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# Misguided Fairness - Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality

Michael H. LeRoy

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

*Michael H. LeRoy\**

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## INTRODUCTION

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

Congress created a policy that favors arbitration by enacting the U.S. Arbitration Act (USAA), now called the Federal Arbitration Act (FAA).<sup>1</sup> FAA proponents convinced Congress that the law was needed to end judicial hostility to arbitration.<sup>2</sup> This view was exaggerated,

1 United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (current version at 9 U.S.C. §§ 1–16 (2000 & Supp. V 2005)).

2 The Senate Report emphasized that the effect of the bill would be to abolish the judicial reluctance to enforce arbitration agreements. See S. REP. NO. 68-536, at 2–3 (1924). During Senate debate, Senator Thomas J. Walsh explained: “In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced.” 66 CONG. REC. 984 (1924) (statement of Sen. Walsh). The

grounded in two English precedents from the 1700s<sup>3</sup> that some American courts followed.<sup>4</sup> English and American courts were not hardened opponents to arbitration. Many rulings preserved the autonomy of arbitration.<sup>5</sup>

When lawmakers passed the FAA in 1925, they never learned that an English statute of 1697 authorized judicial enforcement of arbitration awards.<sup>6</sup> Congress did not appreciate that as early as the 1600s, English sentiment favored arbitration because court litigation wasted time and money.<sup>7</sup> Lawmakers overlooked Lord Mansfield's pivotal use of his court's authority in the 1700s to foster commercial arbitration.<sup>8</sup>

These oversights would be academic but for the fact that Congress patterned the FAA after New York's arbitration law,<sup>9</sup> and New

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same point was raised during House debate. See 65 CONG. REC. 1931 (1924) (statement of Rep. Graham).

3 See *Avery v. Scott (Scott II)*, (1853) 8 Exch. 497, 155 Eng. Rep. 1447; *Kill v. Hollister*, (1746) 1 Wils. K.B. 129, 95 Eng. Rep. 532.

4 See *infra* Part II.B.1.

5 See *infra* notes 36–42 and accompanying text.

6 See 1697–98, 9 Will. 3, c. 15 (Eng.). The preamble of the law stated: “[F]or promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters.” *Id.* John Locke's role in formulating the statute is documented in Henry Horwitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 HIST. J. 137, 138–39 (1993).

7 See, e.g., JOSIAH CHILD, A NEW DISCOURSE OF TRADE 141–44 (London, J. Hodges et al. 4th ed. 1745). His chapter, “Concerning a Court Merchant,” said that “this Kingdom will at length be blessed with a happy method, for the speedy, easy, and cheap deciding of differences between Merchants, Masters of Ships, and Seamen by some Court or Courts of Merchant.” *Id.* at 141. He complained that conventional litigation in courts of law entailed “tedious attendance and vast expenses” that tended to result in “empty purses and grey heads.” *Id.* at 142. The preface of Sir Child's book indicates that he wrote the treatise “long before the last session of Parliament, which began the 19th of October, 1669.” *Id.* at i. This suggests the possibility that his ideas influenced enactment of the arbitration statute.

8 See, e.g., C.H.S. FIFOOT, LORD MANSFIELD 104–05 (1936) (“The collaboration of judge and merchant, if it was to exercise its due influence upon the law, required adequate channels of communication. In the development of the special jury Lord Mansfield found the vital medium. . . . Lord Mansfield converted an occasional into a regular institution, and trained a corps of jurors as a permanent liaison between law and commerce.”).

9 Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce, and a chief architect of the USAA, testified before a congressional committee on the virtues of the New York arbitration law. See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comms. on the Judiciary*, 68th Cong. 13–18 (1924) [hereinafter *Hearings*]. The influential role played

York based its legislation on English law.<sup>10</sup> Somehow, Congress lost perspective of the American replication of English law. Amusingly, FAA sponsors acted as though they pioneered protection of arbitration from intrusive court review.<sup>11</sup>

If the FAA was founded on historically faulty grounds—specifically, if the judicial hostility thesis was flawed eighty years ago—why does this problem matter today? Ironically, the FAA retarded the development of common law standards that were deferential to arbitration. Paradoxically, the FAA set into motion current state legislation that is leading to much greater vacatur of arbitration awards.<sup>12</sup>

For this Article, I collected and analyzed employment arbitrations that were challenged by a losing party. My database contains 426 federal and state court rulings from 1975–2007 that confirmed or vacated awards. These courts acquired jurisdiction of arbitrator rulings because the FAA oddly allows parties to choose a federal or state forum, including the respective reviewing standards.<sup>13</sup> Magnifying this anomaly, the FAA sets forth specific and narrow standards for federal court review of contested awards,<sup>14</sup> but allows states to enact their own judicial review standards.<sup>15</sup> For many years, state arbitration laws mirrored the FAA. In a key finding, however, my research shows that this parallelism is breaking down.

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by the New York law is validated in *Rosenthal v. Great Western Financial Securities Corp.*, 926 P.2d 1061, 1067 (Cal. 1996) (“In most important respects, the California statutory scheme on enforcement of private arbitration agreements is similar to the USAA; the similarity is not surprising, as the two share origins in the earlier statutes of New York and New Jersey.”). For a contemporaneous summary of the origins of the New York law, see *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 289 (N.Y. 1921) (describing the policy of section 2 of the law, which abolished the ancient rule against enforcement of arbitration agreements).

10 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, 460 n.79 (1958) (citing Act of Dec. 31, 1768, reprinted in 4 THE COLONIAL LAWS OF NEW YORK 1040 (Albany, N.Y., James B. Lyon 1896)).

11 See *infra* notes 49–52.

12 An award is the arbitrator’s ruling or disposition of an issue. It functions like a court judgment.

13 See 9 U.S.C. § 9 (2000); see also *Bull HN Info. Sys. Inc. v. Hutson*, No. CIV. A. 98-10-998-RCL, 1998 WL 426047, at \*1 (D. Mass. July 24, 1998) (“[T]he FAA [Federal Arbitration Act] ‘is something of an anomaly in the field of federal-court jurisdiction’ because it ‘creates a body of federal substantive law’ without simultaneously ‘creat[ing] any independent federal-question jurisdiction . . . .’” (second alteration in original) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983))), *rev’d*, 229 F.3d 321 (1st Cir. 2000).

14 See 9 U.S.C. § 10 (2000).

15 See *infra* note 141 (providing examples of states that have adopted UAA vacatur standards).

This is because states are enacting more intrusive reviewing standards.<sup>16</sup> My data suggest that the Revised Uniform Arbitration Act (RUAA),<sup>17</sup> a model law that expert commissioners drafted in 2000, plays a role in this development. The RUAA was largely motivated by disturbing trends in the 1990s that raised questions about the fairness of arbitration. The growing use of mandatory arbitration fueled this concern.<sup>18</sup> In the workplace, employers implemented arbitration procedures to enhance their advantage over individuals. They shifted large forum costs to employees,<sup>19</sup> designated inconvenient venues,<sup>20</sup> placed arbitrary remedial limits on arbitrator powers,<sup>21</sup> shortened time bars to file claims,<sup>22</sup> and selected arbitrators without employee input.<sup>23</sup> RUAA Commissioners stated in their prefatory note that their “new provisions are intended to reflect developments in arbitration law and to insure that the process is a fair one.”<sup>24</sup>

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16 See, e.g., *infra* notes 209–14 and accompanying text.

17 UNIF. ARBITRATION ACT (amended 2000), 7 U.L.A. 1 (2005); see also *infra* notes 142–43 and accompanying text (discussing the states that have adopted the RUAA).

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

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

20 See, e.g., *Poole v. L.S. Holding, Inc.*, No. 2001-57, 2001 WL 1223748, at \*1 (D.V.I. Aug. 20, 2001) (rejecting the contention of a Virgin Islands employee that Massachusetts is a prohibitively expensive venue to arbitrate a claim).

21 See, e.g., *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 827 (S.D. Ohio 1999) (finding that although Title VII permits up to \$300,000 in punitive damages and compensatory damages, a \$162,000 limit imposed on punitive damages by an arbitration agreement was valid), *aff’d*, 317 F.3d 646 (6th Cir. 2003).

22 See, e.g., *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 726–27 (9th Cir. 2000) (holding that because ERISA provides a four-year statute of limitations for an action to recover benefits under a written contract, the plan administrator breached its fiduciary duty by adopting a mandatory arbitration clause that set a sixty-day time limit in which to demand arbitration); *Louis v. Geneva Enter.*, 128 F. Supp. 2d 912, 917 n.2 (E.D. Va. 2000) (determining that the sixty-day filing limit in an arbitration agreement drafted by the employer unlawfully conflicted with the three-year statute of limitations for Fair Labor Standards Act claims).

23 See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (finding that the only possible purpose of the employer’s arbitration rules was “to undermine the neutrality of the proceeding” when an employee was allowed to select one arbitrator from a list created exclusively by Hooters).

24 UNIF. ARBITRATION ACT prefatory note (amended 2000), 7 U.L.A. 3 (2005).

My research does not assess whether post-RUAA arbitrations are more fair, but my statistical analysis shows a pernicious trend for arbitral finality—a finding that would surprise and chagrin the FAA Congress. Recall that lawmakers wanted minimal court interference with arbitration. My data from federal courts would reassure them. District judges confirmed 92.7% of these arbitrator decisions.<sup>25</sup> But state trial judges confirmed only 78.8% of awards.<sup>26</sup> This difference is statistically significant. The analysis for appellate courts produced a similar result—an 87.7% confirmation rate at the federal level, but only a 71.4% level for state courts.<sup>27</sup>

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

I conclude that these worrisome trends and possibilities are structurally rooted in the history and text of the FAA. Left alone, courts can be more trusted than state legislatures to preserve the finality of the arbitration process. But courts are increasingly subservient to state arbitration statutes that elevate arbitral fairness over finality. In the short term, higher rates of vacatur may mollify critics and skeptics who call attention to particularly unfair arbitration practices.<sup>28</sup> But I

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25 See *infra* Part V.A.

26 See *infra* Part V.A.

27 See *infra* Part V.A.

28 The stream of critical publications is extensive. Current and representative examples include Richard A. Bales, *Normative Considerations of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 390–93 (2006) (stating that mandatory arbitration will not be a fair process until a clear set of due process rules is implemented and a penalty is imposed on employers who draft flagrantly one-sided arbitration agreements); 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, 1078–79 (2004) (noting that by enforcing mandatory arbitration agreements, courts avoid dealing with a considerable volume of employment litigation); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 524–25 (2006) (arguing that the privacy that surrounds many arbitrations makes the process less observable and transparent, which in turn raises fundamental questions about accountability in the adjudication of public law claims); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1721–22 (2006) (stating that by steering class action disputes to a private setting, some arbitration agree-

suggest that the trend line for vacatur implies serious costs for disputing parties. More arbitration proceedings are becoming lengthy and costly preludes to final disposition by courts. This implies that long queues at American courts will grow as parties lose confidence in arbitral finality.

### *B. Organization of This Article*

Part I.A shows that the Supreme Court and Congress believe that the FAA ended judicial hostility to arbitration. I trace the source of this faulty idea to an influential commercial lawyer who spearheaded lobbying for the FAA. Part I.B reports on congressional intent in the FAA. I also demonstrate how FAA sponsors overlooked case law that contradicted their sweeping condemnation of common law courts.

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

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

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ments do not guarantee procedural protections for absent class members). For opposing and laudatory views of contemporary arbitration, see William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 616 (2006) (expressing a more optimistic view that employer-promulgated arbitration is providing fairness, for example, by utilizing arbitration services that adopted the Due Process Protocol for Mediation and Arbitration of Statutory Disputes in 1995); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–64 (2006) (stating that enforcement of adhesive arbitration agreements benefits society by reducing process costs, thereby benefiting consumers, employees, and other adhering parties).



potential to undermine the vital principle that awards are to be final and binding.

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

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

Part V.B elaborates on qualitative differences between federal courts that review awards under section 10 standards in the FAA, and state courts that review awards under RUAA standards. Four issues appear to be causing federal and state courts to take different approaches in reviewing awards: (a) arbitrator disclosures to the parties, (b) the award of attorney’s fees, (c) the award of punitive damages, and (d) the legality of the underlying agreement to arbitrate.

The Article concludes with the implications of my historical and statistical research.<sup>29</sup>

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

### A. Overview

In a key 1991 decision, *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>30</sup> the Supreme Court explained that the FAA’s “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”<sup>31</sup> Certainly, Congress embraced this purpose when

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<sup>29</sup> The state and federal cases that constitute my sample are contained in an Appendix on file with the author.

<sup>30</sup> 500 U.S. 20 (1991).

<sup>31</sup> *Id.* at 24. The decision enforced a mandatory arbitration agreement over the objections of an employee who filed an age discrimination lawsuit against his employer. The *Gilmer* majority rejected the employee’s contention that the arbitra-

it said that American courts, influenced by English common law, had grown hostile to arbitration.<sup>32</sup> But Congress did not do its own homework on this point, and adopted an erroneous view.

This mistake traces to an overzealous proponent of the FAA, a prominent commercial lawyer named Julius Henry Cohen, who published his views in a 1921 edition of the *Yale Law Journal*.<sup>33</sup> His categorical condemnation of American courts should have given pause for its lack of professional objectivity: "For over three hundred years a dictum of Lord Coke has held sway over the minds of America. It is now on its fair way to a decent burial."<sup>34</sup> Cohen meant that American judges "had been inadvertently led into following an obsolete theory of the law"<sup>35</sup> that blocked arbitration agreements.

If Cohen and the Congress had investigated more carefully, they would have tempered their harsh judgment of courts. In a published case, *Brush v. Fisher*,<sup>36</sup> a Michigan court relied on an established line of precedent from the 1800s that upheld arbitration procedures. *Brush* explained that courts have narrow grounds for intruding upon arbitration when it said that "there is power in a court of equity to relieve against awards in *some cases* where there has been fraud and misconduct in the arbitrators, or they have acted under some manifest

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tion agreement could not be enforced because he did not voluntarily consent to waive access to courts. *Id.* at 29. *Gilmer* led to the widespread adoption of individual employment arbitration. See Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 *INDUS. L.J.* 84, 92-93 (2007).

<sup>32</sup> See H.R. REP. NO. 68-96, at 1-2 (1924). This passage is quoted in its entirety because it is the most thorough account of the judicial hostility thesis that Congress embraced when it passed the FAA.

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

*Id.*

<sup>33</sup> See Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 *YALE L.J.* 147 (1921).

<sup>34</sup> *Id.* at 147.

<sup>35</sup> *Id.*

<sup>36</sup> 38 N.W. 446 (Mich. 1888).

mistake.’”<sup>37</sup> Stating the majority rule, *Brush* emphasized that “it is evident that there are great objections to any general interference by courts with awards.”<sup>38</sup>

*Brush* was decided near the end of the century, in 1888. An Alabama decision from earlier in the 1800s, *Tankersley v. Richardson*,<sup>39</sup> came to the same conclusion: “This Court must, in accordance with a rule repeatedly laid down . . . intend in favor of the award . . . .”<sup>40</sup> *Campbell v. Western*,<sup>41</sup> a New York case from 1832, similarly endorsed arbitration: “Awards are much favored, and the court will intend everything in their favor.”<sup>42</sup> Read together, *Brush*, *Tankersley*, and *Campbell* mean that Cohen and other FAA supporters misjudged the role of American courts in arbitration disputes.

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

### *B. Congressional Intent to End Judicial Hostility to Arbitration*

In 1925, Congress enacted the United States Arbitration Act<sup>43</sup>—and renamed it the Federal Arbitration Act in 1947<sup>44</sup>—to help businesses reduce expense and delay in resolving their legal disputes.<sup>45</sup> Proposed by the American Bar Association and corporate lawyers, the

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37 *Id.* at 447 (emphasis added) (quoting *Port Huron & N.W. Ry. Co. v. Callanan*, 34 N.W. 678, 679 (Mich. 1887)).

38 *Id.* at 448.

39 2 Stew. 130 (Ala. 1829).

40 *Id.* at 132.

41 3 Paige Ch. 124 (N.Y. Ch. 1832).

42 *Id.* at 138 n.1.

43 Ch. 213, 43 Stat. 883 (1925) (current version at 9 U.S.C. §§ 1–16 (2000 & Supp V 2005)).

44 See Act of July 30, 1947, ch. 392, § 14, 61 Stat. 669, 674.

45 See S. REP. NO. 68-536, at 3 (1924) (stating that the USAA was proposed to help businesses avoid “the delay and expenses of litigation”); H.R. REP. NO. 68-96, at 2 (1924) (showing that Congress believed the simplicity of arbitration would “reduc[e] technicality, delay, and [keep] expense to a minimum and at the same time safeguard[ ] the rights of the parties”).

law used arbitration statutes in New York and New Jersey as models.<sup>46</sup> Congress wanted to make arbitration agreements enforceable in courts of law.<sup>47</sup> Lawmakers proposed a national arbitration model based on federal jurisdiction.<sup>48</sup>

Business leaders promoted the law by contending that lawsuits led to "ruinous litigation."<sup>49</sup> Court battles adversely affected consumers because the costs of litigation were hidden in prices.<sup>50</sup> These costs were avoided when businesses voluntarily submitted their differences to arbitration.<sup>51</sup> Arbitration offered "the best means yet devised for an efficient, expeditious, and inexpensive adjustment of . . . disputes."<sup>52</sup>

An attorney suggested to Congress that state arbitration law had already discouraged contract-breaking behaviors, while creating "a spirit of conciliation and settlement."<sup>53</sup> But federal legislation was

46 See *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1062, 1067 (Cal. 1996).

47 See *id.* at 1067. The bill was reintroduced in the 68th Congress with this heading: "Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations." *Hearings, supra* note 9.

48 See *Hearings, supra* note 9, at 6-9 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of New York). 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, at 1.

49 See *Hearings, supra* note 9, at 6 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of New York). Bernheimer stated:

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.

*Id.*

50 *Id.* at 7 ("The 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.").

51 *Id.* at 31 (statement of Wilson J. Vance, Secretary, New Jersey State Chamber of Commerce) ("[T]here 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.").

52 *Id.* (statement of Thomas B. Paton, American Bankers Association).

53 *Id.* at 10 (statement of W.H.H. Piatt, Chairman, Comm. on Commerce, Trade, and Commercial Law, American Bar Association).

needed to improve arbitration. A party who agreed to arbitrate a dispute was free to revoke its submission at any time and not face a legal consequence.<sup>54</sup> Too often, according to FAA sponsors, courts compounded this withdrawal behavior by permitting a party to revoke a submission to arbitration.<sup>55</sup>

To this day, the Supreme Court has taken Cohen's thesis as an article of faith.<sup>56</sup> But the research he presented to Congress had no data or case law analysis. After describing judicial hostility to arbitration as "an unfortunate situation in the law,"<sup>57</sup> Cohen offered a rambling and occasionally folksy justification for his position.<sup>58</sup>

Had Cohen checked sources available at that time, he would have found contrary evidence. An 1897 *Harvard Law Review* article by Addison C. Burnham demonstrated that common law courts were divided in their approach to enforcing arbitration agreements.<sup>59</sup> With more digging, Cohen and Congress would have read an oft-cited English precedent from 1757, *Hawkins v. Colclough*,<sup>60</sup> and its clear declaration:

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54 *Id.* at 14 (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce) ("The difficulty is that men do enter into these [arbitration] agreements and then afterwards repudiate the agreement . . . . You go in and watch the expression on 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 any more.'").

55 *Id.* ("[T]he difficulty has been that for over 300 years, for reasons that would take me too long to undertake to explain at this time, the courts have said that that kind of an agreement was one that was revocable at any time.").

56 The Court repeats its mantra that the FAA was enacted "'to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)); see also *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20, 220 n.6 (1985) (stating that when Congress passed the FAA, it was "motivated, first and foremost, by a congressional desire" to reverse longstanding judicial resistance to arbitration); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring) (providing examples of statements suggesting that courts' hostility to arbitration agreements originated in contests for jurisdiction). The Court made the same point in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974) ("English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act.").

57 *Hearings*, *supra* note 9, at 14 (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce).

58 See *id.*

59 See Addison C. Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234 (1897) (showing courts' differences of opinion and arguing that a single approach is needed).

60 (1757) 1 Burr. 274, 97 Eng. Rep. 311 (K.B.).

"[A]wards ought to be construed liberally and favourably."<sup>61</sup> Lord Mansfield left an indelible impression when he plainly "declared against critical niceties, in scanning awards made by Judges of the parties' own choosing"<sup>62</sup>—a point that was noticed 120 years later by the New Hampshire Supreme Court in *Truesdale v. Straw*.<sup>63</sup> This court thought that Lord Mansfield's rule was a settled point of law.<sup>64</sup> If Cohen and Congress had investigated, they would have found examples of extreme judicial deference to arbitration.<sup>65</sup>

Truth lost to political expedience, however, when lawmakers concluded that "[t]he need for the law arises from an anachronism of our American law."<sup>66</sup> The House Report explained:

Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.<sup>67</sup>

The Report erroneously concluded:

The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.<sup>68</sup>

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61 *Id.* at 278, 97 Eng. Rep. at 312.

62 *Id.* at 277, 97 Eng. Rep. at 312; see also *Hearings*, *supra* note 9, at 14 (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce).

63 58 N.H. 207 (1877).

64 *Id.* at 216 ("The books are full of the rule, and its application to particular cases, that voluntary arbitration is held by the common law in high estimation, and that the regularity of the proceedings and the validity of the award are to be presumed.").

65 See Lord Jeffrey's stunning statement in *Mitchell v. Cable* that an arbitrator "may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power." E.J. Cohn, *Commercial Arbitration and the Rules of Law: A Comparative Study*, 4 U. TORONTO L.J. 1, 5 (1941) (quoting (1848) *Mitchell v. Cable*, 10 D. 1297).

66 H.R. REP. NO. 68-96, at 1 (1924).

67 *Id.* at 1-2.

68 *Id.* at 2.

## II. CORRECTING THE RECORD: THE COMMON LAW REGULATION OF ARBITRATION

### A. Overview

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

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

### B. *Judicial Regulation of Arbitration Before the FAA*

When arbitration supporters came to Congress for relief, they focused on judicial obstruction in the pre-award phases of arbitration.<sup>69</sup> The underlying problem was that a party to an arbitration agreement could renege on the bargain. Some refused to submit a cause to arbitration, preferring to file a lawsuit. Others were unwilling to select an arbitrator, failed to appear at a hearing, or revoked the arbitrator's authority to rule before a hearing ended. FAA sponsors expressed little concern about another important time when courts regulate arbitration—when an award is rendered, and a party refuses to accept it.

Again, history tells an informative story that the FAA Congress overlooked. A party who refused to pay on an arbitration award was imprisoned for his noncompliance. The *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:

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69 See, e.g., *Hearings*, *supra* note 9, at 14–15.

"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 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 . . . on which the court said, You have been ordered to pay a sum of money, and you must do it."<sup>70</sup>

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

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

## 1. Common Law Opposition to Arbitration

### a. Arbitration Agreements Are Revocable

Some judges applied the revocation doctrine<sup>71</sup> to preserve a disputant's access to courts. This allowed a party to withdraw from arbi-

<sup>70</sup> John Brewer, *The Wilkites and the Law, 1763-64: A Study of Radical Notions of Governance*, in *AN UNGOVERNABLE PEOPLE* 128, 168-69 (John Brewer & John Styles eds., 1980) (quoting WORCESTER J., Nov. 15, 1770).

<sup>71</sup> This doctrine is traced to an English decision reported by Sir Edward Coke in 1609. See *Vynior's Case*, (1609) 8 Co. Rep. 81b, 77 Eng. Rep. 597 (K.B.). William Wilde and Robert Vynior had a disagreement over a bond, and both men agreed at the time of making the bond that William Rugge would serve as an arbitrator to resolve any dispute that should arise. *Id.* at 81b, 77 Eng. Rep. at 597. Vynior alleged that Wilde breached terms of the bond, and received a favorable award from Rugge, but Wilde contended that he revoked Rugge's authority before the award was made. *Id.* Lord Coke's decision allowed Wilde's revocation of the submission to arbitration. *Id.* at 82a-83b, 77 Eng. Rep. at 600-01. He agreed that, although William Wilde was "bound in a bond to stand to, abide, [and] observe" the rule of arbitration, the judge might countermand the bond "for a man cannot by his act make such authority, power, or warrant not countermandable, which is by the law and of its own nature countermandable." *Id.* at 82a, 77 Eng. Rep. at 598-99. This opened the door to Lord



tration and sue in court. In the most common case, a person who agreed to arbitration could revoke his delegation of power to an arbitrator.<sup>72</sup> Some courts allowed revocation until an award was rendered.<sup>73</sup>

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Coke's court to rule on the debt, and he upheld Vynior's claim. *Id.* at 83a, 77 Eng. Rep. at 601. This conclusion is confirmed in Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 207, 209, and Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 598 (1927).

Julius Cohen highlighted the importance of this decision, claiming that this faulty ruling swayed American courts for 300 years. *See* Cohen, *supra* note 33, at 147. My research demonstrates that Cohen's claim is seriously overstated. However, it is also true that numerous nineteenth-century courts knew of *Vynior's Case*, and considered it at some length. In the interest of historical accuracy, these courts are reported. *See* Curtiss v. Beardsley, 15 Conn. 518, 525 (1843); Shroyer v. Bash, 57 Ind. 349, 353 (1877); Mills v. Conner, 1 Blackf. 7, 9 (Ind. 1818); Brown v. Leavitt, 26 Me. 251, 256 (1846); Cumberland v. N. Yarmouth, 4 Me. 459, 461 (1827); Damon v. Granby, 19 Mass. (2 Pick.) 345, 351 (1824); Rochester v. Whitehouse, 15 N.H. 468, 472 (1844); Haight v. Morris, 7 N.J.L. 289, 298 (1824); Union Ins. Co. of Phila. v. Cent. Trust Co. of N.Y., 52 N.E. 671, 674 (N.Y. 1899); People *ex rel.* Union Ins. Co. v. Nash, 18 N.E. 630, 630 (N.Y. 1888); Clayton v. Liverman, 19 N.C. (2 Dev. & Bat.) 558, 561 (1837), *overruled in part by In re Davis' Will*, 26 S.E. 636 (N.C. 1897); Carey v. Comm'rs of Montgomery County, 19 Ohio 245, 247 (1850); Zehner v. Lehigh Coal & Navigation Co., 41 A. 464, 466 (Pa. 1898); Paist v. Caldwell, 75 Pa. 161, 165 (1874); Bingham's Trs. v. Guthrie, 19 Pa. 418, 423 (1852); Power v. Power, 7 Watts 205, 213 (Pa. 1838); Town of Craftsbury v. Hill, 28 Vt. 763, 764 (1856).

72 *See* Or. & W. Mortgage Sav. Bank v. Am. Mortgage Co., 35 F. 22, 23 (C.C.D. Or. 1888); Peters' Adm'r v. Craig, 36 Ky. (6 Dana) 307, 308 (1838); Jones v. Harris, 59 Miss. 214, 215-16 (1881) (noting that the "right of either party to revoke a submission before award made, where the submission is not a rule of court, or regulated by statute changing the common law, is well settled and universally recognized"), *overruled by* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 103-04 (Miss. 1998); Smith v. Compton, 20 Barb. 262, 267 (N.Y. Gen. Term 1855).

73 *See, e.g.,* Aspinwall v. Towsey, 2 Tyl. 328, 343 (Vt. 1803) (stating that "either party may revoke such submission before the award be made and published, and by such revocation he annuls all contracts relative to the submission conditioned in the bond"); *see also* Allen v. Watson, 16 Johns. 205, 207 (N.Y. Sup. Ct. 1819) (reasoning that "[t]here can be no doubt that the defendant could revoke the powers conferred by the arbitration bond").

b. An Arbitration Agreement Is Against Public Policy

Judges ruled that public policy prohibits arbitration agreements from blocking access to courts.<sup>74</sup> Otherwise, private tribunals could not be held accountable under the law.<sup>75</sup>

c. An Arbitration Agreement Is a Covenant to Refer a Dispute to Private Adjudication, but Remains Collateral to the Main Contract and Therefore May Be Disregarded

A party would need to sue for damages resulting from breach of the contract.<sup>76</sup> Like the condition precedent doctrine,<sup>77</sup> this principle<sup>78</sup> said that an arbitrator could not decide a general question of liability, but only the amount of damages.<sup>79</sup>

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<sup>74</sup> The main reason that arbitration agreements were voided on public policy grounds was that the law disfavored ousting courts of their jurisdiction. See *Hurst v. Litchfield*, 39 N.Y. 377, 379 (1868) ("Such stipulations [for arbitration] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts . . ."); see also *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704, 704 (S.D.N.Y. 1889) ("Such agreements have repeatedly been held to be against public policy and void."). The Supreme Court repeated this idea in *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.").

<sup>75</sup> The best explanation for the policy is in *Greason v. Keteltas*, 17 N.Y. 491, 496 (1858). The court observed that courts of equity would not entertain a suit to compel parties specifically to perform an agreement to submit to arbitration: "To do so, would bring such courts in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration already made." *Id.* at 496. The court explained:

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

*Id.*

<sup>76</sup> See *Munson v. Straits of Dover S.S. Co.*, 99 F. 787, 792 (S.D.N.Y. 1900), *aff'd*, 102 F. 926 (2d Cir. 1900).

<sup>77</sup> See *infra* note 87 and accompanying text.

<sup>78</sup> See *Crossley v. Conn. Fire Ins. Co.*, 27 F. 30, 31 (C.C.D. Mass. 1886).

<sup>79</sup> *Munson*, 99 F. at 792.

d. An Arbitration Agreement Could Not, as a Matter of Law,  
Completely Oust Courts of Their Jurisdiction

Some judges believed that no party had lawful authority to diminish the statutory powers of a court.<sup>80</sup> This view—called the ouster doctrine because it states that courts cannot be ousted from their jurisdiction by a private contract—is attributed to two English cases, *Avery v. Scott* (*Scott II*)<sup>81</sup> and *Kill v. Hollister*.<sup>82</sup> Perhaps the Supreme Court has accepted Congress' judicial hostility thesis because the Court reached a similar conclusion in an 1874 decision, *Insurance Co. v. Morse*.<sup>83</sup> As early as 1897, however, a noted authority questioned whether American courts properly understood these two English courts. Burnham's *Harvard Law Review* article—which Congress overlooked—shows that there were *multiple* decisions in *Scott v. Avery*,<sup>84</sup>

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80 *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (declaring that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.").

81 (1853) 8 Exch. 497, 155 Eng. Rep. 1447.

82 (1746) 1 Wils. K.B. 129, 95 Eng. Rep. 532.

83 *Morse*, 87 U.S. (20 Wall.) at 451 (attributing the ouster doctrine to *Hollister*). *Morse* ruled that an individual cannot be compelled to waive his right to a judicial forum. In a passage that implicated pre-dispute arbitration agreements, the Court said that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." *Id.* at 451. In the following dictum, the Court took a dim view of pre-dispute arbitration agreements that waive access to courts:

In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

*Id.*

84 See Burnham, *supra* note 59, at 234–37 (quoting at length from the *Scott II* decision of 1853, 8 Exch. 497, 155 Eng. Rep. 1447, and the *Scott v. Avery* (*Scott III*) decision of 1856, 5 H.L.C. 811, 10 Eng. Rep. 1121). The *Scott II* decision stated the ouster doctrine. In that decision, Lord Coleridge wrote that "it is conceded that any agreement which is to prevent the suffering party from coming into a Court of law, or, in other words, which ousts the Courts of their jurisdiction, cannot be supported." *Scott II*, 8 Exch. at 500, 155 Eng. Rep. at 1448. A thorough and scholarly account of the appellate decision in *Scott III* appears in *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N.Y. 250 (1872). Summarizing this pro-arbitration ruling, the New York court said: "The judge lays no stress upon the form of the contract, but regards the provision for determining the amount to be paid by arbitration as in legal effect postponing the right of action until *after the award is made*." *Id.* at 268 (emphasis added).

which together *rejected* the reasoning of the oft-reported *Scott II* case.<sup>85</sup> The Supreme Court and Congress failed to understand that Lord Campbell ultimately opposed the ouster doctrine.<sup>86</sup> This correction by the English court in 1856 was virtually unnoticed. The prior *Scott II* decision is mainly responsible for the flawed thesis that underpins the FAA.

e. An Arbitration Agreement Is Valid for the Limited Purpose of Serving as a Condition Precedent to Suit

This doctrine is similar to the current idea of exhausting administrative procedures before suing. According to the condition precedent doctrine, an arbitration agreement could not prevent subsequent legal action or determine the general question of liability, but could decide limited or collateral issues, such as damages.<sup>87</sup>

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85 The author credits the law review's editors for this important discovery. The two initial *Scott v. Avery* decisions are found in *Scott v. Avery* (*Scott I*), (1853) 8 Exch. 487, 155 Eng. Rep. 1442, 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 ruling was overturned on a writ of error in the Exchequer Chamber. This ruling for the defendant, which is in *Scott II*, contains Coleridge's statement of the ouster doctrine. *Id.* at 500, 155 Eng. Rep. at 1448. The case was appealed to the House of Lords, where in *Scott v. Avery* (*Scott III*), (1856) 5 H.L.C. 811, 10 Eng. Rep. 1121, 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 851–56, 10 Eng. Rep. at 1137–39. Burnham came to a similar conclusion in 1897:

In the Exchequer, judgment was rendered for the plaintiff. On writ of error, the judgment was reversed in the Exchequer Chamber, and in the House of Lords, also, judgment was given for the original defendant, but on a much broader ground than in the Exchequer chamber. There was a clear issue between the Exchequer Chamber and the House of Lords as to the principle which should govern the decision.

Burnham, *supra* note 59, at 235. In sum, the ouster doctrine as stated in *Scott II* was effectively but indirectly rejected by a higher court.

86 Lord Campbell explained why the ouster doctrine could not stand:

That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? . . . It is contended, that it is 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.

*Scott III*, 5 H.L.C. at 852, 10 Eng. Rep. at 1138.

87 See *Dugan v. Thomas*, 9 A. 354, 354–55 (Me. 1887) (“Parties may by agreement impose conditions precedent with respect to preliminary and collateral matters, such as do not go to the root of the action. But men cannot be compelled even by their own agreements, to mutually agree upon arbiters whose duties would, as in this case,

## 2. Common Law Support for Arbitration

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

*Larkin v. Robbins*<sup>88</sup> is a typical dispute between the opposing theories of ouster and liberty of contract. The latter principle led courts to conclude that parties had a right to enter into a contract for private dispute resolution procedures—like any other subject for a contract. *Larkin* was a liberty-of-contract case. Once a party agreed to arbitration, this discontinued a court's jurisdiction to decide the matter *de novo*.<sup>89</sup>

*Yates v. Russell*<sup>90</sup> is singled out because of the court's pragmatic view of the underlying dispute. The matter dealt with damages from an adulterous affair.<sup>91</sup> Upholding the arbitration agreement, the

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go to the root of the principal claim or cause of action, and oust the courts of their jurisdiction."); *see also* *Stephenson v. Piscataqua Fire & Marine Ins. Co.*, 54 Me. 55, 70 (1866) ("While parties may impose, as a condition precedent to applications to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. . . . Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void."). The United States Supreme Court validated this view in *Hamilton v. Liverpool, London & Globe Insurance Co.*, 136 U.S. 242 (1890), where an insurance policy authorized arbitrators to determine the amount of loss or damages. *Id.* at 242–43. Referring to this partial arbitration, the Court concluded:

Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country.

*Id.* at 255.

88 2 Wend. 505 (N.Y. Sup. Ct. 1829).

89 *Id.* at 506 ("The reason that the submission operates as a discontinuance, is not because the subject of the suit is otherwise disposed of than by the decision of the court in which it was prosecuted; but because the parties have selected another tribunal for the trial of it."). Giving preeminent effect to the parties' contract, *Larkin* reasoned:

The court will not look to the proceedings of that tribunal to determine whether the suit is gone beyond its jurisdiction. It is sufficient that the parties have selected their arbitrators, and concluded their agreement to submit to them. It is this agreement which withdraws the cause from the court, and effects the discontinuance of the suit.

*Id.*

90 17 Johns. 461 (N.Y. Sup. Ct. 1820).

91 *Id.* at 466. The court explained that the adulterous affair factored into the decision to enforce the arbitration agreement:

court in *Yates* understood that the parties sought privacy to resolve their dispute.<sup>92</sup> When *Yates* and the judicial hostility thesis are read side-by-side, it is hard to agree that American courts were dogmatic foes of arbitration.

Many nineteenth-century courts favored arbitration.<sup>93</sup> When courts referred disputes to arbitration, they ended their jurisdiction.<sup>94</sup> They enforced arbitration agreements.<sup>95</sup> Judges considered the parties' intentions to arbitrate.<sup>96</sup> Arbitration agreements precluded courts from hearing a lawsuit that paralleled or duplicated the matter being arbitrated.<sup>97</sup> Judges did not interfere with arbitration proceedings on technical grounds when a procedure varied from the strict requirements of the contract.<sup>98</sup>

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There might be, and no doubt were, very good and sufficient reasons in the minds of the parties for withdrawing from a public trial so painful and distressing an investigation as an action for adultery involves; and I see no good reason why the agreement of the parties to withdraw the trial from a jury to a more retired examination, before well selected referees, should be discountenanced or rejected.

*Id.*

92 *Id.* at 465. *Yates* upheld the arbitrators' ruling on the theory that this was what the parties originally intended: "It is not pretended there was any imposition or collusion in the case. It was an agreement made in good faith, and I think that good faith requires that it should be truly and accurately observed." *Id.* at 465–66. The court reasoned "that a party to that agreement must be held to be concluded by it, and that he cannot now allege, that the reference and judgment were not warranted by law. I think that it would be establishing a precedent that might be very pernicious in its consequences." *Id.* at 466.

93 *See, e.g.,* Neely v. Buford, 65 Mo. 448, 451 (1877) ("Courts are disposed to regard with favor these [arbitration] tribunals of the parties' own selection, which prevent litigation in courts and are less expensive and dilatory.").

94 *See, e.g.,* Dorsey v. Hammond, 1 Bland. 463, 469 (Md. 1828) ("When a case is referred to arbitrators, the Court divests itself of all judgment . . .").

95 *See, e.g.,* Pike v. Emerson, 5 N.H. 393, 393 (1831) ("We have no doubt, that an attorney has authority, by an [arbitration] agreement put upon file, in a cause, to bind his client, and that such an agreement may, in many cases, be specially enforced."); Camp v. Root, 18 Johns. 22, 23 (N.Y. Sup. Ct. 1820) ("The submission to arbitration was a discontinuance of the suit.").

96 *See, e.g.,* Henry v. Porter, 29 Ala. 619, 622 (1857) ("Whether a submission to arbitration, or an award, will work the dismissal of a pending suit, must depend on the intention of the parties, to be gathered from the facts of each particular case . . .").

97 *See, e.g.,* Dederick's Adm'rs v. Richley, 19 Wend. 108, 112 (N.Y. Sup. Ct. 1838) ("The principle upon which the cases proceed seems to be this: if the parties agree to an unauthorized reference, it amounts to nothing more than an arbitration; the suit is at an end—the court has no longer any jurisdiction over the parties, and will take no further cognizance of the matter.").

98 *See, e.g.,* Howard v. Conro, 2 Vt. 492, 494 (1829) ("If [the parties] mutually agree to dispense with the attendance of one of the referees, and in pursuance of

Some courts refused to allow parties to revoke an arbitrator's authority after the matter was referred to arbitration but before issuance of an award.<sup>99</sup> Others refused pre-award revocations to protect the parties' investment of time and costs in a hearing.<sup>100</sup> Courts were especially supportive of arbitrations after the process ran its full course and an award was issued. Judges believed that awards should be enforced.<sup>101</sup> Awards were reviewed with more deferential standards than appellate courts used to review trial court rulings.<sup>102</sup> Courts emphatically rejected revocations after an award was rendered.<sup>103</sup>

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such agreement appear and submit to a hearing before the other two . . . it is not competent for either party . . . to urge the absence of the third referee as an objection to the report.”).

99 *See, e.g., Bank of Monroe v. Widner*, 11 Paige Ch. 529, 534 (N.Y. Ch. 1845) (“[A]t the common law, it was competent for one of the parties to a submission to arbitration, to revoke the submission at any time before the award was actually made, and ready to be delivered to the parties. But the revised statutes have wisely provided that neither party, to a submission to arbitration, shall have power to revoke such submission after the cause has been finally submitted to the arbitrator . . . for his decision. And this court has decided that the statutory provision on this subject, applies to all cases of submission to arbitration.” (citations omitted)).

100 *See, e.g., Paist v. Caldwell*, 75 Pa. 161, 166 (1874) (“The parties agreed to consolidate these actions and try them before referees, who should render a final award whether the defendant should pay anything, and if any, how much . . . . Here valuable rights were released and acquired on each side, and the effect of the settlement on this basis was to put an end to litigation ruinous to both sides . . . . Under such circumstances, it was not in the power of the defendant at the last moment, and after the referees had gone far into the case, suddenly to give a notice of revocation, and avert a result.”).

101 *See, e.g., Garitee v. Carter*, 16 Md. 309, 312 (1860) (“[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 . . . .” (quoting *Roloson v. Carson*, 8 Md. 208, 225–26 (1855))).

102 *See, e.g., Wilson v. Williams*, 66 Barb. 209, 210 (N.Y. Gen. Term 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.”).

103 *See, e.g., McGheehen v. Duffield*, 5 Pa. 497, 500 (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 . . . .”); *Rogers’ Heirs v. Nall*, 25 Tenn. (6 Hum.) 29, 30 (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.”).

Courts treated awards as final and binding.<sup>104</sup> They favored the procedural simplicity<sup>105</sup> and efficiency<sup>106</sup> of arbitration. Arbitrators could not withdraw their rulings.<sup>107</sup> Where only two out of three arbitrators signed an award, courts enforced the ruling.<sup>108</sup> Where parties authorized a panel of arbitrators to rule on their dispute, withdrawal by one arbitrator did not deprive the remaining arbitrators of authority to render an enforceable award.<sup>109</sup> In one case, an award was enforced after it was amended to include payment of forum costs.<sup>110</sup>

Courts enforced arbitration agreements that consented to judicial enforcement of the award.<sup>111</sup> Courts believed they had authority

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104 See, e.g., *Tankersley v. Richardson*, 2 Stew. 130, 132 (Ala. 1829) ("The adjustment of controversies and suits by arbitration, is a species of remedy much favored by legislation; so much so, that, not only what can be, is intended in its favor, but it will not be permitted to be impugned for any extrinsic cause; unless it be founded in corruption, partiality or other undue means.").

105 See, e.g., *Brush v. Fisher*, 38 N.W. 446, 448 (Mich. 1888) ("[Awards] are made by a tribunal of the parties' own selection, who are usually, at least, expected to act in their own view of law and testimony more freely and less technically than courts and regular juries.").

106 See, e.g., *Campbell v. Western*, 3 Paige Ch. 124, 138 (N.Y. Ch. 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.").

107 See, e.g., *Patton v. Baird*, 42 N.C. (7 Ired. Eq.) 255, 260 (1851) ("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.").

108 See, e.g., *Campbell*, 3 Paige Ch. at 138 n.1 ("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.").

109 See, e.g., *Kile v. Chapin*, 9 Ind. 150, 152 (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.").

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

111 See, e.g., *Hughes v. Bywater*, 4 Hill 551, 552 (N.Y. Sup. Ct. 1843) ("[T]he stipulation in this instrument of submission [to arbitration] is the same thing as if it had



to enforce arbitrator rulings,<sup>112</sup> even erroneous ones.<sup>113</sup> When awards were partially defective, courts enforced the valid portion of the arbitrator's ruling.<sup>114</sup>

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

My historical analysis closes with one more example of the FAA's intellectual vacuum. The Supreme Court has *repeatedly* affirmed the judicial hostility thesis.<sup>115</sup> *Scherk v. Alberto-Culver Co.*<sup>116</sup> informs us that "English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act."<sup>117</sup>

Oddly, the Court failed to contemplate its own nineteenth-century experience with arbitration. Justices decided two arbitration

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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.").

112 See, e.g., *Green v. Patchin*, 13 Wend. 293, 295-96 (N.Y. Sup. Ct. 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."); *Farrington v. Hamblin*, 12 Wend. 212, 214 (N.Y. Sup. Ct. 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." (citation omitted)).

113 See, e.g., *Winship v. Jewett*, 1 Barb. Ch. 173, 184 (N.Y. Ch. 1845) ("[I]t is well settled that the award, if made in good faith, is conclusive upon the parties; and that neither of them can be permitted to prove that the arbitrators decided wrong, either as to the law or the facts of the case.").

114 See, e.g., *Brown v. Warnock*, 35 Ky. (5 Dana) 492, 493 (1837) ("An award . . . if void as to the costs . . . would still be good for the debt, as an award may be good in part, and bad in part."); *Banks v. Adams*, 23 Me. 259, 261 (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.").

115 See *supra* note 56 and accompanying text.

116 417 U.S. 506 (1974).

117 *Id.* at 510 n.4.

cases in this period.<sup>118</sup> Their mixed treatment of arbitration is consistent with the common law findings in Burnham's 1897 study.<sup>119</sup>

*Carnochan v. Christie*<sup>120</sup> reversed a lower court ruling that upheld a commercial arbitration award. Notably, the lower court enforced the arbitrator's award.<sup>121</sup> This outcome is counter to the inaccurate picture painted by Cohen and FAA supporters. Chief Justice Marshall's opinion in *Carnochan* reversed the award-confirmation ruling.<sup>122</sup> However, he ruled on narrow grounds,<sup>123</sup> and found no fault with the arbitration per se.<sup>124</sup>

Later, *Lutz v. Linthicum*<sup>125</sup> strongly supported arbitration. The parties agreed to arbitrate a lease dispute. By court order, two arbitrators were appointed and the decree also authorized their selection of a third neutral.<sup>126</sup> After the panel rendered an award for damages payable to the evicted lessee, a lower court entered judgment on the award.<sup>127</sup>

Lutz, the losing party, raised several objections to the award. It was not final and definite; the appointment of the third arbitrator did not conform to the public policy of Maryland; and delivery of the

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118 A third Supreme Court arbitration decision occurred soon after the nineteenth century ended. *Colombia v. Cauca Co.*, 190 U.S. 524 (1903), is another example of pre-FAA judicial deference to arbitration. After a U.S. company became entangled in a contract dispute with the government of Colombia to build a railroad in that nation, a three-member arbitration panel was appointed. *Id.* at 527. One arbitrator was appointed by the company, and another by Colombia. *Id.* The governments of Colombia and the U.S. co-selected the third arbitrator. *Id.* At the close of the hearings, Colombia withdrew its arbitrator and failed to appoint a replacement. *Id.* The remaining arbitrators rendered an award for the company, prompting Colombia to argue that the resignation of its arbitrator made the award void. *Id.* at 526–28. Justice Holmes' decision confirmed the award, reasoning that when the two governments and company established the arbitration panel, "it was not expected that a commission made up as this was would be unanimous." *Id.* at 528. Rather, the parties had "resolved, under the powers given to it in the agreement, that a majority vote should govern. Obviously that was the only possible way, as each party appointed a representative of its side." *Id.* The Court concluded: "We are satisfied that an award by a majority was sufficient and effective." *Id.*

119 Burnham, *supra* note 59, at 234.

120 24 U.S. (11 Wheat.) 446 (1826).

121 *Id.* at 459.

122 *Id.* at 466.

123 *Id.* (ruling that the award was indefinite as to when a credit was due to one of the parties, and therefore, the arbitrators' ruling was not final).

124 *Id.* ("[T]he award ought itself to settle finally and conclusively the whole matter referred to them.").

125 33 U.S. (8 Pet.) 165 (1834).

126 *Id.* at 168.

127 *Id.* at 169.

award to the losing party did not conform to the strict requirements of statutory law.<sup>128</sup> Citing treatises and common law precedents, Justice Story rejected these arguments in a thoroughly contemporary sounding decision.<sup>129</sup>

These nineteenth-century Supreme Court rulings vanished over time. Only four courts have cited *Carnochan* since 1925, the year that the FAA was enacted—and all are at the state level.<sup>130</sup> Only three federal courts have cited *Lutz* since 1925.<sup>131</sup> No Supreme Court decision in the post-FAA era has cited either decision. This disappearing lineage is sobering proof of the modern-day amnesia caused by the FAA's judicial hostility thesis.

### III. STATUTORY STANDARDS FOR JUDICIAL REVIEW OF ARBITRATION AWARDS

#### A. *The Federal Arbitration Act*

While Congress was preoccupied with enforcing arbitration agreements,<sup>132</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>133</sup> The 1924 Senate Report stated that the award could be set aside where it was secured by corruption, fraud, or undue means; if there was partiality or corruption on the part of the arbitrators; in a situation where an arbitrator was guilty of misconduct or refused to hear evidence; because of prejudicial misbehavior by the parties; or where an arbitrator exceeded his or her powers.<sup>134</sup> The Senate included a significant excerpt from a lawyer's brief as its main evidence of intent on award enforcement:

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128 See *id.* at 169–70.

129 See *id.* at 178–79 ("But, prima facie the award is to be taken to have been regularly made, where there is nothing on its face to impeach it.").

130 See *Crofoot v. Blair Holdings Corp.*, 260 P.2d 156, 175 (Cal. Ct. App. 1953); *Cont'l Milling & Feed Co. v. Doughnut Corp. of Am.*, 48 A.2d 447, 451 (Md. 1946); *Mueller v. Chi. & N.W. Ry. Co.*, 259 N.W. 798, 801 (Minn. 1935), *overruled by* *Eisen v. State, Dep't of Pub. Welfare*, 352 N.W.2d 731 (Minn. 1984); *State v. N. Packing Co.*, 244 N.W. 31, 32 (N.D. 1932).

131 See *Citizens Bldg. of W. Palm Beach, Inc. v. W. Union Tel. Co.*, 120 F.2d 982, 984 n.2 (5th Cir. 1941); *Union R.R. Co. v. Nat'l R.R. Adjustment Bd.*, Fourth Div., 170 F. Supp. 281, 289 n.4 (N.D. Ill. 1958); *Seldner Corp. v. W.R. Grace & Co.*, 22 F. Supp. 388, 392 (D. Md. 1938).

132 See *supra* notes 48, 55.

133 H.R. REP. NO. 68-96, at 2 (1924).

134 S. REP. NO. 68-536, at 4 (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>135</sup>

Section 10 codifies these grounds to vacate an award.<sup>136</sup> The FAA added a critical layer of review by preserving dual and concurrent roles for state and federal courts—a feature that now complicates review of awards. Section 9, which specifies rules for reviewing awards, authorizes a reviewing role for state courts.<sup>137</sup>

### *B. The Revised Uniform Arbitration Act of 2000*

Forty-nine states have arbitration laws. Before 2000, thirty-five states adopted the Uniform Arbitration Act (UAA), while fourteen adopted similar legislation.<sup>138</sup> The UAA was proposed in 1955, supposedly to repeal state laws that obstructed arbitration agreements.<sup>139</sup>

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135 See *Hearings*, *supra* note 9, at 36 (statement of W.W. Nichols, President, American Manufacturers' Association of New York). The legislative reports and debates said nothing as to whether post-award and state court litigation rules should be preempted by the new federal law.

136 See United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (current version at 9 U.S.C. §§ 1–16 (2000 & Supp. V 2005)), authorizing courts to vacate an award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

*Id.* § 10.

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

138 UNIF. ARBITRATION ACT prefatory note (amended 2000), 7 U.L.A. 2 (2005).

139 See *id.*

Many state laws contain the four statutory standards in section 10 of the FAA,<sup>140</sup> and add a fifth ground for vacatur.<sup>141</sup>

This fairly uniform approach was fragmented after 2000, when the RUAA was approved. In a recent survey of all state laws, the American Arbitration Association reports that twelve states adopted the RUAA.<sup>142</sup> The revised vacatur standards, appearing in RUAA Section 23, added a sixth element. This section also made other amendments

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140 See *supra* note 136.

141 UNIF. ARBITRATION ACT §§ 1–25 (amended 2000), 7 U.L.A. 101 (2005). Section 12, “Vacating an Award,” states:

- a) Upon application of a party, the court shall vacate an award where:
  - (1) The award was procured by corruption, fraud or other undue means;
  - (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
  - (3) The arbitrators exceeded their powers;
  - (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
  - (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

*Id.* § 12, at 497.

UAA vacatur standards appear in Alaska (ALASKA STAT. § 09.43.120 (2006)); Arizona (ARIZ. REV. STAT. ANN. § 12-1512 (2003 & Supp. 2006)); Arkansas (ARK. CODE ANN. § 16-108-212 (2006)); Idaho (IDAHO CODE ANN. § 7-912 (2004)); Illinois (710 ILL. COMP. STAT. ANN. 5/12 (West 2007)); Indiana (IND. CODE § 34-57-2-13 (1999)); Kansas (KAN. STAT. ANN. § 5-412 (2001)); Kentucky (KY. REV. STAT. ANN. § 417.160 (West 2006)); Maine (ME. REV. STAT. ANN. tit. 14, § 5938 (2003)); Massachusetts (MASS. GEN. LAWS ch. 150C, § 12 (1999)); Minnesota (MINN. STAT. ANN. § 572.19 (West 2000 & Supp. 2007)); Missouri (MO. ANN. STAT. § 435.405 (West 1992 & Supp. 2007)); Montana (MONT. CODE ANN. § 27-5-312 (2007)); Nebraska (NEB. REV. STAT. § 25-2613 (1995 & Supp. 2006)); South Carolina (S.C. CODE ANN. § 15-48-130 (2005)); South Dakota (S.D. CODIFIED LAWS § 21-25A-24 (2004)); Tennessee (TENN. CODE ANN. § 29-5-213 (2007)); Virginia (VA. CODE ANN. § 8.01-581 (2007)). Alaska and Colorado retain the UAA structure but also adopted the Revised Uniform Arbitration Act. See *infra* note 142.

142 See RUAA and UMA Legislation from Coast to Coast, DISP. RESOL. TIMES, Aug. 31, 2005, <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. *Id.*

within the structure of the four FAA standards and the fifth standard in the UAA.<sup>143</sup>

The RUAA drafters identified fourteen issues to resolve in contemporary arbitration.<sup>144</sup> They believed that courts must play a larger role to ensure fairness in arbitration. The RUAA is premised on the

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143 See UNIF. ARBITRATION ACT § 23 (amended 2000), 7 U.L.A. 73 (2005). In reproducing the vacatur provision, I italicize all additions to section 10 of the FAA, and italicize and underline additions to section 12 of the UAA:

Section 23. Vacating Award.

(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

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

(2) there was:

(A) evident partiality by an arbitrator *appointed as a neutral arbitrator*;

(B) corruption by an arbitrator; or

(C) *misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding*;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) *there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or*

(6) *the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.*

144 See *id.* prefatory note, 7 U.L.A. at 2–3 (listing “(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 prehearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a preaward ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney’s fees, punitive damages or other exemplary relief; (11) when a court can award attorney’s fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney’s fees and costs to a prevailing party in an appeal of an arbitrator’s award; and (13) which sections of the UAA would not be waivable . . . particularly in those instances in which one party may have significantly

belief that arbitration should be a consensual process.<sup>145</sup> In addition, the RUAA broke new ground by regulating arbitrator neutrality.<sup>146</sup> The revised Act expanded arbitrator powers by authorizing discovery and other protective orders, rulings on motions for summary judgment, prehearing conferences and other actions that manage the arbitration process.<sup>147</sup> A new rule empowered courts, during the hearing phase, to enforce a pre-award ruling by an arbitrator.<sup>148</sup>

Drafters regulated the remedial boundary that overlaps arbitration and courts.<sup>149</sup> A new section prescribed arbitrator remedies, including attorney's fees, punitive damages, and other exemplary relief.<sup>150</sup> The RUAA also allows courts to award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award.<sup>151</sup>

The RUAA drafters recognized the need for arbitral finality.<sup>152</sup> The revised regulations were designed to facilitate "the relative speed, lower cost, and greater efficiency of the [arbitration] process."<sup>153</sup> In particular, they acknowledged that "in most cases parties intend the decisions of arbitrators to be final with minimal court involvement unless there is clear unfairness or a denial of justice."<sup>154</sup>

I close this discussion by suggesting that the RUAA drafters cannot simultaneously improve fairness and finality in arbitration. Later, I present data to show that the RUAA is significantly eroding award finality.<sup>155</sup> For now, my discussion is confined to the assertion by drafters that "in most cases parties intend the decisions of arbitrators to be final with minimal court involvement *unless there is clear unfairness or a denial of justice.*"<sup>156</sup> The italicized text underscores a major

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less bargaining power than another; and (14) the use of electronic information . . . in the arbitration process").

145 *Id.*, 7 U.L.A. at 3. ("[A]rbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness.").

146 *Id.* § 12, 7 U.L.A. at 42.

147 *Id.* § 17, 7 U.L.A. at 57.

148 *Id.* § 18, 7 U.L.A. at 62.

149 *Id.* § 21, 7 U.L.A. at 69.

150 *Id.*

151 *Id.* § 25, 7 U.L.A. at 85.

152 *Id.* § 25 cmt. 3, 7 U.L.A. at 86 ("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.").

153 *Id.* prefatory note, 7 U.L.A. at 86.

154 *Id.*

155 *See infra* Part V.

156 UNIF. ARBITRATION ACT prefatory note (amended 2000), 7 U.L.A. 86 (2005) (emphasis added).

philosophical difference between the RUAA drafters and the FAA Congress. The FAA was passed to make arbitration a quick, efficient, low-cost alternative to courts.<sup>157</sup> The RUAA drafters paid lip service to these values, but their overriding concern was to make arbitration fairer for parties who are vulnerable to overreaching by the scrivener of the arbitration agreement.

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

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

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

##### A. *Method for Creating the Sample*

I used research methods from my earlier empirical studies.<sup>158</sup> The sample was derived from Westlaw’s Internet service. Because Congress allowed parties to choose federal or state courts to contest awards, I used federal and state law databases. The search used keywords from terms in the FAA, RUAA, and state arbitration laws.<sup>159</sup>

The sample focused on employment arbitrations. To be included, a case involved a post-award dispute between an individual employee and the employer in which an arbitrator’s ruling was challenged by either party. Arbitration cases involving a union and employer were not included because these adjudications are no longer regulated under the FAA. Instead, court review occurs under

157 See H.R. REP. NO. 68-96, at 2 (1924) (“It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation.”).

158 See 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); 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. RESOL. 19, 45–48 (2001) [hereinafter LeRoy & Feuille, *Private Justice*]; Michael H. LeRoy & Peter Feuille, *Reinventing the Enterprise Wheel: Court Review of Punitive Awards in Labor and Employment Arbitrations*, 11 HARV. NEGOT. L. REV. 199, 230–34 (2006).

159 E.g., “procured by corruption,” “evident partiality,” “refusing to postpone the hearing,” “arbitrators exceeded their powers,” and “imperfectly executed.”



section 301 of the Labor-Management Relations Act.<sup>160</sup> When judges review labor arbitration awards, they apply federal common law principles from three closely integrated decisions, now called the *Steelworkers Trilogy*.<sup>161</sup>

The sample had no historical limit. The earliest decision was reported in 1975.<sup>162</sup> Sampling ended in April 2007. After a potential case was identified, I read it to see if it met the inclusion criteria. For example, pre-arbitration disputes over enforcement of an arbitration clause were excluded. Cases were included, on the other hand, where employees resisted arbitration, were compelled to arbitrate their claims, and were later involved in a post-award lawsuit.<sup>163</sup> Some cases involved employees who preferred court to arbitration but prevailed in the private forum, leading the employer to seek vacatur.<sup>164</sup>

Once a case met the criteria, it was checked against a roster of previously read and coded cases to avoid duplication.<sup>165</sup> Next, relevant data were taken from each case. Variables included (1) state or federal court, (2) first court ruling on motion to confirm or vacate an award, and (3) appellate ruling on motion to confirm or vacate an award. Other data were collected and analyzed for a companion study.<sup>166</sup>

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160 Labor-Management Relations Act, ch. 120, § 301, 61 Stat. 136, 156–57 (1947) (current version at 29 U.S.C. § 185(b) (2000)).

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

162 *McClure v. Montgomery County Cmty. Action Agency*, No. 4798, 1975 WL 181652 (Ohio Ct. App. Nov. 7, 1975).

163 See, e.g., *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 145 (2d Cir. 2004) (upholding the denial of a judicial stay where an arbitration panel had dismissed a terminated employee's sexual harassment claims).

164 In *Madden v. Kidder Peabody & Co.*, 883 S.W.2d 79, 81 (Mo. Ct. 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. *Id.* at 83.

165 In rare cases, an award was challenged once and remanded to arbitration; after arbitrators ruled again, the award was challenged a second time. These award reviews were treated as separate cases, even though the parties and dispute were unchanged, because the awards differed. See *Sawtelle v. Waddell & Reed, Inc.*, 801 N.Y.S.2d 286, 287–88 (App. Div. 2005) (affirming lower court vacatur of punitive damages and remanding to a new arbitration panel); *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 268–69, 277 (App. Div. 2003) (remanding to the original panel of arbitrators for reconsideration of punitive damages).

166 Michael H. LeRoy & Peter Feuille, *Happily Never After: When Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. (forthcoming 2008) (manuscript at 19, on file with author) (reporting on a recent spurt of award-review cases, exemplified by the finding that 64.9% of federal district courts' award-review decisions occurred

*B. Method for Comparing Reversal Rates by Courts*

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

Comparative data improves my ability to assess whether judicial deference to awards is insufficient, moderate, or excessive. This judgment can be partly made by understanding what a legislature intended for the scope of court review. The other part of this quantitative judgment is informed by considering the intent behind the FAA. Recalling my earlier discussion, Congress barely considered the issue of award enforcement.<sup>167</sup> Still, it is reasonable to infer that Congress intended low vacatur activity. This is because the FAA was meant to end judicial hostility to arbitration.<sup>168</sup>

But how low is low for a vacatur rate? Table 1 helps to answer that question by depicting appellate reversal rates in other studies, and arranging them by levels. I created a simple hierarchy for these studies: courts review with extreme deference (reversal rate 8.0% or less), great deference (reversal rate 8.1% to 16.0%), high deference (reversal rate 16.1% to 24.0%), moderate deference (reversal rate 24.1% to 32.0%), slight deference (reversal rate 32.1% to 40.0%), and no deference (reversal rate 40.1% or more).

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since 2000). Courts will likely face a growing docket of post-arbitration appeals as parties seek to relitigate the claims that were privately adjudicated. This upsurge also suggests that employment arbitration serves too many masters—an uncoordinated array of legislatures and courts that regulate this process—despite the fact that the FAA appears to legislate uniform standards. *Id.*

<sup>167</sup> See *supra* Part III.A.

<sup>168</sup> See *supra* note 2 and accompanying text.

TABLE 1. EMPIRICAL STUDIES OF APPELLATE REVIEW OF RULINGS BY  
LOWER COURTS AND ADMINISTRATIVE LAW AGENCIES:  
A WIDE RANGE OF REVERSAL RATES

Level of Deference by Appellate Court	Reversal Rate by Appellate Court
<i>Extreme Deference</i> Reversal Rate 8.0% or Less	6.0% Reversal of Employer Dismissals of Employment Discrimination Lawsuits (Clermont & Eisenberg, 2002)  7.4% Reversal by the U.S. Court of Appeals for the Ninth Circuit of Lower Court Rulings, 2005 (Catterson, 2006)
<i>Great Deference</i> Reversal Rate Between 8.1% and 16.0%	9.1% Reversal by all Federal Courts of Appeals, 2005 (Catterson, 2006)  14.7% Reversal by Federal Appeals Courts of NLRB Rulings of Union Liability (Brudney, 1996)
<i>High Deference</i> Reversal Rate Between 16.1% and 24.0%	19.7% Reversal by Federal Appeals Courts of NLRB Rulings of Employer Liability (Brudney, 1996)  22.0% Reversal by Federal Appeals Courts of Jury Patent Rulings (Moore, 2000)  22.0% Reversal by Federal Appeals Courts of Judges' Patent Rulings (Moore, 2000)
<i>Moderate Deference</i> Reversal Rate Between 24.1% and 32.0%	28.2% Reversal by Federal District Courts of Labor Arbitration Awards, 1960–1991 (LeRoy & Feuille, 2001)  29.5% Reversal by Federal Appeals Courts of Labor Arbitration Awards, 1961–1991 (LeRoy & Feuille, 2001)  29.7% Reversal by Federal District Courts of Labor Arbitration Awards, 1991–2001 (LeRoy & Feuille, 2001)
<i>Slight Deference</i> Reversal Rate Between 32.1% and 40.0%	33.6% Reversal by Federal Appeals Courts of Labor Arbitration Awards, 1991–2001 (LeRoy & Feuille, 2001)
<i>No Deference</i> Reversal Rate of 40.1% and Above	66% Reversal of Death Penalty Sentences in Nebraska (Baldus et al., 2002)

*Extreme Deference (Reversal Rate 8.0% or Less):* A study by Kevin Clermont and Theodore Eisenberg examined appellate court reversal of lower courts in the federal system.<sup>169</sup> In employment discrimination cases, appellate courts reversed less than 6.0% of wins by employers at trial.<sup>170</sup> This is an extreme example of appellate court deference.

Cathy Catterson's recent study of the U.S. Court of Appeals for the Ninth Circuit provides a second example of extreme judicial deference.<sup>171</sup> The research was related to a study by the Commission on Structural Alternatives for the Federal Courts of Appeals.<sup>172</sup> Chaired by retired Supreme Court Justice Byron White, the Commission studied the possibility of splitting this overburdened circuit.<sup>173</sup> Catterson's study showed that as the circuit's caseload has mushroomed from 1945 to 2005, appellate courts have reversed far fewer rulings.<sup>174</sup> The reversal rate in 2005, 7.4%,<sup>175</sup> was due to diminishing judicial resources.<sup>176</sup>

*Great Deference (Reversal Rate Between 8.1% and 16.0%):* Catterson's study also measured the reversal rate for all federal appeals courts and found that they reversed 9.1% of lower rulings in 2005.<sup>177</sup> She suggested this was due to channeling of complex litigation—a prime subject of appeals and subsequent reversals—to ADR venues.<sup>178</sup>

James Brudney analyzed 1224 National Labor Relations Board (NLRB) decisions that were appealed to federal courts.<sup>179</sup> Over time, courts reversed fewer rulings.<sup>180</sup> From 1960 to 1992, they enforced

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169 Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947.

170 *Id.* at 957. Clermont and Eisenberg interpreted this result to mean that appellate courts may have an anti-plaintiff bias. *See id.* at 957–58.

171 Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287 (2006).

172 *Id.* at 288.

173 *Id.*

174 *Id.* at 289 tbl.1. The reversal rate was 32.1% in 1945, 22.5% in 1955, 23.6% in 1965, 21.4% in 1975, 18.2% in 1985, 9.3% in 1995, and 7.4% in 2005. *Id.*

175 *Id.*

176 Appellate judgeships rose from thirteen in 1945 to twenty-eight in 2005, while the caseload grew by 500%. *Id.* at 293.

177 *Id.* at 289 tbl.1. The reversal rate was 27.9% in 1945, 26.9% in 1955, 22.0% in 1965, 17.8% in 1975, 15.8% in 1985, and 9.3% in 1995. *Id.*

178 *Id.* at 291.

179 James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 945 (1996).

180 *Id.* at 969–70. He attributes the declining rate of reversal to fewer doctrinal conflicts and disagreements in interpreting the NLRA. *Id.*

only 66.9% of NLRB orders.<sup>181</sup> The rate varied, however.<sup>182</sup> Courts reviewed NLRB decisions with great deference in cases where a union violated the National Labor Relations Act (NLRA). These rulings were reversed in only 14.7% of cases.<sup>183</sup>

*High Deference (Reversal Rate Between 16.1% and 24.0%)*: Brudney's study found an area where courts were highly deferential, but reversed more NLRB rulings. When an employer violated the NLRA, courts reversed 19.7% of these cases.<sup>184</sup>

Kimberly Moore's study on appellate review of patent judgments from trial judges and juries is an example of moderately deferential review.<sup>185</sup> Moore asked whether federal appeals courts were more inclined to overturn jury verdicts or judge rulings.<sup>186</sup> She expected a higher reversal rate for jury verdicts but found that appeals courts affirmed at the same rate—78%—for judge and jury verdicts.<sup>187</sup> Table 1 converts the 78% affirmance rate to a 22% reversal rate.

*Moderate Deference (Reversal Rate Between 24.1% and 32.0%)*: In two studies, Michael H. LeRoy and Peter Feuille analyzed 1783 federal court rulings on labor arbitration awards rendered from 1960 through 2001.<sup>188</sup> In the first study, award confirmation rates by district and appellate courts from 1960–1991 were, respectively, 71.8% and 70.5%.<sup>189</sup>

In a more recent study that examined court rulings from 1991–2001, LeRoy and Feuille observed very similar confirmation rates. District courts enforced 70.3% of all challenged awards, and

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181 *Id.* at 970 n.93.

182 *Id.* ("The rate of success . . . was below 60% in the 1960s, rose to 72% in the early 1970s, declined slightly to 65% in the early 1980s, and was above 75% from 1985–92.").

183 *Id.* at 972 & 973 tbl.2.

184 *Id.* at 972 & 973 tbl.1.

185 Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365 (2000).

186 *Id.* at 367–68.

187 *Id.* at 397 tbl.6.

188 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) [hereinafter LeRoy & Feuille, *Steelworkers Trilogy*]. This research analyzed "1,148 federal district court decisions and 480 federal circuit court decisions that resulted in a court order which compelled or denied arbitration or which enforced or vacated an arbitrator's award in whole or in part." *Id.* These decisions were published from June 24, 1960 to July 24, 1990. *Id.* at 98 n.105. A follow-up study reported data for court review of awards from 1991 to 2001. See LeRoy & Feuille, *Private Justice*, *supra* note 158, at 50 tbl.1.

189 LeRoy & Feuille, *Steelworkers Trilogy*, *supra* note 188, at 102 tbl.3.

appellate courts confirmed 70.5% of awards.<sup>190</sup> As with the Moore study, Table 1 converts the award confirmation rate to a reversal vacatur rate.

*Slight Deference (Reversal Rate Between 30.1% and 40.0%)*: LeRoy and Feuille's 2001 study showed an example of slight judicial deference. Federal appeals courts confirmed 66.4% of labor awards.<sup>191</sup> Table 1 converts this to a 33.6% reversal rate.

*No Deference (Reversal Rate 40.1% or More)*: A Nebraska study of death penalty reversals provided an example of no appellate deference to lower court rulings.<sup>192</sup> On appeal, courts vacated nineteen of twenty-nine death penalty sentences, or 66%.<sup>193</sup> The high reversal rate reflected the "arbitrariness and comparative injustice in the administration of the death penalty."<sup>194</sup>

## V. EMPIRICAL FINDINGS: QUANTITATIVE AND QUALITATIVE ASSESSMENTS

### A. Statistical Findings and Quantitative Assessment

Table 2 shows that parties challenged 254 individual employment arbitration awards. Many challenges were appealed after a first court ruling. There were 150 federal district and 81 appeals court rulings, yielding a federal sample of 231 cases. States use different names for courts that conduct first review of awards (e.g., "Circuit Court" or "Superior Court"). These tribunals are generically called first-level courts. The sample contained 104 first-level courts, and 91 appellate court rulings, yielding a state sample of 195 cases. Combining federal and state court rulings, the sample contained 426 cases.

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190 LeRoy & Feuille, *Private Justice*, *supra* note 158, at 49. The authors also found that southern circuits confirmed only 59% of awards while courts in the rest of the nation confirmed 79%. *Id.* at 85–86.

191 *Id.* at 49.

192 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, 512 (2002).

193 *Id.* Analyzing the nineteen reversals, the study found that 68% (thirteen out of nineteen) were decided by the Nebraska Supreme Court either on direct appeal or in post-conviction proceedings, while 32% (six out of nineteen) resulted from a federal court. *Id.* at 545 fig.1.

194 *Id.* at 496.

TABLE 2. INITIAL COURT RULINGS ON AWARDS: CONFIRMATION OF  
ARBITRATOR AWARDS BY FEDERAL DISTRICT COURTS AND  
FIRST-LEVEL STATE COURTS

	Confirm Award	Partially Confirm/ Partially Vacate Award	Vacate Award
Federal District Court Decisions	139/150 (92.7%)	3/150 (2.0%)	8/150 (5.3%)
State Court Decisions	82/104 (78.8%)	3/104 (2.9%)	19/104 (18.3%)
Total $\chi^2 = 11.220$ , df 2 (Sig. 0.004)	221/254 (87.0%)	6/254 (2.4%)	27/254 (10.6%)

TABLE 3. APPELLATE COURT RULINGS ON AWARDS: CONFIRMATION OF  
ARBITRATOR AWARDS BY FEDERAL APPELLATE COURTS AND  
STATE APPELLATE COURTS

	Confirm Award	Partially Confirm/ Partially Vacate Award	Vacate Award
Federal Appellate Court Decisions	71/81 (87.7%)	2/81 (2.5%)	8/81 (9.9%)
State Appellate Court Decisions	65/91 (71.4%)	10/91 (11.0%)	16/91 (17.6%)
Total $\chi^2 = 7.709$ , df 2 (Sig. 0.021)	136/172 (79.6%)	12/172 (7.0%)	24/172 (14.0%)

Finding No. 1: Federal district and appellate courts review awards, respectively, with extreme deference and great deference. Federal district courts confirmed 139 awards in 150 cases. The 92.7% confirmation figure translates to a vacatur rate of 7.3%. This compares to the extreme deference of the Ninth Circuit in Catterson's study.<sup>195</sup> Federal appeals courts showed great deference but not extreme deference, confirming 71 awards in 81 cases. This translates to a 12.3% vacatur rate, similar to a finding in Brudney's study.<sup>196</sup> The highly deferential results are reflected in the language that federal courts use to describe the scope of review under the FAA:

195 See *supra* notes 171–78 and accompanying text.

196 Brudney, *supra* note 179, at 973 tbl.2.

"Maximum deference is owed to the arbitrator's decision," and the standard of review of arbitration awards "is among the narrowest known to law."

"Once an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily in favor of the award, and courts must exercise great caution when asked to set aside an award. Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited."<sup>197</sup>

Finding No. 2: State first-level and appellate courts review awards, respectively, with high deference and moderate deference. First-level state courts confirmed 82 awards in 104 cases. This 78.8% confirmation rate translates to a 21.2% vacatur rate. The figure is similar to the result in Moore's study.<sup>198</sup> State appellate courts were less deferential than their lower courts. They confirmed 65 of 91 awards for a confirmation rate of 71.4%. Converted to a vacatur rate of 28.6%, this result compares to the findings in LeRoy and Feuille's study.<sup>199</sup>

Finding No. 3: There was a statistically significant difference in federal and state award confirmation rates. First-level state courts confirmed 92.7% of awards compared to 78.8% for state counterparts. The difference in confirmation rates was 13.9%. This result was statistically significant at the 0.004 level.<sup>200</sup> Appellate courts registered a wider difference, as federal courts confirmed 87.7% of awards compared to 71.4% of state courts. The difference in confirmation rates was 16.3%. Due to the smaller sample size, the strength of statistical significance was lower compared to first level courts. However, the difference was significant at the 0.02 level.<sup>201</sup>

### B. Case Analysis and Qualitative Assessment

The findings show that federal and state courts behave differently in enforcing employment arbitration awards. The data do not explain what causes these disparities. I suggest that substantive provisions in federal and state arbitration statutes—not judges or differences in

197 *Durkin v. CIGNA Prop. & Cas. Corp.*, 986 F. Supp. 1356, 1358 (D. Kan. 1997) (citation omitted) (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462–63 (10th Cir. 1995)).

198 See *supra* notes 185–87 and accompanying text.

199 LeRoy & Feuille, *Private Justice*, *supra* note 158, at 45–48.

200 Chi-Square ( $\chi^2$ ) 11.220,  $df = 2$ ,  $p < 0.004$ .

201 Chi-Square ( $\chi^2$ ) 7.709,  $df = 2$ ,  $p < 0.021$ .



state and federal courts<sup>202</sup>—account for these disparities. There are key differences in the text of the FAA and the RUAA. In the following sections, I explain how these differences are reflected in specific federal and state court rulings.

### 1. Arbitrator Misconduct over Nondisclosures of Past and Present Relationships

The text in section 23 of the RUAA provides broader grounds than the FAA in section 10 to vacate awards. The first difference appears in a grammatical change in subsection (a)(2). The FAA states a general standard, “where there was evident partiality or corruption in the arbitrators.”<sup>203</sup> The RUAA subdivides these components and adds more terms for a reviewing court to consider when it says “there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.”<sup>204</sup>

The RUAA again mentions arbitrator misconduct in subsection (a)(3) when it declares that an award may be vacated if “an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, [or] refused to consider evidence material to the controversy.”<sup>205</sup> This mirrors language in section 10 of the FAA.<sup>206</sup> The

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202 My results may reflect differences in federal and state judicial systems, or the decisional tendencies of judges. In the federal system, judges are appointed by the President, approved by the Senate, and serve with life tenure. In contrast, many state judges are elected. Therefore, they may be subjected to more political pressure. Some studies suggest that the two judicial systems administer the same justice. See, e.g., Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 251 (1983) (arguing that empirical examination reveals that state and federal courts behave about the same in ruling in favor of constitutional claims). Other evidence suggests that federal and state judges behave differently. See, e.g., Mark C. Miller, *A Legislative Perspective on the Ohio, Massachusetts, and Federal Courts*, 56 OHIO ST. L.J. 235, 248–49 (1995) (arguing that Ohio courts, and especially the Ohio Supreme Court, are seen as partisan actors in the state’s policymaking process). Another analysis concludes that “the federal judiciary’s insulation from majoritarian pressures makes federal court structurally preferable to state trial court as a forum in which to challenge powerful local interests.” Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21 (1977) (arguing that, compared to state trial courts, federal district courts are more technically competent in resolving legal issues, more able to analyze complex and conflicting lines of authority, and more accomplished in writing opinions).

203 9 U.S.C. § 10(a)(2) (2000 & Supp. V 2005).

204 UNIF. ARBITRATION ACT § 23(a)(2) (amended 2000), 7 U.L.A. 74 (2005).

205 *Id.* § 23(a)(3), 7 U.L.A. at 74.

206 See 9 U.S.C. § 10(a)(3) (2000 & Supp. V 2005).

fact that arbitrator misconduct appears twice in the RUAA must mean that this term differs in subsection (2) compared to the repetition of the standard in subsection (3). Otherwise, the repetition is an empty surplus.

In comments for the model act, the RUAA drafters did not elaborate on the meaning of arbitrator misconduct in subsection (a)(2)(C).<sup>207</sup> Therefore, its meaning must be inferred by the grammatical change in the new law, as well as surrounding provisions in the statute. Misconduct cannot mean refusal to postpone a hearing or refusal to hear pertinent evidence—again, because these grounds are mentioned in subsection (a)(3).

Likely, subsection (a)(2)(C) refers to a broad new area of arbitrator conduct that is regulated in RUAA section 12. This regulates arbitrator disclosures to the parties by requiring an arbitrator to disclose “(1) a financial or personal interest in the outcome of the arbitration proceeding; and (2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.”<sup>208</sup>

*Ovitz v. Schulman*,<sup>209</sup> an important decision by the California Court of Appeals, is an example of how disclosure regulation contributes to the disparity between state and federal court confirmation of awards. The arbitration involved a wrongful termination claim by Cathy Schulman, former president of a major film company.<sup>210</sup> During the proceedings, the arbitrator accepted another appointment in a separate arbitration involving the same movie company.<sup>211</sup> After the arbitrator denied Schulman’s claims and awarded her former employer approximately \$1.5 million in damages and \$1.8 million in attorney’s fees and costs,<sup>212</sup> Schulman invoked the disclosure law as grounds for vacating the award.<sup>213</sup> The appellate court found merit in her argument and affirmed the order vacating the award.<sup>214</sup>

Two points are notable. First, Schulman did not prove or attempt to show bias or evident partiality. She simply made her case for vaca-

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207 UNIF. ARBITRATION ACT § 23(a)(2) cmt. A (amended 2000), 7 U.L.A. 74 (2005).

208 *Id.* § 12(a)(1)–(2), 7 U.L.A. at 43.

209 35 Cal. Rptr. 3d 117 (Ct. App. 2005).

210 *Id.* at 119.

211 *Id.* at 120.

212 *Id.*

213 *Id.*

214 *Id.* at 136. The court concluded that because the arbitrator failed to comply with California Standard 12(b), he was precluded from serving as an arbitrator in any other matter involving the parties or any lawyer for the parties until the Schulman arbitration was completed. *Id.* at 127.

tur on the arbitrator's unwitting noncompliance with the disclosure law. Second, the FAA is silent on the subject. If Schulman had sued under this law, her prospects of vacating the award would have been highly doubtful.

Consider an FAA case in point, *Bender v. Smith Barney, Harris Upham & Co.*,<sup>215</sup> where another arbitrator made an incomplete disclosure that the losing party characterized as evidence of bias.<sup>216</sup> The chair of that arbitration panel was terminated from his job in a prior and unrelated dispute by a company named W.H. Newbold.<sup>217</sup> W.H. Newbold hired Sandra Bender, the complainant, after Smith Barney fired her.<sup>218</sup>

Bender argued that the arbitrator was required to make this disclosure, reasoning that "the individual who was instrumental in the decision to employ [her] was the same party who had the distasteful duty of discharging [the arbitrator], thereby creating an inference of bias against [her]."<sup>219</sup> While the arbitrator disclosed his prior employment with W.H. Newbold, he failed to mention his adverse experience with this employer, and the fact that he disputed his termination to the point of arbitrating his own claim against W.H. Newbold.<sup>220</sup> Bender's motion to vacate the award was denied under the FAA's evident partiality standard.<sup>221</sup>

The cases show that the RUAA and the FAA vary in their regulation of arbitrator disclosures. Under the FAA, a party seeking to vacate an award must prove "circumstances 'powerfully suggestive of bias.'"<sup>222</sup> Much less is needed under the RUAA to cause a court to intervene: either technical noncompliance with a disclosure deadline, or failure to comply with an amorphous duty that includes even an "appearance of bias."<sup>223</sup>

## 2. The Award of Attorney's Fees

These cases are significant because representation costs in arbitrations are increasing and arbitrators are now inclined to order this

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215 901 F. Supp. 863 (D.N.J. 1994).

216 *Id.* at 866.

217 *Id.*

218 *Id.* at 867.

219 *Id.* at 866 (quoting Brief of Plaintiff at 6-7, *Bender v. Smith Barney, Harris Upham & Co.*, 901 F. Supp. 863 (D.N.J. 1994) (Civ. A. No. 91-5493 (JBS))).

220 *Id.* at 867 n.2.

221 *Id.* at 867-68.

222 *Id.* at 867 (quoting *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1523 n.30 (3d Cir. 1994)).

223 *Id.*

remedy.<sup>224</sup> Nothing in the FAA precludes the award of attorney's fees. More to the point, federal courts acting under the FAA have confirmed awards that order attorney's fees.<sup>225</sup>

This mirrors the fact that courts routinely award attorney's fees to prevailing plaintiffs.<sup>226</sup> Thus, when the Supreme Court announced in *Gilmer* that arbitration is simply a substitute forum for courts,<sup>227</sup> this suggested that arbitrators should behave like judges who award these fees. The FAA is silent on whether an award should be vacated for providing this remedy. But given the autonomy that Congress con-

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224 *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 145–46 (Fla. Dist. Ct. App. 2000) (approving an arbitrator's award ordering the employer to pay a fired employee \$300,000 in compensatory damages and \$160,000 in attorney's fees). Major arbitration services expressly authorize arbitrators to award attorney's fees. See JAMS, JAMS Policy on Employment Arbitration: Minimum Standards of Procedural Fairness, Standard No. 1, at 2 (Feb. 19 2005), [http://www.jamsadr.com/images/PDF/Employment\\_Arbitration\\_Min\\_Std.pdf](http://www.jamsadr.com/images/PDF/Employment_Arbitration_Min_Std.pdf) ("All remedies that would be available under the applicable law in a court proceeding, including attorneys fees and exemplary damages, must remain available in the arbitration. Post-arbitration remedies, if any, must remain available to an employee.").

225 See, e.g., *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 460 (S.D.N.Y. 1997). A female employee filed a sex discrimination lawsuit after her employer ignored complaints that she was being sexually harassed by her boss. A federal judge denied her access to a trial by ordering arbitration. *Id.* at 460. DeGaetano added a claim for attorney's fees. The arbitration panel awarded her \$90,355 in damages and interest to make her whole for loss of one year of pay, but denied her attorney fees. *Id.* at 461. She recovered \$146,053 in these fees only after she successfully sued in federal court. See *DeGaetano v. Smith Barney, Inc.*, No. 95 CIV. 1613(DLC), 1998 WL 661491, at \*2 (S.D.N.Y. Sept. 25, 1998).

226 See, e.g., *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 845 (2001) (reporting that a female worker who was subjected to flagrant discrimination was awarded \$107,364 in backpay and benefits, \$252,997 in attorney's fees, and \$300,000 in compensatory damages); see also *Jones v. Rent-A-Center, Inc.*, 281 F. Supp. 2d 1277, 1290 (D. Kan. 2003) (awarding \$53,430 in attorney's fees); *Parker v. Olympus Health Care, Inc.*, 264 F. Supp. 2d 998, 1004, 1007 (D. Utah 2003) (awarding \$214,417 in attorney's fees, plus augmentation of \$41,636); *Hall v. Lowder Realty Co.*, 263 F. Supp. 2d 1352, 1371 (M.D. Ala. 2003) (awarding \$128,149 in attorney's fees); *Greenbaum v. Svenska Handelsbanken, N.Y.*, 998 F. Supp. 301, 306–07 (S.D.N.Y. 1998) (awarding \$336,778 in attorney's fees and costs); *Migis v. Pearle Vision, Inc.*, 944 F. Supp. 508, 516–17 (N.D. Tex. 1996) (awarding \$89,687 in attorney's fees, less 10%), *rev'd*, 135 F.3d 1041 (5th Cir. 1998); *Luciano v. Olsten Corp.*, 925 F. Supp. 956, 967 (E.D.N.Y. 1996) (awarding \$283,107 in attorney's fees).

227 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("'[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.'" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

ferred upon arbitrators, courts should reject challenges to awards that provide for attorney's fees.

Section 21(b) of the RUAA changes this presumption by stating that "[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration *if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.*"<sup>228</sup>

The italicized language shows how the RUAA's qualified grant of this arbitrator power can actually lead to vacatur. In a recent case decided under Colorado's RUAA statute, *Carson v. PaineWebber, Inc.*,<sup>229</sup> an employee was ordered by an arbitrator to reimburse his employer for damages arising out of his failure to execute trades on behalf of clients.<sup>230</sup> The arbitrator also ordered the employee to pay PaineWebber's attorney's fees.<sup>231</sup> An appeals court ruled, however, that the arbitrator exceeded his powers under the newly revised arbitration statute.<sup>232</sup> The court based its conclusion on section 13-22-212 of Colorado's arbitration law, a provision that authorizes arbitrators to award attorney's fees *only if this power appears in the arbitration agreement.*<sup>233</sup> Because the agreement said nothing about this arbitrator power, the court vacated this remedy.<sup>234</sup>

A similar case arose in *Moore v. Omnicare, Inc.*<sup>235</sup> The company acquired David Moore's shares in a pharmaceutical supply corporation and named him chief operating officer.<sup>236</sup> Moore was terminated after the new company struggled financially, and he arbitrated numer-

228 UNIF. ARBITRATION ACT § 21(b) (amended 2000), 7 U.L.A. 69 (2005) (emphasis added).

229 62 P.3d 996 (Colo. Ct. App. 2002).

230 *Id.* at 997.

231 *Id.*

232 *Id.* at 1000 (citing COLO. REV. STAT. § 13-22-212 (2001)); *see also* RUAA and UMA Legislation from Coast to Coast, *supra* note 142 (listing Colorado as a state that has adopted the revised arbitration statute).

233 *Carson*, 62 P.3d at 1000. The language is italicized to highlight the fact that the terms from the RUAA led to vacatur.

234 *Id.* at 1001. ("[T]he arbitrator exceeded his powers by awarding attorney fees in the absence of an express agreement between the parties."). The Colorado Uniform Arbitration Act provided: "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award." *Id.* at 1000. (quoting COLO. REV. STAT. § 13-22-212 (2001)). The language of the statute has since been changed to mirror the language of the Uniform Arbitration Act. Compare COLO. REV. STAT. § 13-22-221(2) (2005), with UNIF. ARBITRATION ACT § 21(b) (amended 2000), 7 U.L.A. 69 (2005).

235 118 P.3d 141 (Idaho 2005).

236 *Id.* at 144.

ous claims against Omnicare.<sup>237</sup> In a complex series of interim and final awards, Moore was granted \$130,000 in attorney's fees.<sup>238</sup> Omnicare appealed in the state district court and prevailed in its motion to vacate this part of the award.<sup>239</sup>

The Idaho Supreme Court affirmed the vacatur ruling based on a state arbitration provision<sup>240</sup>—which is similar to section 21 of the RUAA, and identical to language in Colorado's RUAA.<sup>241</sup> This law disallows the award of attorney's fees by an arbitrator unless an agreement expressly authorizes this power.<sup>242</sup> As if to underscore the core difference between the FAA and the RUAA on this point, the Idaho Supreme Court wrote: "The Idaho UAA and not the FAA applied to the substantive law of the parties' contract. With respect to the Judgment to vacate the arbitration panel's award of attorney fees on Mednat's Earnings Holdback claim, the judgment is affirmed."<sup>243</sup>

### 3. The Award of Punitive Damages

Section 21 in the RUAA provides another opportunity to challenge an award where no explicit grounds exist under the FAA. The model law says that "[a]n arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award *under the legal standards otherwise applicable to the claim.*"<sup>244</sup>

The reasoning behind this provision is evident in another state arbitration case, *Sawtelle v. Waddell & Reed, Inc.*<sup>245</sup> A fired securities broker alleged that his former employer maliciously attempted to sever his relationship with clients by defaming him.<sup>246</sup> The arbitration

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237 *Id.* at 144–46.

238 *Id.* at 146.

239 *Id.*

240 *Id.* at 148–49 (citing IDAHO CODE ANN. § 7-910 (2004)).

241 Compare IDAHO CODE ANN. § 7-910 ("Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."), with COLO. REV. STAT. § 13-22-221(2) (2005) ("An arbitrator's expenses and fees . . . shall be paid as provided in the award.").

242 *Moore*, 118 P.3d at 148–49.

243 *Id.* at 152.

244 UNIF. ARBITRATION ACT § 21(a) (amended 2000), 7 U.L.A. 69 (2005) (emphasis added). Emphasis is added because the law places a condition on this arbitrator power, thus limiting arbitrator discretion and creating a new ground for review.

245 754 N.Y.S.2d 264 (App. Div. 2003).

246 *Id.* at 267–68.

was lengthy and expensive.<sup>247</sup> The arbitrators awarded the broker, Sawtelle, \$1.87 million in compensatory damages and \$25 million in punitive damages.<sup>248</sup> On a cross-petition to vacate or modify the arbitration award, the firm failed to reduce its punitive damages before the first court to hear its challenge.<sup>249</sup>

On appeal, however, a New York court vacated the punitive part of the award, and remanded the issue to the original arbitrators.<sup>250</sup> The appellate justices concluded that "in awarding \$25 million in punitive damages, the [arbitration] panel completely ignored applicable law, an error that provides a separate basis for vacating the award."<sup>251</sup> They also concluded that punitive damages violated the Supreme Court's ruling on punitive damages in *BMW of North America v. Gore*.<sup>252</sup> Also, the award manifestly disregarded the law.<sup>253</sup>

On remand, the arbitrators accepted "voluminous written submissions, held a one-day hearing, and issued a second award."<sup>254</sup> Then, they reissued the award with only one cosmetic change.<sup>255</sup> Again, they awarded \$25 million in punitive damages.<sup>256</sup> When the matter was reviewed once more, the lower court vacated the punitive portion a second time because it was disproportionate to the compensatory damages.<sup>257</sup>

Concerned that another remand to the same panel would not change anything, the lower court ordered a third arbitration before a new panel.<sup>258</sup> This prompted Sawtelle to ask the court to order remittitur for the excessive portion of the punitive award, and spare him the additional time and expense in re-arbitrating his case.<sup>259</sup> The court conceded that Sawtelle's "suggestion seems to make sense,"<sup>260</sup> and that the "history of this arbitration undermines the very purpose

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247 *Id.* at 268.

248 *Id.*

249 *Id.* at 269.

250 *Id.* at 276.

251 *Id.* at 273.

252 *Id.* at 270-71 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996)).

253 *Id.* at 274.

254 *Sawtelle v. Waddell & Reed, Inc.*, 789 N.Y.S.2d 857, 858 (Sup. Ct. 2004).

255 *Id.* The only change that the panel made was to modify its finding that the employer "orchestrated a campaign of deception," to the phrase that the company "orchestrated and conducted a horrible campaign of deception, defamation and persecution of Claimant." *Id.*

256 *Id.*

257 *Id.* at 859.

258 *Id.*

259 *Id.* at 858.

260 *Id.* at 859.

of arbitration: to provide a manner of dispute resolution more swift and economical than litigation in court.”<sup>261</sup> Still, the lower court refused the motion because no statute authorized the court to set a conditional remittitur of an arbitration award. The court, therefore, affirmed its earlier order for a new round of arbitration before different arbitrators.<sup>262</sup>

A federal court acting under the FAA provides a contrasting example. The brokerage firm in *Acciardo v. Millennium Securities Corp.*<sup>263</sup> forced out its director of compliance after he refused to participate in regulatory frauds.<sup>264</sup> His attorney offered proof that the firm filed defamatory statements to the National Association of Securities Dealers (NASD), and thereby limited his employment prospects.<sup>265</sup> Five former employees testified that they had observed regulatory violations at the firm, and three testified that when they left the firm their industry termination forms were marked with false and derogatory statements.<sup>266</sup> The arbitrators awarded \$100,000 in punitive damages and \$5000 in compensatory damages.<sup>267</sup>

The firm argued that this 20:1 ratio violated the company’s due process rights.<sup>268</sup> The court disagreed, reasoning that arbitrators could base their punitive award on testimony that proved that the firm engaged in repeated and malicious misuse of the NASD’s termination forms.<sup>269</sup> In addition to finding no due process violation in the punitive award, the court considered whether the remedy manifestly disregarded the law.<sup>270</sup> The firm contended that the law requires a factfinder to determine a defendant’s ability to pay as a precondition for determining the amount of punitive damages.<sup>271</sup> The court concluded that even if the arbitrators ignored the firm’s financial standing, their error was “not so obvious or egregious as to require overturning the award.”<sup>272</sup>

*Sawtelle* and *Acciardo* highlight differences in how state and federal courts review punitive awards. In theory, no difference should occur if the main rule is that courts strongly defer to arbitrator rul-

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261 *Id.*

262 *Id.* at 860.

263 83 F. Supp. 2d 413 (S.D.N.Y. 2000).

264 *Id.* at 415.

265 *Id.*

266 *Id.* at 415–16.

267 *Id.* at 416–17.

268 *Id.* at 422.

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.* at 423.



ings. State courts, however, are more apt to judge the validity of a punitive award against recent due process guidelines set forth by the Supreme Court—guidelines that are law. This signifies the growing importance of RUAA section 21, which allows an arbitrator to award punitive damages, but only if a court would be authorized by law to order the same remedy based on the same evidence.<sup>273</sup>

This is a new condition on this arbitral remedy, thereby limiting arbitrator discretion and creating a new ground for review. Moreover, the RUAA adds language authorizing a punitive award only when the “award is authorized by law in a civil action,” and the award meets the applicable evidentiary standards,<sup>274</sup> thereby inviting a court to review arbitrator factfinding. This new development conflicts with the Supreme Court’s recent and strongly worded admonition that reviewing courts should almost never disturb an arbitrator’s findings of fact.<sup>275</sup>

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

#### 4. Validity of an Agreement to Arbitrate

A striking difference between the FAA and the RUAA is the addition of the RUAA’s fifth substantive ground for vacating an award: “[T]here was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing.”<sup>276</sup> The RUAA drafters explained this change was made “to address the problem of contracts of adhesion in the statute while taking into account the limitations caused by federal preemption.”<sup>277</sup> Their comments elaborated: “Because an arbitration agreement effec-

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273 UNIF. ARBITRATION ACT § 21(a) (amended 2000), 7 U.L.A. 69 (2005).

274 *Id.*

275 *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 511 (2001). *Garvey* emphasized that “established law ordinarily precludes a court from resolving the merits of the parties’ dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator’s decision.” *Id.* *Garvey* sent a strong message to the federal judiciary: do not overturn “the arbitrator’s decision because [the court] disagree[s] with the arbitrator’s factual findings, particularly those with respect to credibility.” *Id.* at 510.

276 UNIF. ARBITRATION ACT § 23(a)(5) (amended 2000), 7 U.L.A. 74 (2005).

277 *Id.* § 6 cmt. 7, 7 U.L.A. at 28.

tively waives a party's right to a jury trial, courts should ensure the fairness of an agreement to arbitrate, particularly in instances involving statutory rights that provide claimants with important remedies."<sup>278</sup> Moreover, "[c]ourts should determine that an arbitration process is adequate to protect important rights. Without these safeguards, arbitration loses credibility as an appropriate alternative to litigation."<sup>279</sup>

*Scott v. Borg Warner Protective Services*<sup>280</sup> is a dramatic illustration of how this fairness concept can lead to vacatur. Consider that the odds of vacatur are generally low. Also, let us assume that a pro se appellant is at a disadvantage over a company who is represented by lawyers in a court. The fact that Scott overcame these steep odds demonstrates the potency of the fairness concept in the RUAA.

The case came up for appeal in 2003 after Scott had been compelled to arbitrate<sup>281</sup> an employment disability claim and the district court affirmed the arbitrator's award against him.<sup>282</sup> By this time, Hawaii had adopted the RUAA and its supreme court had ruled broadly to deny enforcement to compulsory arbitration agreements that are the "result of coercive bargaining between parties of unequal bargaining strength."<sup>283</sup> Applying this state law, the federal appeals court vacated the award because the employee was not bound by the arbitration agreement.<sup>284</sup> Using the reasoning behind the RUAA's fairness concerns, the court noted that Scott was given the arbitration agreement "to sign on a 'take this or nothing basis' and thus it was the result of coercive bargaining between parties of unequal bargaining strength."<sup>285</sup> The court also noted that the agreement unfairly advantaged the employer in its substantive and procedural clauses.<sup>286</sup> Finding that the arbitration agreement was not valid in the first place,

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278 *Id.*

279 *Id.*

280 55 F. App'x 414 (9th Cir. 2003).

281 *Id.* at 415.

282 *Scott v. Burns Int'l Sec. Servs., Inc.*, 165 F. Supp. 2d 1133, 1143 (D. Haw. 2001), *rev'd in part, vacated in part sub nom. Scott v. Borg Warner Protective Servs.*, 55 F. App'x 414 (9th Cir. 2003).

283 *Borg Warner*, 55 F. App'x at 416 (quoting *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 167 (Haw. 1996)).

284 *Id.*

285 *Id.*

286 *Id.* The agreement provided that "only the company has standing to enforce this agreement to avoid piecemeal litigation." *Id.* In addition, Scott was required to submit his claims to binding arbitration within sixty days of Borg Warner's request or be barred from future recourse. *Id.* The court concluded that the arbitration agreement was "therefore unenforceable under Hawaii law." *Id.*

the court ruled that the arbitrator lacked the authority to resolve Scott's claims; therefore, the court vacated the award.<sup>287</sup>

### CONCLUSIONS AND IMPLICATIONS

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

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

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

The deeper problem is institutional. Are courts or legislatures best at preserving the autonomy of arbitration? For too long, courts have been portrayed as jealous competitors to arbitration. The FAA wrenched control of arbitration from these supposedly untrustworthy courts. This shift occurred even as Congress ignored evidence that many common law courts reviewed awards with great deference. Paradoxically, instead of inventing their own standards, Congress adopted common law standards to review awards, though they had little or no idea about their origins!<sup>288</sup>

This institutional dilemma deepened as the FAA kept courts on a short leash for nearly seventy years. Judges were in no position to counteract questionable—even abusive—arbitration practices that employers began to adopt following the pro-arbitration decision in *Gilmer* in 1991. Employers were emboldened to implement arbitration procedures to enhance their advantage over individuals. They

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287 *Id.*

288 *See supra* Parts I.B, II.

shifted large forum costs to employees,<sup>289</sup> designated inconvenient venues,<sup>290</sup> restricted the remedial powers of arbitrators,<sup>291</sup> shortened time bars to file claims,<sup>292</sup> and selected arbitrators without employee input.<sup>293</sup>

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

A third institution—large, private providers of arbitration services—recently entered the picture in the 1990s by enacting their own procedural reforms. As Congress prepared to regulate securities industry employment, the NASD revised its procedures.<sup>294</sup> Another large ADR provider, the American Arbitration Association, heeded the concerns of the American Bar Association by adopting due process procedures and practices.<sup>295</sup> As more balanced procedures were

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

290 See, e.g., *Bailey v. Ameriquest Mortgage Co.*, No. Civ. 01-545(JRTFLN), 2002 WL 100391, at \*8 (D. Minn. Jan. 23, 2002) (finding an arbitration agreement unenforceable where Minnesota employees were required to arbitrate in California), *rev’d*, 346 F.3d 821 (8th Cir. 2003).

291 See, e.g., *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 826–27 (S.D. Ohio 1999) (upholding a \$162,000 punitive damage limit imposed by an arbitration agreement, although Title VII permits up to \$300,000 in punitive damages).

292 See, e.g., *Louis v. Geneva Enters.*, 128 F. Supp. 2d 912, 914, 917 n.2 (E.D. Va. 2000) (holding that a sixty-day filing limit in an arbitration agreement unlawfully conflicted with a three-year statute of limitations for FLSA claims).

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

294 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.” Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration Rules, Exchange Act Release No. 34-40858, 64 Fed. Reg. 1051, 1051 (Jan. 7, 1999). This followed an SEC decision on June 29, 1998, approving a proposed rule change offered by the NASD that abolished mandatory NASD arbitration of statutory employment discrimination claims. Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, Exchange Act Release No. 34-40109, 63 Fed. Reg. 35,299, 35,303 (June 29, 1998) (becoming effective on Jan. 1, 1999).

295 Susan J. McGolrick, *Revised AAA Arbitration Procedures Reflect Due Process Task Force Scheme*, Daily Lab. Rep. (BNA) No. 102, at A-1 (May 28, 1996). The American

utilized, some employers abandoned arbitration in favor of trials.<sup>296</sup> But these reforms did not slow the progress of idealistic drafters of the RUAA. In the interest of making arbitration fairer, they created a larger supervisory role for state courts.

We now arrive at the core problem. Federal courts review awards narrowly under a statutory policy that promotes finality of arbitrator judgment, while state courts increasingly review awards under a statutory policy that promotes procedural fairness in arbitration. States that adopt the RUAA or similar laws are sacrificing final and binding arbitration for fairer arbitrations that are subject to increased court review. The fairness principles in the RUAA are laudable, but RUAA drafters seem to have ignored an ancient maxim of fairness—the Magna Carta’s injunction that justice delayed is justice denied.<sup>297</sup> RUAA drafters never imagined that so many arbitrations at the state level would leave the underlying arbitration agreements, which secure a promise for a final and binding award, in tatters—with an apparent winner in arbitration deprived of justice.

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

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

296 Jane Spencer, *Waiving Your Right to a Jury Trial: After Years of Requiring Arbitration, Companies Return to the Court System, but with Conditions*, WALL ST. J., Aug. 17, 2004, at D1.

297 See MAGNA CARTA cl. 40 (1215) (“To no one will we sell, to no one deny or delay right or justice.” (emphasis added)).

pressure from interest groups such as the insurance industry and the plaintiffs' bar when they consider specific RUAA amendments.

To illustrate, when Nevada adopted the RUAA, its version of the law excluded the model statute's limited grant to empower arbitrators to award punitive damages.<sup>298</sup> The insurance industry lobbied for this total exclusion, arguing that it gave arbitrators too much power.<sup>299</sup> In Maryland, business groups blocked passage of the RUAA because they objected to a provision that would allow for class actions in arbitrations.<sup>300</sup> On the liberal side of the political spectrum, consumer groups and the Attorney General's Consumer Division were concerned that the bill would expand mandatory arbitration clauses in consumer contracts.<sup>301</sup>

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

Against this bleak forecast for arbitration, present conditions are unsettled. The review that occurs in federal court is among the narrowest in the law, and finality is virtually assured. An award challenger has a 92% chance of losing in district court, and an 87% chance of losing again on appeal. Multiplying these odds, the award challenger has an 80% chance of losing in both rounds.

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

State expansion of reviewing standards poses three additional problems:

(1) Foremost, this trend has broken the federal policy that favors arbitration. While the Federal Arbitration Act is nominally in place,

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298 See RUAA and UMA Legislation from Coast to Coast, *supra* note 142.

299 *Id.*

300 *Id.*

301 *Id.*

the reality is that the FAA permits one federal policy and fifty separate state policies to regulate arbitration. When Congress and the Supreme Court beat the drum to proclaim that the FAA provides a national arbitration policy, they are wrong.

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

(3) A moral hazard is created when losers at arbitration are tempted to renege on their initial submission in order to pursue “do-over” adjudication. Consider the potential spillover effects for an already dysfunctional civil justice system.<sup>302</sup> When courts vacate awards, disputes remain unresolved. Ironically, vacatur encourages court adjudications. Award challenges are inexpensive, summary judgment proceedings. The more that vacatur occurs, the more it stimulates award challenges. As courts overturn awards, winners at arbitration find that they are either too late to file an action in court, or must go to the back of a long line that has formed at most courts. In time, high vacatur rates will crash the arbitration system by destroying confidence in the finality of an award. Ironically, this is precisely what FAA lawmakers wanted to avert.

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302 See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 516 (2004) (explaining that so few lawsuits result in a trial because “the architecture of the system . . . has capacity to give full treatment to only a minority of matters entitled to invoke it”).