup> *E.g.*, Rick Brundrett, *Mediation, Arbitration Keep Cases Out of Court*, KNIGHT-RIDDER TRIB. BUS. NEWS, Mar. 1, 1999, (stating that court-appointed arbitrators in South Carolina charge \$200 per hour), 1999 WL 13721987; Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1 (showing that fees of \$500 or \$600 per hour are not uncommon); Ted Rohrlich, *Growing Use of Private Judges Raises Questions of Fairness Court*, L.A. TIMES, Dec. 26, 2000, at A1 (reporting that arbitrators charge between \$275 and \$600 per hour, thereby denying access to arbitration for poor litigants); *see also* Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 401 n. 189 (1996) (noting that an arbitrator charged a \$9,000 fee in a dispute that resulted in a \$15,000 award). Some court opinions also reveal the growing expense of arbitration fees. *See* Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234-35 (10<sup>th</sup> Cir. 1999) (finding an arbitration agreement unenforceable under the FAA because it required the employee to pay half of the arbitrator’s fees, estimated at \$1,875 - \$5,000); and Davis v. LPK Corp., 1998 WL 210262 (N.D. Cal. 1998) (denying enforcement of an arbitration agreement that would obligate the Title VII plaintiff to pay one-half of the arbitration fee, estimated to be \$2,000 per day).

overturned only if it is clearly erroneous.<sup>252</sup> Although deferential, this standard allows appellate courts more latitude to correct a judge's fact-finding compared to arbitration.

The FAA does not have an explicit fact-reviewing standard. The matter is regulated by federal common law. A leading precedent, *Major League Baseball Players Ass'n v. Garvey*, declares that when "an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, even silly factfinding does not provide a basis for a reviewing court to refuse to enforce the award."<sup>253</sup> Insofar as courts must defer to unsound fact-finding in awards, the FAA insulates arbitrators more than the FRCP shields judges from appellate review.

After district courts make mixed findings of fact and law, or findings of law, appellate courts may correct errors of law.<sup>254</sup> This differs from court review of awards. The FAA provides no express power to correct legal errors in awards. In some federal circuits, courts apply a narrower standard, manifest disregard of the law.<sup>255</sup> While this common law standard can lead to vacatur, it occurs only when the arbitrator "appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."<sup>256</sup> In sum, the manifest disregard standard is exceedingly narrow. Some

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<sup>252</sup> Fed. R. Civ. P. 52(a)(6), stating:  
Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

<sup>253</sup> 532 U.S. 504, 509 (2001).

<sup>254</sup> *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.").

<sup>255</sup> *E.g.*, *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001); and *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991).

<sup>256</sup> *E.g.*, *DeGaetano v. Smith Barney, Inc.*, 983 F.Supp. 459 (S.D.N.Y.1997). The court vacated the panel's denial of attorney's fees because the arbitrators "appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it." *Id.* at 464.

circuits do not even allow for this extremely limited form of review.<sup>257</sup>

A district court's legal findings are subject to *de novo* review.<sup>258</sup> This standard is significantly broader than reviewing awards. To illustrate, the Supreme Court rebuked lower courts, in *W.R. Grace*,<sup>259</sup> *Misco*,<sup>260</sup> *Eastern Associated Coal*,<sup>261</sup> and *Garvey*,<sup>262</sup> for vacating awards on the judge's general belief that the award was contrary to the law. The Court said that an award may be vacated under the public policy exception only if "the contract as interpreted by [the arbitrator] violates some explicit public policy."<sup>263</sup> The Court further narrowed the vacatur standard by emphasizing that a "public policy . . .

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<sup>257</sup> The standard has been adopted by the Second Circuit (*Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978)), Fourth Circuit (*Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir. 2006)), Fifth Circuit (*Prestige Ford v. Ford Dealer Computer Svcs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003)), Sixth Circuit (*Buchignani v. Vining Sparks IBG, Inc.*, 208 F.3d 212 (6th Cir. 2000)); Ninth Circuit (*Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991)), and Eleventh Circuit (*Ainsworth v. Skurnick*, 960 F.2d 939, 940-41 (11th Cir. 1992) (per curiam)). A Tenth Circuit district court used the standard in *Durkin v. CIGNA Property & Cas. Corp.*, 986 F.Supp. 1356 (D. Kan. 1997). *Also see* *Baravati v. Josephthal*, 28 F.3d 704, 706 (7th Cir. 1997). Judge Posner expressed strong doubts about the manifest disregard standard, noting: "We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration."

<sup>258</sup> *E.g.*, *Doe v. DeKalb County School Dist.*, 145 F.3d 1441, 1445 (11th Cir. 1998)

<sup>259</sup> 461 U.S. 757 (1983). The employer had entered into a consent decree with the Equal Employment Opportunity Commission that required the company to maintain its extant proportion of women and blacks in the work force in the event of layoffs to remedy past sex and race discrimination at its Corinth, Mississippi plant. A year after entering into the decree, the employer needed to lay off part of its work force and, consistent with the decree, protected females and blacks by laying off white males. Having more seniority than the protected employees, white males filed a grievance to vindicate this contractual right. After being compelled by federal courts to arbitrate this grievance, the company lost at arbitration. The arbitrator ruled that the employer breached the CBA, notwithstanding the consent decree, and awarded the affected employees damages rather than reinstatement. *Id.* at 763 - 64.

The district court vacated the award, but was reversed by the Fifth Circuit Court of Appeals in *W.R. Grace & Co. v. Local Union No. 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 652 F.2d 1248 (5th Cir. 1981). In ordering confirmation of the award, the Supreme Court showed how deference to an award differs from judicial review of a legal claim adjudicated by a trial court:

[The arbitrator's] analysis of the merits of the grievances is entitled to . . . deference. He found that the collective bargaining agreement provided no good faith defense to claims of violations of the seniority provisions, and gave him no authority to weigh in some other fashion the Company's good faith. Again, although conceivably we could reach a different result were we to interpret the contract ourselves, we cannot say that the award does not draw its essence from the collective bargaining agreement.

461 U.S. at 765-66.

<sup>260</sup> *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987).

<sup>261</sup> *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000).

<sup>262</sup> *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001).

<sup>263</sup> *W.R. Grace*, *supra* note 255, at 766.

must be well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”<sup>264</sup>

## VII. CROWNING THE NEW KING? THE STATUTORY ARBITRATOR AND DEMISE OF JUDICIAL REVIEW

### A. *The King’s Arbitrator: Royal Origins and Regal Deference*

Western civilization traces arbitration to King Solomon’s ingenious resolution of a maternity dispute.<sup>265</sup> I show that the English monarchy and courts cooperated with merchants to fashion our present system of reviewing arbitration awards.<sup>266</sup> To regain perspective, recall that nearly 700 years ago small merchants traded goods at fairs that operated under a royal franchise. In that primitive economy, the fair raised revenue for the throne while providing an essential market for producers and consumers. Arbitrators improved the efficiency of these markets as they adjudicated transactional disputes. By authorizing merchant arbitrators in the Statute of the Staple of 1353, the king delegated his sovereign power to ensure the success of the fair.

At two prominent junctures— in 1698, and again in 1925— lawmakers in England and the U.S. believed that court litigation hampered commerce. They enacted similar statutes to compel courts to enforce arbitration agreements, and confirm awards. The laws allowed courts to vacate awards only if these private rulings were tainted by gross unfairness. But they shielded awards from ordinary appellate review. Vacatur of an award required an extraordinary proof of arbitrator misconduct, corruption, or

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<sup>264</sup> *Id.*

<sup>265</sup> See 1 Kings 3:16-28 (King James), reporting King Solomon’s stratagem of suggesting that a baby be cut in half to dispose of a maternity dispute, and his award of the contested infant to the woman agreed to surrender her son rather than see him killed.

<sup>266</sup> A similar theme appears in Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595, 598 (1928). Commenting more generally on the relationship between courts, arbitrations, and English kings, Sayre concluded: “Perhaps the main purposes of the King’s justice were political and financial, in consolidating and unifying the kingdom and in bringing fees into the royal treasury.”

procurement. Such deference grew out of practical considerations. The parties had chosen the arbitrator, agreed to the private process, and abided by a commercial code.

I suggest that courts deferred so heavily to awards because William III took an active role in shaping the autonomy of these merchant courts. By my view, these arbitrators were judicial proxies for the king. The extreme deference in 1698 Arbitration Act reviewing standards reflected William III's infallibility. A court could not review an award for fact finding errors or legal defects.

Chart A shows how the FAA's reviewing standards directly descended from expressions in William III's arbitration statute. Thus, I conclude that our law crowns the arbitrator with the king's mantle of infallibility. In statistical analysis, I show that federal courts review awards with nearly blind deference. My point is that these statistical measures suggest that modern courts conform to the infallibility premise. Consider whether these excerpts from contemporary courts treat arbitrators as royal proxies.

- “The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.”<sup>267</sup>
- “Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called ‘review’ at all.”<sup>268</sup>
- “[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.”<sup>269</sup>
- “[T]he court’s function in confirming or vacating an arbitration award is

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<sup>267</sup> McClure v. Montgomery County Community Action Agency, *supra* note 229, at \* 4, quoting Safeway Stores v. Am. Bakery & Confectionery Workers, Local 111, 390 F.2d 79, 84 (5<sup>th</sup> Cir. 1968).

<sup>268</sup> Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1997).

<sup>269</sup> Durkin v. CIGNA Property & Cas. Corp., 986 F.Supp. 1356, 1358 (D. Kan. 1997), quoting the Tenth Circuit Court of Appeals in ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462-63 (10<sup>th</sup> Cir. 1995).

severely limited.”<sup>270</sup>

- “Judicial intrusion is restricted to the extraordinary situations indicating abuse of arbitral power or exercise of power beyond the jurisdiction of the arbitrator.”<sup>271</sup>

My empirical research confirms this textual impression. When federal district courts reviewed awards in my sample from 1977 through February 2008, they vacated only 4.3 percent of these rulings— and just 4.5 percent of Title VII awards. By comparison, in the most recent reporting period for federal courts, appellate courts reversed district courts in 12.9 percent of civil cases.

My historical and empirical evidence paint an unsettling constitutional picture. Following *Gilmer*, arbitration is not necessarily a consensual process. Often, it is mandatory. This violates the consensus principle that governed arbitration for centuries. This deviation has constitutional import when a compulsory arbitration rules on a statutory right. Not only does this depart from the mercantile and contractual province of arbitration. It treads upon the delegated duties of Article III judges.

*Gilmer* falsely equates courts and arbitration, and judges and arbitrators, when it espouses its theory of forum substitution. Because federal court review arbitration awards more narrowly than they review rulings in Article III trials, legal errors committed by arbitrators are likely to stand, while the same errors committed by judges are more likely to be reversed and corrected. The root problem is that congressional laws receive unequal application, interpretation, and enforcement. Constitutional framers would perceive this as a usurpation of Article III power.

### *B. Conclusions and Proposed Solutions*

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<sup>270</sup> Booth v. Hume Pub., Inc., 902 F.2d 925, 932 (11<sup>th</sup> Cir. 1990).

<sup>271</sup> Landmark v. Mader Agency, Inc., 878 P.2d 773, 776 (Idaho 1994).

An obvious implication of my study is to amend the FAA's award reviewing standards. A logical approach is to equate judicial review of statutory awards to the standards that appellate courts use in reviewing in civil trials. This would seem to restore the constitutional check against errors of law that might otherwise elude correction.

But this prescription would ignore centuries of great judicial deference to arbitration awards, dating back the Arbitration Act of 1698. Thus, this policy change would precipitous. By deterring the use of arbitration, it would worsen the backlog of Article III court dockets. It would also undermine the informality of arbitration—and its attendant benefits of lower cost, speed and efficiency— by exposing these loose tribunals to withering scrutiny. Arbitrations would morph into court-like proceedings, thereby losing their procedural advantages.

Legislation to limit *Gilmer* is a better approach. A bill proposes to make mandatory arbitration agreements unenforceable under the FAA.<sup>272</sup> If passed, it would restore arbitration to its consensual foundations by allowing only for enforcement of arbitration agreements and awards that result from arm's length bargaining.

But this approach has costs and risks. The federal court system has serious problems, including intense partisanship that undermines the appointment process,<sup>273</sup> and failure to expand judgeships in response to the nation's expanding population and need for new courts.<sup>274</sup> Repeal of *Gilmer* would probably divert disputes involving statutory claims to a flooded litigation channel that is not built for this capacity. It is hard to see how the constitutional problem of judicial review— in particular, ensuring that legislative

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<sup>272</sup> See Cinquegrani, *supra* note 11.

<sup>273</sup> See, e.g., David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479 (2005).

<sup>274</sup> Catherson, *supra* note 238, at 287-88.

enactments are enforced— would be fixed by denying disputants any kind of a hearing on their statutory claims.

I offer prosaic but more effective solutions. I suggest re-examination of two existing approaches. First, judges should take a closer look at awards that are challenged on grounds that they violate a public policy. Often, these appeals are specious and vague, and must be rejected.<sup>275</sup> But there a few cases where the award clearly contradicts a statutory provision or a judicial precedent. In these cases, the court should vacate the award.

*Tassin v. Ryan's Family Steakhouse, Inc.*<sup>276</sup> is a case in point. A woman alleged in a lawsuit that she was sexually harassed at work in Louisiana.<sup>277</sup> Relying on a mandatory arbitration agreement that Tassin had executed, Ryan's Family Steakhouse won a court order to compel her to arbitrate her claim.<sup>278</sup> Meanwhile, the Fifth Circuit Court of Appeals ruled in *Goins* that Ryan's standard arbitration agreement was unconscionable and unenforceable under Texas state law.<sup>279</sup> Still, Tassin proceeded to arbitration and lost.<sup>280</sup> In challenging her award, she contended that her arbitration was the product of the same unconscionable agreement that the Fifth Circuit refused to enforce in Texas.<sup>281</sup>

Apparently, the *Tassin* district court was not aware of the unpublished *Goins* decision— the only party who seemed to know about the ruling was the employer's

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<sup>275</sup> *E.g.*, *Henneberry v. ING Capital Advisors, LLC*, 831 N.Y.S.2d 378 (N.Y. 2007), at \*1 (court summarily rejected employee's claim that the award upholding her termination violated a strong public policy).

<sup>276</sup> 509 F.Supp.2d 585 (M.D. La. 2007).

<sup>277</sup> *Id.* at 587.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* citing *Goins v. Ryan's Family Steakhouse, Inc.*, 181 Fed.Appx. 435 (5<sup>th</sup> Cir. 2006).

<sup>280</sup> *Id.* at 588.

<sup>281</sup> *Id.*

attorney.<sup>282</sup> Nonetheless, the district court denied Tassin’s motion to vacate, even though the court readily conceded that “the Court was and continues to be concerned that counsel for the defendant [Ryan’s Family Steakhouse], whose firm was also counsel of record in the *Goins* case, did not bring the *Goins* decision to the attention of the plaintiff and the Court when the decision was entered.”<sup>283</sup> By any reasonable reading of the public policy basis for reviewing awards, the *Tassin* court should have vacated the award.

In addition, my study should encourage federal circuit courts that do not use the manifest disregard standard to adopt this approach. This standard is consistent with the longstanding deference that courts owe to awards. It allows vacatur only when an arbitrator “appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.”<sup>284</sup>

For centuries courts have managed tensions between private and public tribunals. My research shows a public policy consensus that favors narrow court review of arbitration awards. In a new finding, I show how the deferential principles in the FAA derive from statutory and common law sources that originated in the Arbitration Act of 1698. Describing how arbitration has evolved from royal origins, I merely retell a story from an earlier generation of scholars. Paul Sayre recognized, for example, the relationship between royal authority and modern arbitration.<sup>285</sup>

Updating Sayre’s pragmatic view of this relationship, I challenge *Gilmer*’s theory of forum substitution as it relates to employment arbitrations. The king’s arbitration

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<sup>282</sup> *Id.* at 587, n.7.

<sup>283</sup> *Id.*

<sup>284</sup> *E.g.*, *DeGaetano v. Smith Barney, Inc.*, 983 F.Supp. 459 (S.D.N.Y. 1997). The court vacated the panel’s denial of attorney’s fees because the arbitrators “appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it.” *Id.* at 464.

<sup>285</sup> A similar theme appears in Sayre, *supra* note 266.

model continues to work well for commercial disputes that involve voluntary arbitration agreements, but is fundamentally at odds with the role of Article III courts in conducting judicial review. Finding that federal courts reverse judge rulings three times more often than arbitrator awards, I suggest that the FAA is being exploited to impair the normal functioning of our federal courts— in the first instance as original forums to adjudicate statutory employment claims, and in the second instance, as forums that are excessively shielded from judicial review. Until federal courts deal with the statistical disparity between arbitration awards that are vacated and court rulings that are reversed, *Gilmer* forum substitution will be an inviting refuge from enforcement of statutory employment rights.

**Law review editors have discretion to publish the roster of cases. The rationale for publishing the full list is to enable readers to verify the empirical findings, and to share a valuable resource for policy-makers, judges, scholars, practitioners, and students. The author understands, however, that space and cost constraints might preclude publication of this roster.**

### **Appendix I: Table of Cases in the Empirical Database**

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