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Michael H. LeRoy

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# Irreconcilable Deferences? The Troubled Marriage of Judicial Review Standards under the *Steelworkers Trilogy* and the Federal Arbitration Act

Michael H. LeRoy\*

## SUMMARY

The Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*<sup>1</sup> should raise new questions about judicial deference to arbitration awards. That ruling precluded plaintiffs from suing in federal court under the Age Discrimination in Employment Act (ADEA), and required them to arbitrate their age discrimination claims by using the labor arbitration procedures in their collective bargaining agreement.<sup>2</sup> Until now, the Supreme Court has said that labor arbitration is uniquely suited to adjust disputes between unions and employers—but never has labor arbitration been depicted as an appropriate forum for litigating employment discrimination claims.

To explore the ramifications of this hybrid, labor-employment discrimination award, I ask what standards would a court apply to review an arbitrator's ruling. The *Steelworker's Trilogy*—three Supreme Court decisions that explain to courts how to review awards under section 301 of the Labor-Management Relations Act—pronounce deferential standards.<sup>3</sup> But until now, individual employment awards have typically been reviewed under section 10 of the Federal Arbitration Act (FAA) or state law equivalents. My research on labor awards and individual employment awards show that courts do not behave the same under these different regimes. They enforce about seventy-two percent of labor awards, but as much as ninety-two percent of employment discrimination awards. Posing a hypothetical example from the Court's recent affirmative action decision, *Ricci v. DeStefano*,<sup>4</sup> I assess *Penn Plaza*'s potential impact on this new method for adjudicating discrimination claims.

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\* Professor, School of Labor and Employment Relations, and College of Law, University of Illinois at Urbana-Champaign. Prof. LeRoy gratefully acknowledges the research contribution of Professor Rafael Gely, who collected and analyzed data for Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78 (1992). These data form part of the research findings that I report here.

1. 129 S. Ct. 1456 (2009).

2. *Id.* at 1474.

3. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 664 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

4. 129 S. Ct. 2658 (2009).

## I. INTRODUCTION

A. *The Research Question*

The Supreme Court's decisions in *14 Penn Plaza LLC v. Pyett*<sup>5</sup> and *Ricci v. DeStefano*<sup>6</sup> raise new questions about judicial deference to arbitration awards. These landmark cases set the stage for our research question: do courts equally defer to arbitration awards under the Federal Arbitration Act and the Labor-Management Relations Act's (LMRA's) counterpart, the *Steelworkers Trilogy*?

In *Penn Plaza*, a union entered into a collective bargaining agreement (CBA) that required individual employees to submit discrimination claims to arbitration.<sup>7</sup> Steven Pyett and co-workers filed a grievance that alleged violations of the CBA when their jobs as security guards were sub-contracted.<sup>8</sup> Separately, they filed an age discrimination lawsuit in federal district court.<sup>9</sup> Their employer moved to compel arbitration of this claim, but the court denied the motion.<sup>10</sup> Eventually, the Supreme Court ruled that Steven Pyett was precluded from suing his employer under the Age Discrimination in Employment Act (ADEA).<sup>11</sup> His only recourse, therefore, was to arbitrate his claim under the conditions set forth in the CBA.<sup>12</sup>

The *Penn Plaza* decision failed to appreciate a long-simmering tension between employment arbitration that occurs under the FAA<sup>13</sup> and labor arbitrations that occur under section 301 of the LMRA.<sup>14</sup> The FAA authorizes courts to enforce arbitration agreements.<sup>15</sup> Also, it provides courts authority to confirm or

5. 129 S. Ct. 1456 (2009).

6. 129 S. Ct. 2658 (2009).

7. *14 Penn Plaza*, 129 S. Ct. at 1461. The non-discrimination clause also provided for arbitration, stating:

§ 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

*Id.* at 1461.

In conjunction with this provision, Art. VI of the CBA said that the arbitrator "shall . . . decide all differences arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement." *Id.* at 1461, n.1.

8. *Id.* at 1462.

9. *Pyett v. Pa. Bldg. Co.*, No. 04-CV-7536(NRB), 2006 WL 1520517 (S.D.N.Y. 2006)

10. *14 Penn Plaza*, 129 S. Ct. at 1462-63.

11. *Id.* at 1474.

12. *Id.* at 1461. In conjunction with non-discrimination clause in *supra* note 3, pt. VI of the CBA said that the arbitrator "shall . . . decide all differences arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement." *Id.* at 1461 & n.1.

13. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

14. Labor Management Relations Act, 29 U.S.C. § 185(b) (2006).

15. The FAA provides court's jurisdiction to stay actions where there is a dispute that is subject to an arbitration agreement. 9 U.S.C. § 3. The FAA also authorizes federal courts to compel arbitration where one party to an arbitration agreement refuses to submit a claim to that forum. 9 U.S.C. § 4.

vacate arbitration awards.<sup>16</sup> By specifying narrow grounds for reviewing awards, the FAA promotes judicial deference to the procedures and outcomes of this private alternative dispute resolution (ADR) process.<sup>17</sup>

The LMRA takes a similar approach in deferring to arbitration, but the statute itself is much less specific. It simply provides federal jurisdiction to enforce collective bargaining agreements, including arbitration clauses in these contracts.<sup>18</sup> Addressing this statutory void, the U.S. Supreme Court has provided standards for enforcing arbitration agreements and arbitrator awards. In the *Steelworkers Trilogy*, the U.S. Supreme Court authorized lower courts to compel arbitration of grievances.<sup>19</sup> Also, the *Trilogy* broadly stated a judicial policy to defer to the judgment of arbitrators. This was accomplished by setting forth limited grounds for vacating awards.<sup>20</sup>

I suggest that the two arbitration regimes, while superficially similar, operate quite differently. In particular, courts do not behave with the same deference to arbitration awards under the FAA and LMRA. And therein is a new problem that *Penn Plaza* created. On the one hand, the majority opinion confidently asserted that Steven Pyett is still protected by federal courts, even though his claim will be decided by an arbitrator:

[A]n arbitrator's decision as to whether a unionized employee has been discriminated against on the basis of age in violation of the ADEA remains subject to judicial review under the FAA. "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."<sup>21</sup>

This is true in theory. But what if empirical evidence shows that federal courts virtually rubber stamp awards under the FAA, but vacate labor arbitration awards more frequently? What if statistics show that state courts vacate FAA awards more much often than federal counterparts? In the face of such inconsistency, would *Penn Plaza* still be justified in concluding that judicial scrutiny of arbitration awards is sufficient to ensure that the arbitrator has complied with the requirements of the ADEA? And on what authority does the Court believe that Mr. Pyett's award is reviewable under the FAA and not the LMRA? After all, his arbitration procedure is specified in a CBA that is subject to LMRA regulation.

I examine a contradiction in *Penn Plaza*. The Court assumes that the individual claimant would challenge an adverse award under the FAA—but if the arbitration occurred under the auspices of a CBA, the resulting award presumably would be subject to LMRA review and its separate standards under the *Steelworkers*

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16. 9 U.S.C. § 10.

17. *Id.*

18. 29 U.S.C. § 185.

19. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (ruling that a federal court may compel an employer to submit a union's grievance to arbitration); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

20. *See* 9 U.S.C. § 10; *see also infra* note 39.

21. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 n.10 (2009) (citation omitted) (quoting *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 232 (1987)).

*Trilogy*.<sup>22</sup> *Penn Plaza* created a new FAA-LMRA hybrid arbitration and, with it, an unsettled award-review conundrum.

In this study, I explore the empirical implications of this emerging controversy.

### B. Factual Context for My Study

I pursue my research question by creating two hypothetical scenarios that draw from the Supreme Court's recent landmark ruling in *Ricci*.<sup>23</sup> In *Ricci*, New Haven, Connecticut and its firefighters union negotiated a policy for promotional testing.<sup>24</sup> The city administered a promotion test for firefighters that was developed by a consulting firm.<sup>25</sup> The test resulted in no African-Americans qualifying for promotion.<sup>26</sup> If the city accepted the test results, only white firefighters would be promoted.<sup>27</sup> Concerned that the test would have an adverse impact on minority firefighters, the City's Civil Service Board refused to certify the test results.<sup>28</sup> As a result, white firefighters who were denied a promotion sued New Haven under Title VII and the Equal Protection Clause, claiming that the city unlawfully based its decision on their race.<sup>29</sup> Eventually, a federal district court dismissed their discrimination claims.<sup>30</sup>

To explore our research question, I pose two promotional disputes similar to the *Ricci* case. In the LMRA (*Steelworkers Trilogy*) hypothetical, white union members would be disqualified for promotion in an identical fact pattern. But under *Penn Plaza*, they would submit their discrimination claim to a labor arbitrator. The FAA hypothetical would pose the same facts but arise in a non-union workplace. Thus, the arbitration would proceed under the FAA.

I further suppose that the labor arbitrator and employment arbitrator would decide the discrimination exactly like the district court judge in *Ricci*'s promotional case. Both arbitrators would deny the grievances. The white firefighters would then sue to vacate the awards.

Using my large databases on labor and employment arbitration awards,<sup>31</sup> I estimate the probability that the firefighters would persuade courts to vacate awards

22. Originally, the grievance contained complaints that the Company violated the seniority provisions of the CBA, and also the Age Discrimination in Employment Act; but after the initial arbitration hearing, the union withdrew the ADEA claim. *Id.* at 1462. After Mr. Pyett filed an ADEA lawsuit, the company unsuccessfully sought a court order to arbitrate his claim. *Id.* at 1463. In dictum, the Supreme Court observed that if an arbitration occurred and resulted in an award, it would be reviewed under the FAA (emphasis added). *Id.* at 1471 n.10. But this unnecessary leap to decide a non-issue in the case overlooked the possibility that a union could proceed with both a labor and an age discrimination grievance, as the union in this case originally acted. If an award had been issued on both types of claims, and was subsequently challenged in federal court, logic would dictate that the award would be reviewable under the *Trilogy*. This is because the entire arbitration proceeding would occur under auspices of the collective bargaining agreement—an area specifically regulated by the *Trilogy*.

23. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

24. *Id.* at 2665.

25. *Id.*

26. *Id.* at 2666.

27. *Id.*

28. *Id.* at 2671.

29. *Id.*

30. *Id.* at 2671-72.

31. See *infra* notes 96-98, citing published articles that report on these databases.

under the *Trilogy* and also under the FAA. I also compare their likelihood of overturning the awards in state and federal courts. My data suggest that the odds of vacating these awards would significantly differ under these seemingly similar award review regimes.

The foregoing discussion sets the stage for our research question: do courts equally defer to arbitration awards under the FAA and the LMRA? Before proceeding to the empirical analysis, I examine in more detail the award reviewing standards in the FAA and LMRA.

## II. DIFFERENCES IN DEFERENCE: FEDERAL COURT REVIEW OF EMPLOYMENT AND LABOR ARBITRATION AWARDS

### A. *The FAA: A Statutory Approach to Individual Employment Arbitration*

When Congress enacted the FAA, it meant to end judicial hostility to arbitration agreements.<sup>32</sup> Lawmakers wanted to prevent courts from intervening in private disputes before or during the arbitration.<sup>33</sup> But they gave little thought to post-arbitration disputes where a losing party refuses to comply with an award or seeks to overturn the arbitrator's ruling in court.<sup>34</sup> The 1924 Senate report said that "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."<sup>35</sup> An award should be vacated "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."<sup>36</sup> The Senate concluded that "[t]here 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>37</sup>

32. The Senate Report said that the bill would abolish the judicial reluctance to enforce arbitration agreements. S. REP. NO. 68-536, at 2-3 (1924). During Senate debate on the FAA, Senator Thomas J. Walsh, explained: "In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced." Remarks of Senator Walsh, 66 CONG. REC. 984 (1924).

33. *Joint Hearings before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 1st Sess, on S. 1005 and H.R. 646, at 6 (1924). Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce said, "The difficulty is that men do enter into these such (arbitration) agreements and then afterwards repudiate the agreement. . . . You go in and watch the expression of the face of your arbitrator and you have a 'hunch' that he is against you, and you withdraw and say, 'I do not believe in arbitration anymore.'" *Id.*

34. H.R. REP. NO. 68-96, at 2. The FAA's brief legislative history said: "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."

35. S. REP. NO. 68-536, *supra* note 32, at 4, stating:

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.

36. *Id.*

37. *Id.*

A lawyer's brief on common law vacatur provided the main outline for judicial reviewing standards in the FAA,<sup>38</sup> and now appears in section 10 of the Act.<sup>39</sup> Contemporary courts believe that these grounds are strikingly narrow.<sup>40</sup>

The first sub-part in section 10 of the FAA requires proof of arbitrator fraud or corruption.<sup>41</sup> The second is similarly narrow, requiring proof of evident partiality by the arbitrator.<sup>42</sup> The third basis refers to unlikely events during the arbitration proceedings. A hearing must be scheduled, and a party must request a postponement of the hearing. In addition, the arbitrator must refuse to grant the request for postponement. Assuming that these conditions occur, the party moving to vacate an award must prove that the arbitrator was "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown."<sup>43</sup> Similar to the first two FAA provisions, vacatur depends on arbitrator misconduct. The other basis in sub-section 3 requires proof that the arbitrator refused to hear evidence pertinent and material to the controversy, or was guilty of other misbehavior that prejudiced the rights of a party.<sup>44</sup> The fourth and final ground is the broadest, since it refers to arbitrator judgment and discretion.<sup>45</sup> A court may vacate an award where arbitrators exceeded their powers, or the award is so indefinite that it is imperfectly executed.<sup>46</sup>

Important to note, the FAA is supplemented by parallel legislation in thirty-five states that adopted the Uniform Arbitration Act (UAA) and fourteen other states that enacted similar legislation.<sup>47</sup> Many state laws contain the four statutory standards in section 10 of the FAA, and add a fifth basis to vacate an award.<sup>48</sup>

38. See *Joint Hearings before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 1st Sess, on S. 1005 and H.R. 646, at 36 (1924) (Statement of W.W. Nichols, January 9, 1924). The legislative reports and debates said nothing as to whether post-award and state court litigation rules should be preempted by the new federal law.

39. See 9 U.S.C. § 10 (2006), 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 by 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.

40. See, e.g., *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) ("Judicial review of arbitration awards is tightly limited; perhaps it ought not be called 'review' at all.")

41. 9 U.S.C. § 10(a)(1).

42. *Id.* § 10(a)(2).

43. *Id.* § 10(a)(3).

44. *Id.*

45. *Id.* § 10(a)(4).

46. *Id.*

47. REVISED UNIF. ARBITRATION ACT, Prefatory Note (2000); 7 U.L.A. 2 (Supp. 2005), available at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>.

48. UNIF. ARBITRATION ACT § 12 (1955), 7 U.L.A. 280 (1997), available at <http://www.adr.org/sp.asp?id=29567>. The Act 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 therefore 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 partici-

This fairly uniform approach began to fragment after 2000, when a national panel of experts approved the Revised Uniform Arbitration Act (RUAA). The RUAA drafters identified fourteen issues that required updating in contemporary arbitration.<sup>49</sup>

In a recent survey of all state laws, the American Arbitration Association reported that twelve states adopted the RUAA.<sup>50</sup> The revised vacatur standards appear in the RUAA's section 23.<sup>51</sup> By regulating arbitrations in more detail, these provisions supply award losers with more ammunition to challenge awards.

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pate 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.*

UNIF. ARBITRATION ACT vacatur standards appear in ALASKA STAT. § 09.43.120 (2009); ARIZ. REV. STAT. § 12-1512 (2009); ARK. CODE § 16-108-212 (2009); IDAHO CODE § 7-912 (2009); 710 ILL. COMP. STAT. § 5/12 (WEST 2009); IND. CODE § 34-57-2-13 (2009); KAN. STAT. ANN. § 5-412 (2009); KY. REV. STAT. ANN. § 417.160 (WEST 2009); ME. REV. STAT. ANN. TIT. 14, § 5938 (2009). MASS. GEN. LAWS CH 150, § 12 (2009); MINN. STAT. § 572.19 (2009); MO. REV. STAT. § 435.405 (2009); MONT. CODE ANN. § 27-5-312 (2009); NEB. REV. STAT. § 25-2613 (2009); S.C. CODE ANN. § 15-48-130 (2009); S.D. CODIFIED LAWS § 21-25A-24 (2009); TENN. CODE ANN. § 29-5-213 (2009); VA. CODE ANN. § 8.01-581-010 (2009). See *supra* note 39.

49. The RUAA list includes:

(1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold pre-hearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a pre-award ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney's fees, punitive damages or other exemplary relief; (11) when a court can award attorney's fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award; and (13) which sections of the UAA would not be waivable; particularly when one party has significantly less bargaining power than another; and (14) the use of electronic information in the arbitration process.

REVISED UNIF. ARBITRATION ACT, Prefatory Note.

50. See *RUAA and UMA Legislation from Coast to Coast*, DISP. RESOL. TIMES, Aug. 31, 2005, available at <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.*

51. REVISED UNIF. ARBITRATION ACT § 23, 7 U.L.A. 2 (Supp. 2005), available at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>. The revised vacatur standards, appearing in RUAA Section 23, added a sixth element, and made other changes in its incorporation of the four FAA standards and the fifth standard in the UAA. 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. I do this to support my point that vacatur standards are proliferating, thereby creating more ammunition for award-losers to appeal the arbitration outcome.

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 arbitra-



The FAA picture is further complicated by federal court adoption of common law standards to review awards. Thus, some courts supplement section 10 reviewing standards with their own yardsticks. “Manifest disregard of the law” is a prime example.<sup>52</sup> Federal circuit courts are divided in their use of this standard.<sup>53</sup> Occasionally, courts use manifest disregard of the law to vacate awards.<sup>54</sup> The U.S. Court of Appeals for the Second Circuit explained in *Halligan v. Piper Jaffray, Inc.* that arbitrators cannot “ignore[] the law or the evidence or both.”<sup>55</sup> In contrast, the Seventh Circuit cast doubt on this standard.<sup>56</sup>

State courts have also supplemented statutory standards by vacating awards that are irrational.<sup>57</sup> When applied to multi-million dollar awards in employment arbitrations,<sup>58</sup> this standard imports the Supreme Court’s regulation of jury awards in civil trials.<sup>59</sup>

Although Congress envisioned the FAA as a commercial arbitration law, the Supreme Court expanded the law’s usage when it approved mandatory arbitration for an age discrimination claim in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>60</sup> *Gilmer* ruled that a securities industry employee who had been required to sign an arbitration agreement was precluded from suing in court.<sup>61</sup> This ruling caused many employers to require individual workers to agree to arbitration.<sup>62</sup>

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tor’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.*

*Id.* (emphasis added).

52. *E.g.*, *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1179 (D.C. Cir. 1991).

53. Numerous circuits have adopted this standard. *E.g.*, *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978); *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir. 2006); *Prestige Ford v. Ford Dealer Computer Svcs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003); *Buchignani v. Vining Sparks IBG, Inc.*, 208 F.3d 212 (6th Cir. 2000); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991); *Ainsworth v. Skurnick*, 960 F.2d 939, 940-41 (11th Cir. 1992) (per curiam)).

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

55. 148 F.3d 197, 204 (2d Cir. 1998).

56. Judge Posner noted, “We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration.” *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

57. *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 270 (N.Y. App. Div. 2003) (“A grossly excessive award that is arbitrary and irrational under *Gore* should be equally arbitrary and irrational under the FAA.”).

58. *Id.*

59. *E.g.*, *Lee v. Edwards*, 101 F.3d 805, 809-10 (2d Cir. 1996) (court applied *Gore* factors in terms of irrationality to an employment discrimination claim under 42 U.S.C. § 1983).

60. 500 U.S. 20, 23 (1991).

61. *Id.* at 35.

62. See Ken May, *Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management*, 93 Daily Lab. Rep. (BNA) at A-5 (May 14, 2001) (reporting an employment lawyer’s view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits). David Copus also notes that the biggest financial risk for employers in termination lawsuits—tort claims in which a single plaintiff can be awarded millions of dollars—is controlled by arbitration agreements that cap damages. See also U.S. General Accounting Office, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS-95-150 at 5 (July 5,

In theoretical terms, *Gilmer* broadly approved arbitration as a substitute for trials, concluding that by “agreeing to arbitrate a statutory claim, a party [would] not forgo the substantive rights afforded by the statute . . . .”<sup>63</sup> Thus, *Gilmer* stated a theory of forum substitution where arbitrators serve as substitute judges, subject to the narrow reviewing standards that courts apply to disputed awards. More recently, the Court’s ruling in *Circuit City Stores, Inc. v. Adams* expanded *Gilmer* by limiting a section in the FAA that excludes the employment contracts of employees in railroad, maritime, and closely related industries.<sup>64</sup> For these workers, their arbitration agreements are not enforceable under the FAA—and this implies that they are not subject to mandatory arbitration, but may instead seek recourse in court. But *Circuit City* means that all other employees who have a contract that calls for arbitration must submit their dispute to that forum.

### *B. The LMRA: A Federal Common Law Approach under the Steelworkers Trilogy*

By the late 1940s and 1950s, the FAA’s coverage expanded to review a different kind of workplace arbitration award—those involving grievances filed by unions against employers.<sup>65</sup> When award-enforcement disputes arose in unionized settings, some courts applied the FAA to arbitration clauses in labor agreements.<sup>66</sup> Other courts took a different tack in these disputes. Congress passed the LMRA in 1947 to curb a rising tide of strikes.<sup>67</sup> Section 301 created federal jurisdiction to enforce CBAs.<sup>68</sup>

The LMRA, therefore, created a confusing overlap between its own section 301 and the FAA. The legislative history of the FAA strongly suggests that the

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1995) available at <http://www.gao.gov/archive/1995/he95150.pdf> (reporting that employers prefer alternative dispute resolution forums to court because of growing concerns about “(1) million dollar jury awards to employees and (2) the provision in the Civil Rights Act of 1991 that permits punitive damages in cases of intentional discrimination under Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act.”)

63. *Gilmer*, 500 U.S. at 26.

64. 532 U.S. 105, 114-19 (2001) (ruling that all employment arbitration agreements are enforceable under the FAA, except a relatively small segment of agreements that cover transportation workers.)

65. For background, see Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157 (1953); Donald Wollett & Harry H. Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445 (1955); and Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

66. *E.g.*, Local 205, United Electrical Workers v. Gen. Elec. Co., 233 F.2d 85 (1st Cir. 1956).

67. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957) (stating that “Congress was also interested in promoting collective bargaining that ended with agreements not to strike”); see also BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BULLETIN NO. 916, HANDBOOK OF LABOR STATISTICS 136 tbl. E-3, col. 2 (1948) (Extent of Work Stoppages, 1916-47). Strikes rose sharply from 2,772 in 1938, 2,613 in 1939, 2,508 in 1940, 4,288 in 1941, 2,968 in 1942, and 3,752 in 1943 to 4,956 in 1944, 4,750 in 1945, and 4,985 in 1946. *Id.*

68. 29 U.S.C. § 185(a) (2006) states:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

law was created to help companies resolve commercial and maritime disputes.<sup>69</sup> In contrast, section 301 of the LMRA was enacted specifically to deal with labor disputes. The contours of LMRA jurisdiction were hard to discern, however, because Congress said nothing about court standards for reviewing labor arbitration awards.

The Supreme Court waded into this thicket in *Textile Workers Union v. Lincoln Mills*<sup>70</sup> by approving the development of federal common law contract principles under section 301. A short time later, the Court issued three closely related decisions, now called the *Steelworkers Trilogy*, which set forth standards for enforcing labor arbitration agreements.

One *Trilogy* decision, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,<sup>71</sup> specified limited grounds for vacating an arbitrator's ruling: (1) the award fails to draw its essence from the collective bargaining agreement,<sup>72</sup> or (2) the arbitrator exceeds his authority.<sup>73</sup> In a companion *Trilogy* decision, the Court presumed that the arbitrator has special insight into workplace disputes.<sup>74</sup> Thus, the *Trilogy* sent a strong message to federal courts to enforce awards. This approach was called into question, however, as labor arbitration awards touched on subjects that were regulated by public policies that transcended union-management relations.

For example, employment discrimination laws provided a notable complication for labor arbitration.<sup>75</sup> Consider the dilemma that confronted an employer who needed to lay off part of its workforce. The employer could comply with the

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69. S. REP. NO. 68-536, *supra* note 32, at 2 (stating that the FAA was proposed to help businesses avoid "the delay and expenses of litigation"); H.R. REP. NO. 68-96, *supra* note 34, at 2 (showing that Congress believed the simplicity of arbitration would "reduce[c] technicality, delay, and [keep] expense to a minimum and at the same time safeguard the rights of the parties").

70. 353 U.S. 448 (1957). The Court ruled that federal jurisdiction to enforce collective bargaining agreements under the National Labor Relations Act, including arbitration provisions, arises under section 301 of the Labor-Management Relations Act of 1947, and not the FAA. *Id.* at 451-52

71. 363 U.S. 593 (1960).

72. *Id.* at 597. The Court explained that the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.* When the arbitrator dispenses "his own brand of industrial justice" contrary to the agreement, the "courts have no choice but to refuse enforcement of the award." *Id.*

73. *Id.* at 598. An award should not be disturbed unless the arbitrator "has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration." *Id.* A court should not vacate an award merely because it disagrees with the arbitrator's construction of the agreement. *Id.* It added that a "mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award." *Id.* at 597.

74. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). The Court explained:

The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

*Id.* at 582.

75. A prescient insight to this problem appears in David E. Feller, *The Coming End of Arbitration's Golden Age*, 29 PROC. NAT'L. ACAD. ARB. 109 (1997) (stating: "Arbitration is not an independent force, but a dependent variable, and to the extent that collective bargaining is diminished as a source of employee rights, arbitration is equally diminished.").

CBA, and therefore sequence layoffs in reverse seniority order. Consequently, white men would be retained while lower seniority minorities and women would be laid-off. Or, the employer could comply with a consent decree resulting from a race and sex discrimination lawsuit with its minority employees and ignore the layoff sequence in the CBA.

The employer in *W. R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers* faced this hard choice and complied with a court decree in order to avoid a discrimination lawsuit.<sup>76</sup> But the arbitrator, whose authority was grounded only in the CBA, ruled that the company violated the CBA by not following the agreement's prescribed order for laying off workers.<sup>77</sup> After the employer refused to comply with the award, the Supreme Court in *W.R. Grace* upheld the arbitrator's ruling.

In doing so, the Court stated an additional common law standard for reviewing awards. The award cannot violate a public policy. But the *W. R. Grace* Court applied the standard carefully to circumstances where "the contract as interpreted by [the arbitrator] violates some explicit public policy."<sup>78</sup> Before a court vacates any award, a judge must, therefore, find that a public policy is "well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."<sup>79</sup>

Before long, other public policies tempted courts to vacate arbitration awards. Drug use was regulated by criminal law. If an arbitrator reinstated an operator of an industrial cutting machine who was fired for possessing drugs on an employer's property, the award would be at odds with drug laws. On the other hand, nothing in these laws specifically prohibited the employment of a worker who was arrested on drug charges.

This was the problem presented in *United Paperworkers Int'l Union v. Misco, Inc.*<sup>80</sup> The Court reinforced the message that judges should avoid vacating awards

76. 461 U.S. 757 (1983). The employer had entered into a consent decree with the Equal Employment Opportunity Commission that required the company to maintain its extant proportion of women and blacks in the work force in the event of layoffs to remedy past sex and race discrimination at its Corinth, Mississippi plant. *Id.* at 759-60. A year after entering into the decree, the employer needed to lay off part of its work force and, consistent with the decree, protected females and minorities by laying off white males. *Id.* at 761-62. Having more seniority than the protected employees, the white males filed a grievance to vindicate this contractual right. *Id.* After being compelled by federal courts to arbitrate this grievance, the company lost at arbitration. *Id.* at 763-64.

77. *Id.* at 762-64. The arbitrator ruled that the employer had breached the collective bargaining agreement, in opposition to the consent decree, and awarded the affected employees damages rather than reinstatement. *Id.* at 768-69.

78. *Id.* at 766.

79. *Id.* (quotation omitted).

80. 484 U.S. 29 (1987). In this case, an arbitrator reinstated a paper mill worker who was fired after he was arrested in the company parking lot on a drug charge. *Id.* at 33. The district court vacated the award because the judge believed that reinstatement would violate a public policy against operating dangerous machinery by drug-users. *Id.* at 34-35. *Misco* reversed these rulings. In doing so, it articulated an additional *Trilogy* principle for denying enforcement to an award—albeit a narrow basis—when it said that an award may be set aside only if they "would violate some explicit public policy that is well-defined and dominant, and is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests." *Id.* at 43 (internal quotations and citations omitted).

*Misco* did more than reaffirm the *Trilogy*. The decision dealt explicitly with two other grounds that lower courts use to review awards. In effect, *Misco* enlarged upon the *Trilogy*'s broad ranging consideration of grounds for vacating arbitration awards, but also stressed that judges are to confirm awards

on general public policy grounds.<sup>81</sup> It told judges to leave the fact-finding function entirely to the arbitrator, except in extremely rare instances where arbitrator fraud or other serious misconduct is evident.<sup>82</sup> *Misco* emphasized this point, stating: “Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.”<sup>83</sup> Still, after *Misco*, some federal courts did not get the message to leave awards alone except in very rare instances. This prompted the Supreme Court on two more recent occasions to rebuke wayward judges.<sup>84</sup>

### C. Theoretical Comparison of Award Review under the FAA and LMRA

I return to my research question: do courts equally defer to arbitration awards under the FAA and the LMRA’s counterpart in the *Steelworkers Trilogy*? I do not yet answer this question with data, but summarize the foregoing discussion by noting some important theoretical differences in these award review regimes.

Table 1 summarizes these points. I note that the FAA was enacted as a response to business concerns about the growing costs of civil litigation.<sup>85</sup> Congress

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even when they disagree with the arbitrator’s ruling or reasoning. *See also id.* at 39 (stating “decisions procured by the parties through fraud or through the arbitrator’s dishonesty need not be enforced” but awards that suffer from serious errors are to be enforced “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority” even if “a court is convinced the arbitrator committed serious error.”).

81. *Id.* at 44 (stating “general considerations of supposed public interests” is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.” (citation omitted)).

82. *Misco* stated a nearly absolute rule against reviewing an arbitrator’s fact-findings: When “only improvident, [or] even silly, factfinding is claimed . . . [t]his is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.” *Id.* at 39. The Court elaborated:

Even in the very rare instances when an arbitrator’s procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator’s decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.

*Id.* at 38.

83. *Id.* at 44. (“As we see it, the formulation of public policy set out by the Court of Appeals did not comply with the statement that such a policy must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”) (internal quotes omitted).

84. *See Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001).

85. *Joint Hearings before the Subcommittees of the Committees on the Judiciary*, *supra* note 33, at 6 (1924) (Statement of Charles L. Bernheimer, Chairman of Committee on Arbitration). Mr. 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.*

heard from business leaders about their growing entanglements in courts, and sought to provide businesses a legally enforceable method to privately adjudicate their disputes.<sup>86</sup> Lawmakers believed that arbitration provided businesses a simpler, faster, and less expensive alternative to court adjudication.<sup>87</sup> They also perceived that courts were hostile to arbitration,<sup>88</sup> and therefore sought two new roles for courts—to enforce arbitration agreements by ordering arbitration in place of trials, and to review awards narrowly so as to allow the parties to fulfill their arbitration bargain.

More recently, the FAA has undergone a unique “back door” revision. While the FAA has not been significantly amended, its implementation has been affected by the fact that states have concurrent jurisdiction in FAA proceedings.<sup>89</sup> Thus, if state vacatur standards change, this amounts to a “back door” alteration in FAA reviewing standards. In this vein, it is important to note that some states have enacted the Revised Uniform Arbitration Act—a statutory revision that intends to improve procedural fairness for parties who arbitrate their disputes.<sup>90</sup>

**Table 1. The FAA (Section 10) and LMRA (Section 301)**

<i>Comparing Award Review Standards</i>		
	FAA	LMRA
Purpose	<ul style="list-style-type: none"> <li>▪ Respond to Business Concerns</li> <li>▪ Reduce Litigation Expense</li> <li>▪ Expedite and Simplify Adjudication of Disputes</li> <li>▪ End Judicial Hostility to Arbitration</li> </ul>	<ul style="list-style-type: none"> <li>▪ Promote Industrial Peace</li> <li>▪ Substitute Arbitration for Strikes During Term of CBA</li> </ul>
Regulatory Method	<ul style="list-style-type: none"> <li>▪ Mostly Statutory</li> </ul>	<ul style="list-style-type: none"> <li>▪ Promote Industrial Peace</li> <li>▪ Substitute Arbitration for Strikes During Term of CBA</li> </ul>
Venue and Jurisdiction	<ul style="list-style-type: none"> <li>▪ Federal or State Court</li> </ul>	<ul style="list-style-type: none"> <li>▪ Entirely Common Law</li> </ul>

86. See S. REP. 68-356, *supra* note 32.

87. *Id.* at 2 (stating that the FAA was proposed to help businesses avoid “the delay and expenses of litigation”); H.R. REP. NO. 68-96, *supra* note 34, at 2 (showing that Congress believed the simplicity of arbitration would “reduce[e] technicality, delay, and [keep] expense to a minimum and at the same time safeguard the rights of the parties”).

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

89. *Infra* note 107.

90. *Supra* note 47 and accompanying text.

Recent Change	▪ RUAA Standards (Year 2000) to Improve Procedural Fairness	▪ Federal Court
Judges	▪ Federal (Appointed) ▪ State (Elected or Appointed)	▪ None

In contrast, section 301 of the LMRA has not undergone any revision since its enactment in 1947. I also observe that different circumstances led to the federal law that regulates labor arbitration. The LMRA was enacted to promote industrial peace and stability. Specifically, Congress wanted to minimize strikes while labor agreements were in effect.<sup>91</sup> Unlike the FAA, the LMRA did not set forth specific statutory standards for arbitration awards. Section 301 was a short and vague declaration of policy to authorize courts to enforce labor agreements.<sup>92</sup> Arbitration was brought into the realm of section 301 simply because Congress wanted to fortify the use of arbitration clauses as strike substitutes.<sup>93</sup> As more and more disputes arose over arbitration awards, the federal courts had to decide whether to review these private rulings under the FAA or invent their own common law standards for this purpose. The latter approach won out when the Supreme Court decided the *Trilogy*.

In sum, the FAA and LMRA are strong public policies that favor arbitration. This does not mean, however, that courts apply the same standards in reviewing awards. Even if the standards were identical, one cannot be sure that a federal judge and a state judge would be equally inclined to enforce an award. Federal judges are nominated by the President and approved by the U.S. Senate. State judges, in contrast, hold office by a variety of selection methods.<sup>94</sup> The fact that some are elected may make these judges more sensitive to political pressures, including campaign contributions.<sup>95</sup>

### III. EMPIRICAL FINDINGS

In two earlier studies, I collected and analyzed data from federal court rulings on labor arbitration awards (Rows 1-2, Tables 2A & 2B).<sup>96</sup> These decisions occurred from 1960-2001. In a more recent study, I added new labor arbitration

91. *Supra* note 67.

92. *Supra* note 68.

93. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 48 (1957).

94. Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 181 (tbl. 2) (2009).

95. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (litigant before state supreme justice had contributed \$3 million to the judge's election fund, but judge refused to recuse himself from case involving this contributor).

96. Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78, 98 (1992). This research analyzed federal district and appellate 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. These decisions were published after June 23, 1960 and before July 1, 1991. A follow-up study, Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. DISP. RESOL. 19, 50 tbl.1 (2001), reported data for court review of awards from 1991-2001.

cases from 2001 to 2006 (Row 3, Tables 2A and 2B).<sup>97</sup> I turned my attention at that point to creating a similar database for individual employment awards.<sup>98</sup> The sample had cases from 1975 through 2007 (Row 4, Tables 2A and 2B). For the first time, I combine the labor and employment arbitration award data. Tables 2A and 2B summarize these results. This presentation allows a direct comparison of award review under the FAA and LMRA. Beneath the tables, I glean key findings from this comparison.

**Table 2A. Federal Court Confirmation of Awards: District Court Rulings**

Year of Court Ruling	LMRA: Labor Arbitration Awards <i>Confirmation Ruling/ Total Rulings</i>	FAA: Employment Arbitration Awards <i>Confirmation Ruling/ Total Rulings</i>
1960-1991	724/1008..... 71.8%	—
1991-2001	162/232..... 70.3%	—
2001-2006	156/201..... 77.6%	—
1975-2007	—	148/160..... 92.5%
TOTAL	1041/1441..... 72.3%	148/160..... 92.5%

**Table 2B. Federal Court Confirmation of Awards: Appellate Court Rulings**

Year of Court Ruling	LMRA: Labor Arbitration Awards <i>Confirmation Ruling/ Total Rulings</i>	FAA: Employment Arbitration Awards <i>Confirmation Ruling/ Total Rulings</i>
1960-1991	301/427..... 70.5%	—
1991- 2001	77/116..... 66.4%	—
2001-2006	61/80..... 76.3%	—
1975-2007	—	70/83..... 84.3%
TOTAL	439/623..... 70.5%	70/83..... 84.3%

97. Michael H. LeRoy & Peter Feuille, *Happily Never After: When Arbitration Has No Fairy Tale Ending*, 10 HARV. NEGOT. L. REV. 199 (2006). This research extended the labor arbitration database through 2006.

98. Michael H. LeRoy, *Do Courts Create Moral Hazard? When Judges Nullify Employer Liability in Arbitrations: An Empirical Analysis*, 93 MINN. L. REV. 998 (2009).



**Table 3. Award Confirmation Rates by Federal and States Courts Using FAA, Trilogy and Other Common Law Standards**

<i>Basis &amp; Frequency for Challenging Laws vs. Difference in Confirmation Rates</i>		
▪ <u>Corruption, Fraud, or Undue Means (FAA, 9 U.S.C. § 10(1), or State UAA Equivalent)</u>		
Fed. District Ct. Ruling 7/7 (100%)	State First Court Ruling 5/7 (71.4%)	Difference 28.6% (Federal)
▪ <u>Evident Partiality (FAA, 9 U.S.C. § 10(2), or State UAA Equivalent)</u>		
Fed. District Ct. Ruling 25/25 (100%)	State First Court Ruling 15/19 (78.9%)	Difference 21.1% (Federal)
▪ <u>Hearing Misconduct (FAA, 9 U.S.C. § 10(3), or State UAA Equivalent)</u>		
Fed. District Ct. Ruling 22/24 (91.7%)	State First Court Ruling 10/13 (76.9%)	Difference 14.8% (Federal)
▪ <u>Exceed Powers or Imperfectly Execute Award (FAA, 9 U.S.C. § 10(4), or State UAA Equivalent)</u>		
Fed. District Ct. Ruling 36/43 (90.7%)	State First Court Ruling 17/30 (56.7%)	Difference 34.0% (Federal)
▪ <u>Manifest Disregard of the Law (FAA Common Law, Non-Trilogy)</u>		
Fed. District Ct. Ruling 72/78 (92.3%)	State First Court Ruling 15/19 (78.9%)	Difference 13.4% (Federal)
▪ <u>Irrational, Arbitrary and Capricious, or Gross Error (FAA Common Law, Non-Trilogy)</u>		
Fed. District Ct. Ruling 17/17 (100%)	State First Court Ruling 7/11 (63.6%)	Difference 36.4% (Federal)
▪ <u>Punitive or Excessive (FAA Common Law, Non-Trilogy)</u>		
Fed. District Ct. Ruling 4/4 (100%)	State First Court Ruling 4/6 (66.7%)	Difference 33.3% (Federal)
▪ <u>Unconstitutional, Due Process (FAA Common Law, Non-Trilogy)</u>		
Fed. District Ct. Ruling 4/4 (100%)	State First Court Ruling 2/4 (50.0%)	Difference 50.0% (Federal)

▪ <u>Exceeds Authority (Common Law, <i>Trilogy</i>)</u>		
Fed. District Ct. Ruling 7/9 (77.8%)	State First Court Ruling 5/10 (50.0%)	Difference 27.8% (Federal)
▪ <u>Essence of Agreement (Common Law, <i>Trilogy</i>)</u>		
Fed. District Ct. Ruling 7/8 (87.5%)	State First Court Ruling 2/4 (50.0%)	Difference 37.5% (Federal)
▪ <u>Fact Finding (Common Law, <i>Trilogy</i>)</u>		
Fed. District Ct. Ruling 11/11 (100%)	State First Court Ruling 11/14 (76.8%)	Difference 23.2% (Federal)
▪ <u>Public Policy (Common Law, <i>Trilogy</i>)</u>		
Fed. District Ct. Ruling 17/17 (100%)	State First Court Ruling 20/26 (76.9%)	Difference 23.1% (Federal)

*Finding 1 (Table 2).* Federal courts confirm more individual employment awards under the FAA than labor awards under the LMRA. In Table 2A, the confirmation rate for district courts was 92.5% in individual employment arbitrations under the FAA, compared to 72.3% for labor arbitrations. A similar but smaller difference in confirmation rates was observed for federal appellate courts. Table 2B shows that the confirmation rate under the FAA was 84.3%, compared to 70.5% for the LMRA.

*Finding 2 (Table 3).* In individual employment disputes, federal courts confirmed employment awards under the FAA more often than state courts that used identical standards under the Uniform Arbitration Act. The top four data rows of data in Table 3 correspond to statutory standards in the FAA and closely related state arbitration acts. In cases where the award was challenged on grounds of alleged corruption, fraud, or procurement by undue means, federal courts confirmed 100% of awards, compared to confirmation of 71.4% in state court rulings. Federal courts confirmed 100% of awards when a party claimed challenged the arbitrator's ruling under the evident partiality standard.

State courts, in contrast, enforced only 78.9% of awards in cases where the evident partiality issue was raised. The hearing misconduct argument—reflecting another FAA and UAA vacatur standard—was rejected by twenty-two out of twenty-four federal courts. Thus, the confirmation rate was 91.7%. State courts vacated or modified three out of thirteen awards in which a party raised this argument, yielding a confirmation rate of 76.9%.

*Finding 3 (Table 3).* Award challengers most frequently argued that arbitrators exceeded their powers. This argument often failed in federal courts, as judges confirmed 90.7% of awards in forty-three cases. However, challengers enjoyed remarkable success in state courts, where only 56.7% of awards (seventeen of thirty cases) were confirmed.

*Finding 4 (Table 3).* Not only were state courts less likely to confirm awards than their federal counterparts, but their confirmation rates tended to fall even more when they used common law rather than statutory standards. When challengers argued that the award was irrational or arbitrary and capricious, state courts upheld arbitrator rulings in only 63.6% of cases. The confirmation rate fell to 50% in cases involving a due process or constitutional challenge. I note, however, that these cases were rare. Thus, these statistics may reflect the very small size of the sub-sample.

*Finding 5 (Table 3).* Employment awards were occasionally challenged under *Trilogy* standards, even though reviewing courts had jurisdiction under the FAA or state-law equivalent. In these cases, courts were less likely to confirm awards compared to challenges that were based solely on statutory grounds. When a challenger cited the *Trilogy* standard that the arbitrator exceeded her authority, they confirmed only 77.8% of cases. But when the nearly identical “exceeds powers” standard under the FAA was used, federal courts confirmed 90.7% of awards. State courts confirmed only 76.9% of awards when a challenger made a public policy argument under the *Trilogy*.

#### IV. CONCLUSION: *PENN PLAZA* ACCENTUATES DIFFERENCES IN DEFERENCE

I return again to the research question: do courts equally defer to arbitration awards under the FAA and the LMRA counterpart, the *Steelworkers Trilogy*? This time, I answer the question with the data that are summarized in Table 4. The statistics are derived from the findings for federal district courts and first-level state courts that review awards.

**Table 4. Federal Court Confirmation of Awards; Estimating the Probability of Confirming a “*Ricci*” Award**

	Award Reviewed under LMRA	Award Reviewed under FAA
Federal District Court	72.3%	92.5%
First-Level State Court	Not Studied	78.5%

To set the stage for analysis, I repeat my two hypothetical scenarios. In the LMRA (*Steelworkers Trilogy*) hypothetical, white union members were disqualified for promotion in a fact pattern that mirrored the *Ricci* case. Adhering to *Penn Plaza*, they submitted their discrimination claim to an arbitrator appointed under the provisions of the CBA. Like the district judge in *Ricci*, the arbitrator denied the claim. The data in Table 4 suggest that the employer would have a 72.3% chance of confirming the disputed award.

Turning to the FAA hypothetical, assume that the same dispute arose in a non-union workplace. The arbitrator denied the complaint. If the award were taken to state court for confirmation or vacatur, Table 4 suggests that there would

be a 78.5% chance of upholding the arbitrator's ruling—six percentage points more than the LMRA case.

However, if federal courts ruled on the award, there would be a 92.5% chance of award confirmation. In other words, the probability of award enforcement by federal courts would vary by more than twenty percentage points simply depending on whether the promotional arbitration arose under the LMRA or FAA. The difference between federal and state confirmation rates under the FAA would be fourteen percentage points.

I now examine the implications of these disparate outcomes.

### A. *Difference in Deference*

In the course of reading more than 2,000 LMRA and FAA court rulings on disputed arbitration awards in our previously published studies, I saw widespread agreement among courts that they were supposed to confirm arbitration awards. I share a sample of representative quotes from these courts:

- The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.<sup>99</sup>
- [A]rbitration does not provide a system of “junior varsity trial courts.”<sup>100</sup>
- Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called “review” at all.<sup>101</sup>
- The parties to this action voluntarily entered into an arbitration agreement and further agreed that two arbitrators would decide the dispute. . . . Simply being dissatisfied with the results is not a good reason for setting aside the award.<sup>102</sup>
- This expectation of finality strongly informs the parties’ choice of an arbitral forum over a judicial one. The arbitrator’s decision should be the end, not the beginning, of the dispute.<sup>103</sup>
- [M]aximum deference is owed to the arbitrator’s decision and the standard of review of arbitration awards is among the narrowest known to law.<sup>104</sup>

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

100. *Williams v. Katten, Muchen & Zavis*, No. 92 C 5654, 1996 WL 717447 at \*6 (N.D. Ill., Dec. 9, 1996) (quoting *Eljer Mfg., Inc., v. Kowin Development Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994)).

101. *See Baravati, supra* note 40, at 706.

102. *Dean Witter Reynolds, Inc. v. Deislinger*, 711 S.W.2d 771, 772 (Ark. 1986).

103. *Moncharsh v. Heily & Base*, 10 Cal. Rptr. 2d 183, at 187 (Cal. Ct. App. 1992).

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

- Once parties bargain to submit their disputes to the arbitration system (a system essentially structured without due process, rules of procedure, rules of evidence, or any appellate procedure), we are disinclined to save them from themselves.<sup>105</sup>
- Judicial intrusion is restricted to the extraordinary situations indicating abuse of arbitral power or exercise of power beyond the jurisdiction of the arbitrator.<sup>106</sup>

I highlight these quotes to make our empirical point: beneath the verbal veneer of deferring to arbitration awards, courts vary significantly in their deference to awards. In FAA cases, there should not be a twenty percentage point difference in award confirmation between federal and state courts; nor should there be a similar disparity in federal court review of labor and employment awards. These results undermine the bedrock principles of a sound legal system—that court rulings should be consistent and predictable. Putting the matter more plainly, most courts “talk the talk” about deferring to arbitrator awards, but they do not reliably back up this talk.

### *B. Forum Shopping to Confirm or Vacate Award*

The Supreme Court has recognized a state court’s concurrent jurisdiction under the FAA.<sup>107</sup> But the results in Table 4 imply that the FAA’s procedural flexibility would be subverted as parties race to different courts in order to shop for the best chance of reviewing an award. In our hypothetical cases, white firefighters would seek FAA review in state court or LMRA review in federal court. Meanwhile, the employers would seek FAA review in federal district court. Needless to say, this type of forum shopping would undermine the cornerstone principles of award finality and efficient resolution of disputes.

Making matters worse, current arbitration law would not settle the forum shopping problem. The Supreme Court in *Cortez Byrd Chips, Inc. v. Bill Harbert Contraction Co.*<sup>108</sup> ruled that a petition to confirm or vacate an award under the FAA may be filed not only in the district in which the award was made, but also in any suitable district under general venue provisions. The Court emphasized the practicality for liberal venue options under the FAA, stating:

The parties may be willing to arbitrate in an inconvenient forum, say, for the convenience of the arbitrators, or to get a panel with special knowledge or experience, or as part of some compromise, but they might well be less willing to pick such a location if any future court proceedings had to be held there. Flexibility to make such practical choices, then, could

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105. *Hawrelak v. Marine Bank*, Springfield, 735 N.E.2d 1066, 1070 (Ill. Ct. App. 2000).

106. *Landmark v. Mader Agency, Inc.*, 878 P.2d 773, 776 (Idaho 1994).

107. *See Moses H. Cohen Mem. Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 25 (1983) (stating that “the federal courts’ jurisdiction to enforce the [Federal] Arbitration Act is concurrent with that of the state courts”).

108. 529 U.S. 193, 195 (2000).

well be inhibited by a venue rule mandating the same inconvenient venue if someone later sought to vacate or modify the award.<sup>109</sup>

Our empirical results imply, however, that parties would shop for a venue simply to improve their odds of winning. Complicating matters even more, courts have not definitively decided whether an award review action in state court can rely on the FAA's permissive venue rule.<sup>110</sup>

### C. Preemption Uncertainty

Many opinions in our databases interchangeably cited FAA and *Trilogy* standards. This was not surprising given that both regimes aim to insulate awards from judicial interference. However, Table 4 implies that there are real differences in how state and federal—and FAA and LMRA courts—operate.

*Penn Plaza* will likely bring these latent conflicts to the surface. Specifically, in hybrid disputes, like those in our hypothetical scenarios, courts will confront the question: do LMRA standards preempt FAA standards, or do FAA standards preempt LMRA standards? While it seems clear that the FAA's award review standards preempt a state counterpart,<sup>111</sup> there is no ready answer to this *Penn Plaza* preemption question.

Briefly, I explain why federal courts would divide on this issue. The best argument for ruling that FAA standards preempt the LMRA is that *Penn Plaza* said so. Recall that the majority opinion said that “an arbitrator’s decision as to whether a *unionized employee* has been discriminated against on the basis of age in violation of the ADEA remains subject to judicial review under the FAA.”<sup>112</sup>

I emphasize the Court’s use of *unionized employee* because the majority opinion appears to acknowledge that it is now displacing labor-management arbitration into the realm of the FAA. I also believe that since the *Penn Plaza* ruling removed the legal boundary between LMRA and FAA arbitration under *Gardner-Denver*, some federal courts would conclude that this reasoning clears the way for FAA preemption of LMRA standards.

However, other federal courts could resist this logic with better arguments. To begin, *Penn Plaza* did not decide a complex preemption issue by smuggling its views on award review in footnote 10’s dictum. This footnote may reflect *Penn Plaza*’s aggressive agenda to undermine collective bargaining, but it did not decide anything. Furthermore, a *Trilogy* decision, *United Steelworkers v. Warrior & Gulf Navigation Co.* emphasized that the arbitrator “is rather part of a system of self-government created by and confined to the parties.”<sup>113</sup> Subordinating the *Trilogy* to section 10 of the FAA would corrode the philosophical underpinnings

109. *Id.* at 201.

110. See *MBNA Am. Bank, N.A. v. Bodialia*, 949 So. 2d 935, 939, n.6 (Ala. 2006); *Dunigan v. Sports Champions, Inc.*, 824 So.2d 720, 721 (Ala. 2001). In both cases state courts held that the restrictive rules of venue were jurisdictional. Their opinions noted that the parties had not specifically invoked the FAA.

111. Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 75 (“State law cannot conflict with those decision rules without raising the specter of FAA preemption.”).

112. 14 *Penn Plaza v. Pyett*, 129 S. Ct. 1456, 1471 n.10 (emphasis added).

113. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

that make labor arbitration a unique institution. Some courts that face the preemption issue will perceive that *Penn Plaza* is blind to institutional differences between LMRA and FAA arbitrations.<sup>114</sup>

In sum, the *Penn Plaza* hypothetical scenarios reveal that the Supreme Court has created a new hybrid—an arbitration that is part-FAA and part-LMRA. I believe this landmark ruling will precipitate simmering differences in award vacatur standards under the FAA and LMRA. Professor Stephen Hayford, our co-panelist at this “creeping legalism” symposium sounded a similar alarm, concluding that judicial review of commercial arbitration is in a state of disarray.<sup>115</sup>

*Penn Plaza*, like *Gilmer*, is oblivious to the growing distinctions between arbitration systems. *Penn Plaza* also remains uninformed about the recent changes in the regulation of this ADR process. As more states enact the RUAA, a gulf grows between the statutory regulation of commercial arbitration and the federal common law regulation of labor arbitration. And as award review standards proliferate, disputants who are stuck with *Penn Plaza* hybrid arbitration will find that their awards are not so final.

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114. The Ninth Circuit has some likelihood to appreciate this context. For example, on two occasions its courts have cited the “self government” passage. See *Cannery Warehousemen, Food Processors, Drivers and Helpers for Teamsters Local Union No. 748 v. Haig Berberian, Inc.*, 623 F.2d 77, 81 (9th Cir. 1980); *Louisiana-Pacific Corp. v. Int’l B’hd. of Elec. Workers, Local Union 2294*, 600 F.2d 219, 222 (9th Cir. 1979).

115. See Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 842 (1996), stating:

[T]he merits of commercial arbitration awards will be exposed to heightened levels of judicial scrutiny leading invariably to more frequent vacatur of awards on the nonstatutory grounds. At that point, the Supreme Court will be obliged to decide the legitimacy of the nonstatutory grounds for vacatur. Once that issue is squarely placed before the Court, the “other” nonstatutory grounds, borrowed from the law of labor arbitration, should be rejected as inconsistent with the public policy articulated in the FAA and in direct conflict with the standards for vacatur clearly stated in section 10(a) of the Act. Only then will order be restored to the law pertaining to the vacatur of commercial arbitration awards.