Do Partisan Elections of Judges Produce Unequal Justice? When Courts Review Employment Arbitrations

Professor Michael H. LeRoy *

Abstract:

Partisan election of judges is a growing concern as large contributions pour into judicial elections. State judges raised $157 million for their campaign funds from 1999 to 2006. Caperton v. A.T. Massey Co. Inc., 129 S.Ct. 2252 (2009), ruled that a state supreme court justice who cast the deciding vote for a company whose president contributed $2.3 million to his campaign violated the losing company's due process rights.

I examine whether partisan judicial elections affect court review of arbitrator rulings (called awards) in employment disputes. For this study, I added a new variable - method for selecting judges - to my database of 223 state court rulings from 1975-2008.

I relate this empirical research to a strategic model of corporate avoidance of liability in employment disputes. Some employers avoid lawsuits by requiring employment arbitration, and implementing favorable arbitration rules. When awards are appealed to court, employers continue to influence the outcome by designating the court for reviewing an award. This model suggests that some employers would expand their influence by strategically supporting judges who run for office in political campaigns.

I found that in state trial courts where an award was challenged, employees won only 32.1% of cases before party-affiliated judges. But in states where judges were appointed or elected in non-partisan races, employees prevailed in 52.7% of the cases.

The partisan election effect was not observed, however, in appellate cases. Employees won 43.2% of cases before party-affiliated judges, and 50.0% of cases before judges who were appointed or elected in non-partisan races.

My results provide preliminary and limited support for the concern that partisan judicial elections produce unequal justice for ordinary people who are not large campaign donors. But, there are important caveats. This study did not determine whether judges in these cases actually accepted campaign support from employer groups. These judges may have ruled through a more ideological prism than appointed and non-partisan judges.

In the same vein, the finding of no partisan effect at the appellate level is not conclusive -and does not mean that party-affiliated appellate judges are as neutral as their appointed counterparts. Even in partisan judicial elections, it appears that only

* Professor of Labor and Industrial Relations and Law, University of Illinois. E-mail contact profesional: m-leroy@illinois.edu

some appellate candidates raise war chests and declare campaign positions. A seemingly biased judge, such as the justice in Caperton, can be outvoted by more neutral judges on the appellate panel, thereby muffling the effect of campaign spending in partisan elections.

My findings do not prove that employers seek venue before judges who receive their campaign contributions, but they offer preliminary statistical evidence that suggests that this is possible. The fact that employers can designate venue in an arbitration contract reinforces this possibility. In sum, the shocking example in Caperton, along with the preliminary data in my study, suggests that employers are able to expand the liability-avoidance model by donating to judges who would review their arbitration awards.

Rezumat:

Modalitatea de alegere a judecătorilor, în contextul particular al contribuțiilor financiare substanțiale din partea angajatorilor, în campaniile electorale, poate fi analizată în conexiune cu modalitatea ulterioară în care judecătorii astfel aleși, decid în cauzele care opun interesele angajaților față de cele ale angajatorilor.

Keywords: partisan elections, elections of judges

I. Introduction

A. Context for This Empirical Research

Do partisan elections of judges contribute to unequal justice in court decisions? *Caperton v. A.T. Massey Co. Inc*., involving a $50 million civil judgment against a large coal company,[194] highlights the relevance of this question. While appealing this adverse ruling, A.T. Massey's president spent more than $3 million to help elect Brent Benjamin as a new justice to West Virginia's highest court.[195] After Justice Benjamin cast the deciding vote to reverse the entire judgment, the losing party - Hugh Caperton - argued to the U.S. Supreme Court that he was denied process.[196] By a 5-4 vote, the Supreme Court ruled in favor of Caperton, concluding that there is a "serious risk of actual bias"[197] when a litigant has "a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[198]

While state courts are not as prestigious as their federal counterparts, they handle more than 90% of all judicial matters in the U.S,[199] and nearly 89% of state court judges face elections.[200] West Virginia is not alone in using partisan elections to select judges. Eleven states use this method for trial judges,[201] and six states use partisan judicial elections

[194] 129 S.Ct. 2252, 2257 (2009).
[195] *Id*. at 2257.
[196] *Id*. at 2258.
[197] *Id*. at 2263.
[198] *Id*.
[199] Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001).
[200] Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L. J. 1077, 1092 (2007).
[201] American Judicature Society, *infra* note 165.

for trial, appellate, and supreme court positions.[202] The remainder use non-partisan elections and various merit-based appointment methods.

In this Article, I relate my question about the impact of partisan elections to corporations that use a strategy to minimize liability in employment disputes.[203] Many employers avoid lawsuits by requiring employment arbitration,[204] and implementing favorable arbitration rules.[205] However, although employees are expected to fare worse in arbitration compared to litigation, the opposite often occurs - they frequently win the award.[206] Anticipating this possibility, employers try to control the next stage in the dispute resolution process by designating a particular court to review an award.[207] In the arbitration agreements they draft, some employers also provide courts expanded grounds for reviewing awards - thus, opening the door for "re-arbitrating" their case.[208] And increasingly, state courts recognize more grounds to vacate awards.[209]

[202] American Judicature Society, *infra* note 166

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

[204] From an empirical perspective, my model draws from David B. Lipsky & Ronald L. Seeber*, In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. OF LABOR & EMPLOYMENT LAW 133 (1998). Their Cornell survey of 606 in-house corporate lawyers showed that more than 60% of these respondents said they believed arbitration provides a more satisfactory process than litigation. These attorneys preferred the lower cost and confidentiality associated with arbitration. Significantly, many lawyers also cited frustration with the legal system as a reason for preferring arbitration. They expressed concern that responded that "[m]ore and more dimensions of corporate behavior were brought under the scrutiny, not only of the court system, but also of a multitude of regulatory agencies." *Id*. at In the employment area, they also said they must deal with expanding litigation over sexual harassment, disability and age discrimination, and wrongful termination. My strategic avoidance of liability model also draws from Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006). Nagareda contends that corporations have extended their efforts to limit class action lawsuits by imposing mandatory arbitration agreements that limit these actions in ADR proceedings. Mandatory waivers of class actions portend '"the forthcoming, near-total demise of the modern class action' and its replacement with a world in which defendants can opt out of liability through arbitration clauses in their contracts with consumers, employees, and the like." *Id*. at 1873-4. In addition, my model draws from current critiques of mandatory arbitration by noted experts. *See* MANDATORY BINDING ARBITRATION AGREEMENTS: ARE THEY FAIR FOR CONSUMERS?: HEARING BEFORE THE SUBCOMM. ON COMMERCIAL & ADMINISTRATIVE LAW OF THE H. COMM. ON THE JUDICIARY, 110th

Cong. 1, 3 (2007) (statement of Rep. Chris Cannon, Member, Subcomm. on Commercial & Administrative

Law) ("The use of mandatory binding arbitration clauses has risen not because companies want to disadvantage consumers, but because companies increasingly believe they need to protect themselves from abusive class action suits."), available at http://judiciary.house.gov/hearings/printers/110th/36018.pdf. *Also see* testimony by Prof. David Schwartz, stating: "The only reason for businesses to opt for mandatory predispute arbitration is because they believe, with good reason, that they will get better results because they will reduce their overall liability. In effect, they view mandatory arbitration as do-it-yourself tort reform." *Id*. at 82-83.

[205] Case of Hooters of Am., *infra* note 275.

[206] Theodore Eisenberg & Elizabeth Hill, "Arbitration and Litigation of Employment Claims: An Empirical Comparison," DISP. RESOL. J. (Nov. 2003-Jan. 2004), at 44, 49.

[207] The FAA allows a party to draft such a provision. *See* United States Arbitration Act, *infra* note 134, at § 9, stating: "If the parties in their agreement have agreed that a judgment of the court shall beentered 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."

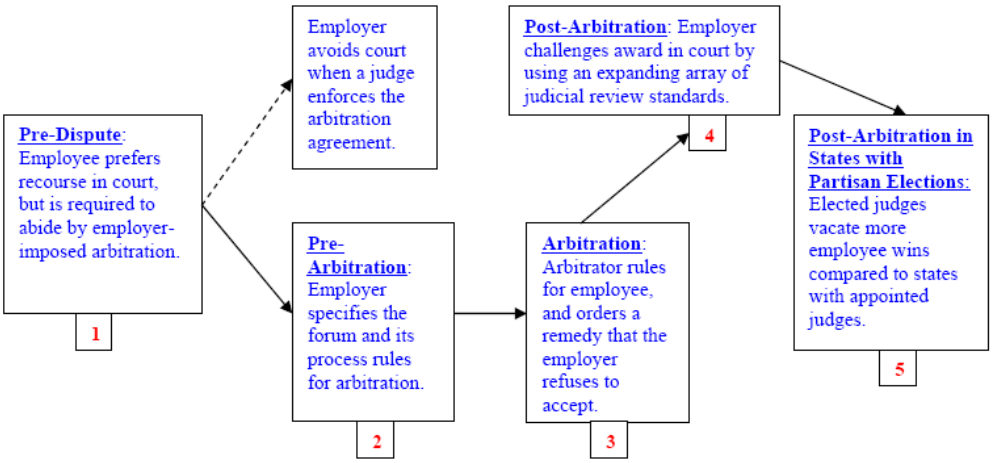
[208] Prescott, *infra* note 99.

[209] *See* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 842 (1996) ("the 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").

My point is that state court review of awards departs from the federal judiciary's more stringent conditions. In those courts, "maximum deference is owed to the arbitrator's decision and the standard of review of arbitration awards is among the narrowest known to law."[210] Empirical research also shows that federal courts are much more deferential than state courts when they review awards.[211]

The present study conceptualizes a new step in the liability-avoidance model by suggesting that some employers expand their influence over the dispute resolution process by strategically supporting state judges who run for office in political campaigns. As shown below in Figure 1 (box 5), this step appears as the final stage of a corporate strategy to avoid liability.

Figure 1:
Employer Strategy to Avoid Liability



B. Organization of This Article

Section II explains my model of corporate avoidance of liability through arbitration.[212] Section II.A describes how employers, prior to a dispute, require workers to waive court access in favor of arbitration.[213] The next section discusses the employer's choice of a private forum and process rules.[214] Section II.C reviews surprising research showing how employees win more often at arbitration than anyone predicted.[215] Section II.D explains how employers challenge arbitrator rulings - called awards - in court.[216]

Section III surveys the election of state judges, and the growing influence of contributions in these campaigns.[217] Section III.A briefly traces the nation's

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

[211] Michael H. LeRoy, *"Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*," 83 NOTRE DAME L. REV., 515 (2008).

[212] *Infra* notes 226 - 343.

[213] *Infra* notes 226 - 263.

[214] *Infra* notes 264 - 280.

[215] *Infra* notes 281 - 291.

[216] *Infra* notes 292 - 343.

[217] *Infra* notes 344 - 389.

history of alternating between movements for electing or appointing judges.[218] The next section provides recent examples of money and influence in state judicial elections.[219]

In Section IV, I report my research methods and statistical results.[220] Section IV.A states my research hypotheses,[221] and is followed in Section IV.B by the method for creating the sample.[222] I report my results and findings in Section IV.C.[223]

Section V discusses my conclusions,[224] and is followed by an appendix of the state cases in the sample.[225]

II. The strategic avoidance of liability

Through mandatory employment arbitration

A. Pre-Dispute Phase: The Emergence of Mandatory Employment Arbitration Pre-Dispute (Fig. 1, Box 1): As employers experience large litigation costs,[226] many respond by imposing mandatory arbitration agreements for employees.[227] These contracts barred individuals from suing employers, and required arbitration as an alternative forum.[228] Mandatory arbitration was

When judges are subject to regular elections, they are "likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects"

[218] *Infra* notes 343 - 359.
[219] *Infra* notes 360 - 389.
[220] *Infra* notes 390 - 412.
[221] *Infra* notes 390 - 400.
[222] *Infra* notes 401 - 412.
[223] *Infra* Tables 1 – 4, and Figures 1 – 2.
[224] *Infra* notes 414 - 425.
[225] *Infra* manuscript page 44.
[226] *See* Josh Meyers, *Pfizer to Pay Record Settlement Over Fraudulent Marketing*, L.A. TIMES (Sept. 3, 2009), at 2009 WLNR 17245552 (Pfizer pays $51 million to six whistleblower employees under the False Claims Act); Mary B. Rogers & Kimberly A. O'Sullivan, *Image Discrimination: Is that Advertising Campaign Really Worth It?*, METROPOLITAN CORP. COUNSEL NORTHEAST ED. (November 2006) (Abercrombie & Fitch paid $50 million in 2005 to settle race discrimination lawsuit that alleged that Hispanic, African American, and Asian employees were assigned backroom duties during regular sales hours because they did not physically match the company's advertising models); Caren Chesler, *Wall Street's Catch-22: Its Managers Keep Tripping over Their Own Feet in Female/Minority Hiring and Firing*, INVESTMENT DEALERS' DIGEST (Sept. 19, 2005) (Morgan Stanley settled sex discrimination lawsuit filed by the EEOC for $54 million in July 2004); Kathy Bergen & Carol Kleiman, Mitsubishi *Will Pay $34 Million*, CHI. TRIB., June 12, 1998, at 1 (reporting that car maker agreed to pay $34 million to settle class action lawsuit claiming sexual harassment); Henry Unger, *17 Coke Class-Action Parties Planning Individual Suits*, ATLANTA J.-CONST., July 7, 2001, at 3F (reporting that a judge approved Coca-Cola's $192.5 million settlement of a class action employment discrimination lawsuit), available at 2001 WL3681156; Jim Fitzgerald, *Anti-Bias Efforts, Payments to Blacks OK'd*, CHI. SUN-TIMES, Nov. 16, 1996, at 1 (reporting that Texaco agreed to spend $176.1 million to settle a race discrimination suit); and *Record $300M Agreement in State Farm Sex-Bias Suit*, NEWSDAY, Jan. 20, 1988, at 45 (reporting that the insurance company agreed to pay 1,100 female employees up to $300 million to settle a sex discrimination lawsuit).
[227] *See Jones v. Fujitsu Network Communications, Inc.*, 81 F.Supp.2d 688, 692 (N.D. Tex. 1999), quoting at length from company president's memo stating that "participation in this (arbitration) program (is) mandatory for all employees - continuing and new, full time and part time, regular and temporary - and is a condition of employment." *Also see Desiderio v. National Ass'n of Securities Dealers, Inc.*, 191 F.3d 198, 200 (2d Cir. 1999)(offer of employment was rescinded after successful job applicant refused to sign mandatory employment arbitration agreement).
[228] Ferguson v. Countrywide Credit Industries, Inc, 2001 WL 867103 (C.D. Cal. 2001), at *4. The agreement required arbitration of claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits ... ; and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy.

therefore implemented as a strategy to avoid courts and costs.[229]

This strategic response was driven by a series of rapid and profound changes in employment law. For more than a century, the doctrine of employment-at-will defined American employment law, allowing either the employer or individual to terminate the work relationship at any time, for any reason.[230] However, fundamental changes in government regulation of employment during the 1960s altered this arrangement.

Congress passed sweeping employment discrimination laws.[231] In the same period, state courts developed common law exceptions to employment-at-will.[232]

As the field of employment law expanded, so did employer liability. A critical threshold was reached when courts applied tort theories and remedies to workplace disputes. New employment torts included the public policy exception to employment-atwill[233] and related whistleblower protection,[234] emotional distress,[235] assault and battery in severe cases of sexual harassment,[236] negligence,[237] and defamation.[238] State constitutions compounded this trend by creating privacy rights for workers.[239]

In the early 1990s, two critical streams in employment law were joined. The 1991 Civil Rights Act,[240] and Americans with Disabilities Act in 1992,[241] posed a liability threat to employers. Employment discrimination lawsuits in federal courts doubled in five years, as filings soared from 8,273 in 1990 to 19,059 in 1995.[242]

To put this trend in perspective, consider that employment claims, including

[229] See Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management, infra note 71.

[230] The doctrine was first recognized in HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877). Comparing American and English law, Wood wrote that: With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof... . It is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants. *Id.*, § 134 at 272. English law presumed that master and servant were bound to each other for one year, unless varied by contract.

[231] *See* S.Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1-2 (1963). Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex, and national origin."

[232] Early cases include Petermann v. Teamsters Local 396, 344 P.2d 25 (Cal.App.1959) (finding a public policy exception to employment-at-will); and Monge v. Beebe Rubber Co., 316 A.2d 549 (1974) (finding covenant of good faith dealing exception to employment-at-will).

[233] *E.g.*, Harless v. First Nat'l Bank in Fairmount, 246 S.E.2d 270 (W.Va. 1978) (finding that the discharge of an employee who tried to convince his employer to comply with the consumer credit laws violated a clear public policy of protecting consumers); and O'Sullivan v. Mallon, 390 A.2d 149 (Law Div. 1978) (finding that employer had no at-will right to discharge an x-ray technician who refused to perform catheterizations because it would have been illegal for this employee to perform the procedure).

[234] *E.g.*, Green v. Ralee Engineering Co., 78 Cal.Rptr.2d 16 (Cal. 1998).

[235] *E.g.*, Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991) (federal court applied Texas law to emotional distress claim), and Bustamento v. Tucker, 607 So.2d 532 (La. 1992).

[236] Maksimovic v. Tsogalis, 177 Ill.2d 511 (1997).

[237] Malorney v. B & L Motor Freight, Inc., 496 N.E.2d 1086 (Ill.App. 1986) (negligent hiring).

[238] Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876 (Minn. 1986).

[239] Soroka v. Dayton Hudson Corp., 1 Cal.Rptr.2d 77 (Cal.App. 1991).

[240] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[241] American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

[242] Administrative Office of the U.S. Courts (2006), *U.S. District Court Cases, Judicial Facts and Figures, Civil Cases Filed By Nature of Suit*, tbl. 4.4, at 2 (see Employment, under the heading Civil Rights, at Line 3), available at http://www.uscourts.gov/judicialfactsfigures/2006/Table404.pdf.

those under Title VII of the 1964 Civil Rights Act, comprised about 52% of all civil rights cases filed in federal courts in 1995.[243] The 1991 amendments expressly allowed discrimination victims to recover up to $300,000 in punitive damages.[244] This supplemented the strong remedial provisions in Title VII.[245] In short, employers felt the dual-impact of surging discrimination claims and more potent remedies that became available to each new litigant.

As the tide of litigation costs began to rise sharply in the 1990s, a Supreme Court decision offered employers a promising refuge. *Gilmer v. Interstate/ Johnson Lane Corp*.[246] forcefully approved mandatory arbitration for an age discrimination claim. The Court held that an employee who had been required by his employer to sign an arbitration agreement was precluded from suing in court.[247]

For employers, *Gilmer* sent a pro-arbitration signal to emulate the NASD's model for resolving workplace disputes.[248] The majority opinion emphatically rejected Gilmer's argument that an individual cannot be compelled in an arbitration agreement to waive access to a court.[249] The Court reasoned that Congress did not preclude this type of waiver when it passed the Age Discrimination in Employment Act.[250]

The opinion also dismissed Mr. Gilmer's public policy arguments - that a private proceeding would deprive employees of a judicial forum,[251] thwart the ADEA's policy of eradicating age discrimination,[252] and undermine the role of the EEOC.[253] The opinion observed that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[254]

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[243] *Id.* There were 36,600 "Civil Rights" cases in federal courts in 1995. This figure included 19,059 "Employment" cases.

[244] *See* 42 U.S.C. § 1981(a)(a)(1), (b)(3) (specifying the compensatory and punitive damages available under Title VII).

[245] The Supreme Court explained the expansion of Title VII remedies in Pollard v. E.I. du Pont de Nemours & Co, 532 U.S. 843, 845 (2001). When Congress originally conceived Section 706(g) of the 1964 Civil Rights Act, it authorized courts to enjoin intentional acts of discrimination and order makewhole type remedies (e.g., back pay), similar to those under the National Labor Relations Act. *Id.* at 848- 49. Congress broadened judicial power to remedy intentional acts of discrimination in 1972 because courts could not always provide effective relief. But some acts of discrimination make reinstatement an unworkable remedy. Thus, front pay - ongoing financial relief until a plaintiff finds equivalent employment at another workplace - is also authorized in Section 706(g). *Id.* at 850. When Congress revisited the remedy issue in 1991, it "determined that victims of employment discrimination were entitled to *additional* remedies (emphasis in original)." *Id.* at 852. Thus, Congress authorized "the recovery of compensatory and punitive damages in addition to previously available remedies, such as front pay." *Id.* at 854. The result is that an employer who commits intentional acts of discrimination may be ordered to pay tort-like damages, and in addition, be subject to the equitable remedies of back pay and front pay.

[246] 500 U.S. 20 (1991).

[247] This ruling is synonymous with the expression "mandatory arbitration." In mandatory arbitration, one party conditions a contractual benefit or entitlement - for example, employment or use of credit card - on the other party's agreement to submit any dispute to arbitration, instead of a court. Because the arbitration clause is a non-negotiable condition for the contractual relationship, it is called mandatory.

[248] *See Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, DAILY LABOR REPORT, No. 93 (May 14, 1997) (surveying 530 Fortune 1000 companies, this study found that 79 percent of employers use arbitration).

[249] *See* Gilmer, *supra* note 53, where the majority based this conclusion on Supreme Court precedents involving mandatory arbitration of legal claims arising under various federal statutes. *Id.* at 26.

[250] *Id*. at 27.

[251] *Id*. at 27.

[252] *Id*. at 28.

[253] *Id*. at 853.

[254] *Id*. at 26.

Arbitration was an acceptable substitute for litigation to "further broader social purposes" of employment discrimination laws.[255]

The *Gilmer* opinion did not "perceive any inherent inconsistency" between the EEOC's role in administering discrimination policies and judicial enforcement of agreements to arbitrate age discrimination claims.[256] It emphasized that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[257]

These expansive policy pronouncements would have sufficed to send a strong arbitration signal to employers. But this opinion added more by denying Gilmer's challenge to the fairness of mandatory arbitration procedures: "Such generalized attacks on arbitration res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, and as such, they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[258]

The Court also dismissed specific procedural concerns about mandatory arbitration. Although Gilmer contended that mandatory arbitration panels would be biased in favor of employers, the majority said "we decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."[259] Gilmer objected to the fact that discovery is more limited in arbitration than in federal courts, but again, the majority dismissed this concern, noting that "[i]t is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims."[260] The majority also rejected concerns that NASD arbitrators often fail to issue written opinions, thus depriving Gilmer and similarly situated complainants an opportunity for effective appellate review.[261] Gilmer noted that this also stifles development of the law.[262] Finally, Gilmer complained that his agreement resulted from unequal bargaining power. The Court showed little sympathy for this argument, concluding that "[m]ere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[263] The broad sweep of the *Gilmer* decision amounted to a clarion call for corporations to seek arbitration as a shelter to avoid the increasingly harsh setting of courts that applied public law in unaltered form.

B. Arbitration Phase: Employers Specify the Arbitral Forum and Process Rules

Pre-Arbitration (Fig. 1, Box 2): Confronted by expanding liability and recognizing the potential refuge offered by private forums, employers began to use arbitration agreements to bypass courts with the hope of lowering the cost

[255] *Id*. at 28.
[256] *Id*. at 27.
[257] *Id*.
[258] *Id.* at 30. The Court also observed that the FAA was enacted to curb judicial resistance to arbitration: "Its 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." *Id.*
[259] *Id*.
[260] *Id*. at 31.
[261] *Id*.
[262] *Id*.
[263] *Id*. at 33.

of employment disputes.[264] In a late-1990s national survey, most Fortune 1000 companies reported that they use employment arbitration.[265] Ninety percent said that they adopted an ADR method as a "critical cost technique."[266] Commentators concluded that adoption of arbitration enabled employers to limit litigation risks and costs.[267] The trend is reflected today in arbitration procedures that allow "employers to manage risk by eliminating jury trials, class actions, and large attorney's fees."[268]

Numerous examples show how employers strategically avoided public justice by requiring arbitration. Workers were required to waive their right to sue,[269] and to use arbitration in place of courts.[270] Individuals could not bargain over this forum.[271] Some companies created their own justice rules to shield themselves from stricter enforcement.[272] They tilted the playing field by putting limits on discovery,[273] shortened periods to file claims,[274] selected arbitrators without employee input,[275] and designated inconvenient venues.[276] One method deterred employee access to arbitration by requiring workers to pay large forum costs associated with the hearing process.[277] Employers placed additional limits on arbitration procedures

[264] *See Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management*, DAILY LAB. REPT, (No. 93) May 14, 2001, reporting an employment lawyer's view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits. David Copus also noted 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.

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

[266] *Id.*

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

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

[269] Baldeo v. Darden Rest., Inc., 2005 WL 44703 (E.D.N.Y. 2005), at * 2.

[270] Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 146 (2d Cir. 2004).

[271] *E.g.*, Brennan v. Bally Total Fitness, 198 F.Supp.2d 377, 381 (S.D.N.Y. 2002).

[272] *See* David B. Lipsky et al., *Emerging Systems for Managing Workplace Conflict* (2003).

[273] *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1478 (D.C. Cir. 1997).

[274] *E.g.*, Marie v. Allied Home Mortgage Corp., 402 F.3d 1 (1st Cir. 2005) (ruling that arbitrator had authority to rule on validity of sixty-day filing requirement); Louis v. Geneva Enterprise, Inc., 128 F.Supp.2d 912 (E.D. Va. 2001) (the 60-day filing limit in arbitration agreement drafted by the employer unlawfully conflicts with three year statute of limitations for FLSA claims); and Chappel v. Laboratory Corp. of America, 232 F.3d 719 (9th Cir. 2000) (because ERISA provides a four-year statute of limitations for an action to recover benefits under a written contract, plan administrator breached its fiduciary duty by adopting a mandatory arbitration clause that set a 60-day time limit in which to demand arbitration).

[275] *See* Hooters of America 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."

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

[277] *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 669 (6th Cir. 2003), where the Sixth Circuit concluded 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."

by prohibiting class actions,[278] limiting remedies on statutory claims,[279] and barring punitive damages in awards.[280] In sum, employers strove not only to find a less costly dispute resolution forum. They attempted to find more congenial, private judges for their disputes. At the same time, they wrote arbitration contracts that capped their liability.

C. Arbitration: A Surprising Outcome - The Employer Loses the Award

Arbitration (Fig. 1, Box 3): The foregoing developments would suggest that employers won an overwhelming percentage of arbitration cases against employees. Early on, however, empirical studies showed that individuals win a surprisingly high percentage of cases against their employers. Lewis L. Maltby's research found that employees won 63% of their claims in arbitration and only 15% of their claims in litigation.[281] Similarly, William Howard's study compared win rates and award amounts for litigation and arbitration in the securities industry from 1992-94, and found that employees won 28% of non-jury trials, 38% of jury trials, and 48% of arbitrations.[282] Samuel Estreicher concluded that claimants won more cases in arbitration then they did in litigation.[283] More recently, a study by Michael Delikat and Morris Kleiner compared verdicts in employment discrimination trials in the federal court in New York City, and awards in New York area arbitrations held by NASD and NYSE, found that employees fared better in arbitration.[284]

Empirical research also showed that some arbitration procedures became more favorable to employees over time. A study by Elizabeth Hill concluded that arbitrations under the American Arbitration Association's rules did not reveal bias against employees.[285] Theodore Eisenberg and Elizabeth Hill determined that cases were processed faster in arbitration than court,[286] while another study by Lewis Maltby found that legal fees in employment arbitrations were comparatively low.[287] Richard Bales' intensive study of mandatory employment arbitration concluded that a company's ADR methods produced net gains to the employer and also its workers: "Compulsory employment arbitration offers

[278] *E.g.*, Adkins v. Labor Ready, Inc., 185 F.Supp. 2d 628 (S.D. W.Va. 2001).

[279] *E.g.*, Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 2000); and Morrison v. Circuit City Stores, Inc., 70 F.Supp.2d 815 (S.D. Ohio 1999) (although Title VII permits up to $300,000 in punitive damages, court upheld $162,000 limit imposed by arbitration agreement).

[280] *E.g.*, Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 225 (3d Cir. 1997).

[281] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46-49 (1998).

[282] William Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. (Oct.-Dec., 1995), 42-43.

[283] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-65 (2001) (claimants win more cases in arbitration then they do in litigation).

[284] Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J. 56 (Nov. 2003 - Jan. 2004), at 56-57. Employees prevailed 33.6% of the time in court versus 46% of the time in arbitration. The median damages award was $95,554 in court versus $100,000 in arbitration. The median award of attorneys' fees was $69,338 in court versus $76,684 in arbitration.

[285] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 808 & 810 (2003) (arbitrations under AAA's rules did not reveal bias against employees).

[286] See Theodore Eisenberg & Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison, 58 DISP. RESOL. J. 44 (2003-2004).

[287] Lewis L. Maltby, *The Projected Economic Impact of the Model Employment Termination Act*, 536 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 117 (1994).

tremendous benefits to both employers and employees. It can reduce significantly the costs and time involved in resolving disputes. It also provides a forum for adjudicating grievances to employees currently shut out of the litigation system."[288]

These studies reflected some of the reforms that arbitration providers have imposed on themselves after these ADR services came under fire. As Congress prepared to regulate securities industry employment, the National Association of Securities Dealers (NASD) revised its procedures to allow for voluntary arbitration.[289] Another large ADR provider, the American Arbitration Association, heeded the concerns of the American Bar Association by adopting due process procedures and practices.[290]

How did employers react to these surprises? Some abandoned arbitration in favor of trials.[291] But as I explain below, others turned their attention to including postarbitration review of an award as a new point on the dispute resolution timeline that needed a better strategy.

D . Post-Arbitration: The Employer Challenges the Award in Court

1. Examples of Employer Court Challenges to Arbitrator Awards

Post-Arbitration (Fig. 1, Box 4): Employers who were adamant in requiring employees to pursue legal claims in arbitration, rather than court, have not been shy about going to court to vacate an adverse ruling by the arbitrator. *Prescott v. Northlake Christian School*[292] exemplifies this trend. An arbitrator's award was nullified as a result of a clause in the arbitration agreement that permitted a court to apply an expanded review standard.[293] A principal of a private school sued her administrator and school board for Title VII sexual harassment and whistleblower violations.[294] She was turned away by the court and ordered to

[288] RICHARD A. BALES, LABOR AND EMPLOYMENT LAW COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 169 (1997).

[289] In December 1998, the Securities and Exchange Commission amended NYSE Rules 347 and 600 "to exclude claims of employment discrimination, including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen." *See* SEC Release No. 34-40858, *Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration Rules* (January 7, 1999), 64 FR 1051-01. This followed an SEC decision on June 29, 1998, approving a proposed rule change offered by the NASD that abolishes mandatory NASD arbitration of statutory employment discrimination claims. *See Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims*, 63 Fed.Reg. 35299 (1998) (rule became effective on Jan 1, 1999).

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

[291] Jane Spencer, *Waiving Your Right To a Jury Trial, After Years of Requiring Arbitration,* Companies Return to the Court System, but With Conditions, WALL ST. J. (Aug. 17, 2004), at 2004 WLWSJ 56937955.

[292] 369 F.3d 491 (5th Cir. 2004).

[293] *Id*. at 493.

[294] *Id*.

pursue her claim in arbitration after the school presented an employment contract that reflected the parties' agreement to use dispute resolution principles and procedures from the Institute of Christian Conciliation.[295] The contract incorporated the Montana Uniform Arbitration Act (MUAA),[296] and contained the parties' handwritten amendment providing that "[n]o party waives appeal rights, if any, by signing this agreement."[297]

After Ms. Prescott won her arbitration, and was awarded $157,856, the school district returned to federal court to vacate the award.[298] The district court denied the motion, interpreting the handwritten amendment to mean that the parties could only appeal under the narrow limits of the Montana arbitration law.[299] The Fifth Circuit Court of Appeals disagreed, and construed a disputed contract term as ambiguous.[300]

Judge Edith Jones ignored the principle of deferring to awards when she reasoned that the "FAA ... does not bar parties from structuring an arbitration by means of their contractual agreements, nor does it preempt all state laws regarding arbitration."[301] She said that "a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties."[302] Her ruling concluded that "contractual tidbits strongly suggest that the parties intended judicial review to be available beyond the normal narrow range of the FAA or MUAA."[303] Prescott signified an employer's disingenuous use of *Gilmer*'s pro-arbitration policies. The employer denied its employee access to court for filing a lawsuit but preserved for itself broad access to court for a "do-over" arbitration.

Sawtelle v. Waddell & Reed, Inc. shows an employer's financial motivation to renege on its agreement for final and binding arbitration.[304] A fired securities broker alleged that his employer maliciously tried to sever his relationship with clients by defaming him.[305] After a lengthy and expensive arbitration,[306] arbitrators awarded Sawtelle $1.87 million in actual damages, and $25 million in punitive damages.[307]

The first state court to rule on the employer's challenge confirmed the award.[308] But the appeals court vacated the punitive award and remanded to the same arbitrators.[309]The judges reasoned 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."[310] They also believed that Sawtelle's award for punitive damages violated the standards in *BMW of N.A. v. Gore*.[311] The court said that the award manifestly disregarded the law.[312]

On remand, the arbitrators accepted voluminous written submissions, held another hearing, and issued a second award.[313] Their new award made a cosmetic change,[314] and awarded the

[295] *Id*.
[296] *Id*.
[297] *Id*. at 494.
[298] *Id*.
[299] *Id*.
[300] *Id*. at 497 - 498.
[301] *Id*. at 496.
[302] *Id*.
[303] *Id*.
[304] 754 N.Y.S.2d 264 (2003).
[305] *Id.* at 267-68.
[306] *Id.* at 268.
[307] *Id.* at 269.
[308] *Id.* at 273.
[309] *Id.* at 276.
[310] *Id.* at 273.
[311] *Id.* at 270-71, citing 517 U.S. 559 (1996).
[312] *Id*. at 274.
[313] Sawtelle v. Waddell & Reed, Inc., 789 N.Y.S.2d 857, 858 (2004).
[314] *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*.

same punitive damages.[315] When the lower court reviewed the matter again, it vacated the punitive part a second time because it was too high relative to actual damages.[316]

Concerned that another remand to the same panel would not change anything, the lower court ordered a third arbitration before a new panel.[317] 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.[318] The court conceded that Mr. Sawtelle's "suggestion seems to make sense,"[319] and that the "history of this arbitration undermines the very purpose of arbitration ... to provide a manner of dispute resolution more swift and economical than litigation in court."[320] Still, the lower court denied the motion because no statute authorized a conditional reduction in an award. The court affirmed its earlier order for a third round of arbitration before new arbitrators.[321]

The case is an ironic twist to *Gilmer*. Mr. Gilmer and Mr. Sawtelle were both employed in the securities industry and were required to submit their employment dispute to arbitration. Recall that when Mr. Gilmer challenged the fairness of mandatory arbitration procedures, the Supreme Court rebuffed him, proclaiming: "Such generalized attacks on arbitration res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, and as such, they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[322] But after two arbitrations, and numerous court appeals, Mr. Sawtelle was no further in his pursuit of justice compared to when he filed his original claim. His award never received *Gilmer*'s broad deference.

2. Employers Use of Expanded Review Standards to Challenge Arbitrator Awards Post-Arbitration (Fig. 1, Box 4): Lawmakers who passed the Federal Arbitration Act wanted to end judicial hostility to arbitration agreements.[323] Congress did not want courts to let parties out of an arbitration agreement, and into a lawsuit. Thus, Congress was primarily concerned about court intervention in private disputes before or during the arbitration.

But lawmakers gave only passing thought to arbitration disputes that arise after the ADR process runs its full course and ends in an award. 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."[324] The 1924 Senate report was more complete, stating that the award could be set aside if it was secured by corruption, fraud, or undue means; or if there was partiality or corruption on the part of the arbitrators; or in a situation where an arbitrator is

[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] *Id.* at 859.

[319] *Id.*

[320] *Id.*

[321] *Id.* at 860.

[322] Gilmer, *supra* note 53, at 30. The Court also observed that the FAA was enacted to curb judicial resistance to arbitration: "Its 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." *Id.*

[323] 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, 68 Cong. Rec. 984 (1924). The same point was raised during House debate. *See* Remarks of Congressman Graham, 68 Cong. Rec. 1931 (1924).

[324] H.R. REP. NO. 68-96, at 2.

guilty of misconduct or refuses to hear evidence or because of prejudicial misbehavior by the parties; or the arbitrator exceeds his or her powers.[325] A lawyer's brief on common law vacatur provided the main outline for judicial reviewing standards in the FAA.[326] Section 10 codifies these very limited reviewing standards.[327]

Contemporary courts believe that these grounds are extremely narrow.[328] The first sub-section requires proof of arbitrator fraud or corruption.[329] The second is similarly narrow when it requires proof of evident partiality by the arbitrator.[330] The third basis refers to unlikely events during the arbitration proceedings. [331] A hearing must be scheduled, and a party must request a postponement of the hearing. [332] In addition, the arbitrator must refuse to grant the request for postponement.[333] 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."[334] Similar to the first two FAA provisions, vacatur depends on arbitrator misconduct. [335] The other basis in the third vacatur element requires proof that the arbitrator refused to hear evidence pertinent and material to the controversy, or that the arbitrator was guilty of other misbehavior that prejudiced the rights of a party. [336] The fourth and final ground appears to be the broadest, since it refers to arbitrator judgment and discretion. A court may vacate an award where arbitrators exceeded their powers.[337] Alternatively, an award may be vacated for being so indefinite that it is imperfectly executed.[338]

In addition, thirty-five states have adopted the Uniform Arbitration Act (UAA), proposed in 1955 to repeal state laws that obstructed arbitration agreements, while fourteen other states have enacted similar legislation.[339]

Many state laws contain the four statutory standards in Section 10 of the FAA, and add a fifth basis to vacate an

[325] S. REP. NO. 68-536, 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.

[326] *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.

[327] *See* United States Arbitration Act, ch. 213, 43 Stat. 883 (1925), codified as amended at 9 U.S.C. § 10 (2000), authorizing courts to vacate an award where (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[328] *E.g.*, Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1997) ("Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called 'review' at all.").

[329] United States Arbitration Act, *supra* note 134.

[330] *Id*.

[331] *Id*.

[332] *Id*.

[333] *Id*.

[334] *Id*.

[335] *Id*.

[336] *Id*.

[337] *Id*.

[338] *Id*.

[339] The Revised Uniform Arbitration Act (Prefatory Note), http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm.

award.[340] This uniform approach became more fragmented after 2000, when a national panel of experts approved the Revised Uniform Arbitration Act (hereafter, RUAA). In a recent survey of all state laws, the American Arbitration Association reported that 12 states adopted the RUAA.[341] The revised vacatur standards appear in the RUAA's Section 23.[342] More generally, the RUAA drafters altered the arbitration law in response to troubling trends in contemporary arbitration.[343] By regulating arbitrations in more detail, the RUAA supplies employers more grounds to challenge an adverse award.

[340] The Uniform Arbitration Act is reproduced by the American Arbitration Association at http://www.adr.org/sp.asp?id=29567. Section 12, "Vacating an Award," states: (a) Upon application of a party, the court shall vacate an award where: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award. UAA vacatur standards appear in Alaska (Ak. St. § 09.43.120, Vacating an Award); Arizona (A.R.S. 12- 1512, Opposition to an Award); Arkansas (A.C.A. § 16-108-212, Vacating an Award); Idaho (I.C. § 7-912, Vacating an Award); Illinois (710 ILCS 5/12, Vacating an Award); Indiana (I.C. § 34-57-2-13, Vacation of an Award); Kansas (Ks. St. § 5-412, Vacating an Award); Kentucky (K.R.S. § 417.160, Vacating an Award); Maine (14 M.R.S.A. § 5938, Vacating Award); Massachusetts (M.G.L.A. 150C §12, Vacation of an Award); Minnesota (M.S.A. § 572-19, Vacating an Award); Missouri (V.A.M.S. 435.405, Vacating an Award); Montana (Mt. St. 27-5-312, Vacating an Award); Nebraska (Neb. Rev. St. § 25-2613, Vacating an Award); South Carolina (Code 1976, § 15-48-130); South Dakota (S.D.C.L. § 21-25A-24, Grounds for Vacation of an Award); Indiana (I.C. § 34-57-1-17, Grounds Against Rendition of Award on Judgment); Tennessee (T.C.A. § 29-5-213); Virginia (Va. Code Ann. § 8.01-581-010). Alaska and Colorado retain the UAA structure but also adopted the Revised Uniform Arbitration Act. *See id.,* Revised Uniform Arbitration Act (Prefatory Note).

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

[342] The Revised Uniform Arbitration Act, *supra* note 146. 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. The significance of this information is that it shows how certain states have more grounds to review awards compared to federal courts, which are limited by Section 10 of the FAA to more narrow grounds. Thus, employers have a strategic incentive to review awards in states. 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 courtshall vacate an award made in the arbitration proceeding if: (1) the award wasprocured 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.*

[343] *Id*. The RUAA list includes: (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue

III. Election of judges: the growth of campaign money and influence

As I continue with the liability-avoidance model in Figure 1, the following section explains why state judges are susceptible to political influence. It is also important to understand where this discussion is heading. My empirical research question focuses on state judges who review disputed awards. I ask whether different selection methods for judges favor, disfavor, or have no impact on employees. Specifically, I explore whether partisan judicial elections favor employees or employers compared to judicial selection methods that are not overtly political. To lay the groundwork for this research question, I review the emerging literature on judicial elections.

A. Appointed or Elected? Methods for Selecting State Judges

English common law recognized that judges should be impartial. In *Bonham's Case*, censors appointed by Cambridge University imprisoned a physician for malpractice. Overruling the university's action, Chief Justice Warburton stated a principle that fair judging requires neutrality and disinterest in the verdict.[344] The principle of judicial neutrality took root early in the founding of the U.S., when *Federalist No. 10* reasoned that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity."[345]

The *Anti-Federalist* countered by advocating the election of judges. Brutus argued that appointed judges would be too detached for the good of a democracy: "In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself."[346] This prompted Alexander Hamilton to rigorously defend lifetime tenure for judges. In *Federalist No. 79* he explained that political considerations should never be a disciplinary factor for dismissing a judge.[347] This essay also recognized that unless judges are insulated from undue financial influences, justice is corrupted.[348] He advocated

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.

[344] *Bonham's Case*, 77 Eng. Rep. 638, 652 (C.P. 1610), stating that that the Cambridge "censors cannot be judges, ministers, and parties; judges to give sentence or judgment, ministers to make summons; and parties to have the moiety of the forfeiture."

[345] THE FEDERALIST NO. 10, at 47 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[346] Brutus, Essay XV (March 20, 1788) in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 304, 305 (Ralph Ketcham ed., 1986).

[347] THE FEDERALIST NO. 79, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("Any attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good.").

[348] *Id.* explaining that "a power over a man's subsistence amounts to a power over his will."

permanent tenure for judges[349] - a vital concept that the framers adopted in Article III of the U.S. Constitution.[350]

States took a different route in selecting their judges. Initially, they appointed judges, with the proviso that the governor could not make selections.[351] However, in response to Jacksonian democracy, many states switched to popular election of judges.[352] In time, this method was derided because political machines actually selected judges.[353]By 1927, twelve states used nonpartisan elections to choose judges.[354] Even this system was flawed because judicial candidates were still selected by party leaders -but voters had no way of knowing the party affiliations of these candidates.[355]

Today, "the combination of schemes used to elect judges in almost endless."[356] Many states use hybrid methods - for example, commissions that make initial appointments, and elections for retaining judges.[357] As I explain below, six states use partisan judicial elections for trial, appellate, and supreme court positions.[358] Five other states use partisan elections for trial judgeships, but provide for gubernatorial selection of appellate and supreme court justices who are selected from a list compiled by a nominating commission.[359]

B. The Growing Influence of Money in Judicial Elections

Returning to *Caperton* for perspective, it is useful to note that West Virginia provides for the partisan election of judges.[360] While it is only one case, *Caperton* shows that partisan election of judges can attract extremely high campaign contributions. It also shows that corporate donations can be given strategically to influence the outcome of a case.

I now consider whether the amount of campaign contributions in *Caperton* was an anomaly or part of pattern. Recent trends show an astonishing sum of money has poured into judicial elections. In 2000, state supreme court candidates raised a total of $45.6 million for judicial elections - a 61% increase over the amount raised by candidates in 1998.[361] States with partisan judicial elections recorded the most spending for campaigns.[362] The trend has grown, with spending on supreme court seats in 14 states rising

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

[350] U.S. Const., Art III, Sec. 1. stating: "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

[351] Larry C. Berkson & Rachel Caufield, *Judicial Selection in the United States: A Special Report* (2004), American Judiacture Society, available at http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf , at 1.

[352] *Id*.

[353] *Id*. at 2-3.

[354] John Aumann, *Selection, Tenure, Retirement and Compensation of Judges in Ohio*, 5 U. CINN. L. REV. 412, 414 n. 11 (1931).

[355] *Id*.

[356] Berkson & Caufield, *supra* note 158, at 3.

[357] *Id*.

[358] American Judicature Society, at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.

[359] American Judicature Society, at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.

[360] *Id*. (showing that West Virginia uses partisan elections for all levels of the state's judiciary).

[361] Lawrence M. Friedman, *Benchmarks: Judges on Trial, Judicial Selection and Election*, 58 DEPAUL L. REV. 451, 457 (2009).

[362] *Id*.

167% from 200 to 2002, and rising another 163 percent from 2002 to 2004.[363] As judges raised $157 million for their campaign funds from 1999 to 2006, they accepted about one-third of this financing from corporations and business groups, more than onefourth from plaintiff and defense attorneys, 11 percent from political parties, and 7 percent from themselves.[364] A federal appeals court observed "[t]here is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court."[365] Several states illustrate the trend:

• In Alabama, corporations, trial lawyers and unions spent nearly $60 million since 1993 on supreme court races.[366]

• In a rural Illinois district in 2004, supreme court Justice Lloyd Karmier and his opponent raised a combined $9.3 million - an amount that exceeded expenditures that year in 18 out of 34 U.S. Senate seats.[367] Two candidates for an Illinois Court of Appeals seat raised more than $3.3 million, quadrupling the state record.[368] Candidates in an Illinois circuit court campaign raised more than $750,000.[369]

• In Wisconsin, Justice Annette Ziegler was disciplined by the state supreme court for her ruling, as a lower court judge, on eleven cases involving a bank where her husband served as a director.[370] After she was elected to the state's highest court, she wrote the majority opinion in a 4-3 decision in favor of the position advocated by a group that spent over $2 million supporting her 2007 election.[371]

• A Pennsylvania election added a twist to this spending pattern, when a Virginia-based group called the Center for Individual Freedom spent close to $1 million dollars to support a Republican superior court judge who was running for Pennsylvania's supreme court in 2007.[372]

Recent federal court rulings may contribute to inappropriate campaigning in judicial elections.[373] In *Republican Party of Minnesota v. White*, the U.S. Supreme Court invalidated state regulation of campaign speech in judicial elections.[374] A Minnesota law prohibited a candidate for the state supreme court from publicizing his views on court rulings involving crime, abortion, and welfare.[375] Justice Scalia's majority opinion in concluded that the speech regulation did not achieve its goal of ensuring judicial impartiality.[376] His view of impartiality was very narrow: judges should be free of "bias for or against either *party* to the

[363] Charles Geyh, The Endless Judicial Selection Debate and Why It Matters for Judicial Independence, 21 GEO. J. LEGAL ETHICS 1259, 1265 (2008).

[364] Bert Brandenburg & Roy A. Schotland, *Keeping Courts Impartial and Changing Judicial Elections*, DAEDALUS (Oct. 1, 2008), at 2008 WLNR 22086476.

[365] Stretton v. Disciplinary Board, 944 F.2d 137, 145 (3d Cir. 1991).

[366] Eric Velasco, Decision on Judges Has Little Effect Here - Contributors Can Hide Who They Are in State, BIRMINGHAM NEWS (June 9, 2009), at 1, 2009 WLNR 11112242.

[367] Brandenburg & Schotland, *supra* note 171.

[368] *Id*.

[369] *Id*.

[370] Patrick Marley & Stacy Forster, *Ziegler, Big Lobby Think Alike*, MILWAUKEE J. SENTINEL (July 14, 2008), at A6.

[371] *Id*.

[372] *Renewed Interest in Merit Selection*, INTELLIGENCER JOURNAL (Nov. 13, 2007), at A8, also at 2007 WLNR 22474144.

[373] Roy A. Schotland, To the Endangered Species List, Add: Nonpartisan Judicial Elections, 39 WILLAMETTE L. REV. 1397 (2003).

[374] 536 U.S. 765 (2002).

[375] *Id*. at 768.

[376] *Id*. at 776.

proceeding."[377] An impartial judge is to apply the law equally to the parties. The state law was unconstitutional, however, because it regulated "speech for or against particular *issues* [emphasis in original]."[378]

In *Weaver v. Bonner*, a federal appeals court narrowed a state's authority to regulate campaign speech for judges. A candidate for the Georgia Supreme Court distributed campaign brochures that attacked the incumbent on issues such as same-sex marriage, the death penalty, and moral values.[379] A state judicial committee, attempting to enforce a canon that prohibited false or misleading campaigning, issued a cease a desist request, but Weaver continued to use these messages in TV ads.[380] After the state elections committee brought more charges, Weaver sued to invalidate the regulations.[381]

The federal appeals court rejected the state's position that the canon was "narrowly tailored to serve Georgia's compelling interests of 'preserving the integrity, impartiality, and independence of the judiciary.'"[382] Believing that the canon swept too far, the *Weaver* court said that the law chilled speech by inducing candidates to "remain silent even when they have a good faith belief that what they would otherwise say is truthful."[383] The court concluded that this "dramatic chilling effect cannot be justified by Georgia's interest in maintaining judicial impartiality and electoral integrity."[384]

In *Buckley v. Illinois Judicial Inquiry Bd.*, a candidate for the Illinois supreme court said in a campaign brochure that he had '"never written an opinion reversing a rape conviction.'"[385] The Illinois Courts Commission found that this type of issue announcement violated a supreme court rule that prohibited candidates from making pledges that prejudged cases, but did not impose a sanction.[386] Nonetheless, Buckley sued to invalidate the rule, claiming that it violated a judicial candidate's First Amendment rights.[387]

Agreeing with the candidate, the Seventh Circuit Court of Appeals concluded that the rule went beyond merely prohibiting speech that "could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election."[388] Judge Posner used a marketplace-of-ideas metaphor to guide his reasoning: "True, the silencing is temporary. It is limited to the duration of the campaign. But interference with the marketplace of ideas and opinions is at its zenith when the 'customers' are most avid for the market's 'product.'"[389]

Viewed in whole, these major federal court rulings sent a clear and discouraging

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[377] *Id*. at 775.
[378] *Id*. at 776.
[379] 309 F.3d 1312 (11th Cir. 2002).
[380] *Id*. at 1316.
[381] *Id*. at 1317.
[382] *Id*. at 1319.
[383] *Id*. at 1320.
[384] *Id*.
[385] 997 F.2d 224 (1993).
[386] *Id*. at 225, citing Ill. S.Ct. R. 67(B)(1)(c), Ill.Rev.Stat. ch. 110A ¶ 67(B)(1)(c). 1316. The rule provided that a candidate for judicial office "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity."
[387] *Id*.
[388] *Id*.
[389] *Id*. at 228-229. Judge Posner continued: "The only time the public takes much interest in the ideas and opinions of judges or judicial candidates is when an important judicial office has to be filled; and in Illinois those offices are filled by election. It is basically only during the campaign that judicial aspirants have an audience, and literal compliance with Illinois Supreme Court Rule 67(B)(1)(c) would deprive the audience of the show." *Id*. at 229.

message to state judicial boards. The boards in these cases attempted to prevent judicial candidates from announcing or taking campaign positions. Their rules were aimed at making judges sound less like political candidates and more like neutral arbiters who had not pre-judged a case or issue. If federal courts had allowed enforcement of these rules, donor influence in campaigns would have been held in check because contributors would have less certainty about the pre-disposition of these candidates. If corporations planned to give strategically to candidates, they would need to spread their contributions to a broader field of candidates. Instead, the Supreme Court and federal appeals courts made the marketplace of campaign contributions more efficient - and the impact of money more potent.

IV. Research methods and statistical results

A. Research Hypotheses

Surveying these failed efforts to take politicking out of judicial elections, Justice Sandra Day O'Connor lamented, "We put cash in the courtrooms, and it's just wrong."[390] Taking a similar position, some scholars have characterized judicial campaigns as litigation investments.[391] Judges are sensitive to political pressures when they depend on winning elections to secure their office.[392] The effect is most pronounced when judges run in partisan elections.[393] They decide cases strategically.[394] As one commentator observed, there is a fundamental tension "between the ideal character of the judicial office and the real world of electoral politics."[395] When judges are subject to regular elections, they are "likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."[396]

A separate research stream shows that big businesses use arbitration strategically to control litigation costs and outcomes. The current trend is marked by "managerial litigants" who "attempt to shape the process used to decide their disputes, and expect the courts to implement any approach upon which the parties have agreed."[397] Businesses with superior bargaining power exploit arbitration to obtain an advantage over weaker parties by obtaining the forfeiture of rights.[398] Companies require customers to agree to arbitration clauses in product purchase forms, residential leases, housing association charters, medical consent forms, banking and credit card

[390] Dorothy Samuels, The Selling of the Judiciary: Campaign Cash 'in the Courtroom', N.Y. TIMES (April 15, 2008), at A22.

[391] *Id*.

[392] Andrew F. Hanssen, The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges, 28 J. LEGAL STUD. 205 (1999).

[393] Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J. OF LAW AND ECON. 157 (1999); Eric Helland & Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. LAW AND ECON. REV. 341-70 (2002); and Melinda Gann Hall & Paul Brace, *Justices Responses to Case Facts: An Interactive Model*, 24 AM. POLITICS Q. 237 (1996).

[394] Chris Bonneau, The Effects of Campaign Spending in State Supreme Court Elections, 60 POLITICAL RES. Q. 489 (2007).

[395] David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 271-72 (2008).

[396] Republican Party of Minnesota*, supra* note 181, at 788-89.

[397] Sarah Rudolph Cole, Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution, 51 HASTINGS L.J. 1199, 1200 (2000).

[398] Sarah Rudolph Cole, Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution, 51 HASTINGS L.J. 1199, 1200 (2000).

applications, and employment handbooks.[399] "Little guys" such as retail customers, franchisees, and employees are forced into arbitration, often without reading the fine print of their agreement or realizing that they waived their right to sue.[400]

Based on the foregoing research, and the corporate campaign financing in *Caperton*, I hypothesize that judges who run in partisan elections will rule more often for employers compared to non-partisan judges when they review arbitration awards. I also hypothesize that employers will prefer state courts to federal courts to review awards because some states allow judges to campaign and receive financial contributions.

B. Method for Creating the Sample

I used research methods from my earlier empirical studies.[401] The sample was derived from Westlaw's internet service. Keywords were derived from terms in the Federal Arbitration Act, Revised Uniform Arbitration Act and state arbitration laws.[402] Cases were limited to arbitrations involving an individual and employer. Each case involved a post-award dispute in which an arbitrator's ruling was challenged by either an employee or employer. Arbitration cases involving unions and employers were excluded because they involve unique characteristics of labor-management relations.[403]

The sample began with a 1975 decision,[404] and ended with cases from February 2008. After a potential case was identified, I read it to see if it met the inclusion criteria. For example, pre-arbitration disputes over enforcement of an arbitration clause were excluded because the matter did not involve an arbitrator's ruling. 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.[405] Some cases involved employees who preferred court to arbitration but prevailed in the private forum, leading the employer to seek vacatur.[406]

Once a case met the criteria, I checked it against a roster to avoid duplication.[407] Relevant data were recorded. Variables

[399] Katherine Van Wezel Stone, Rustic Justice: Community and Coercion under the Federal Arbitration Act, 77 N.C. L. REV. 931 (1999).

[400] Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 WASH. U. L.Q. 637 (1996).

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

[402] *E.g.*, "PROCURED BY CORRUPTION," or "EVIDENT PARTIALITY," or "REFUSING TO POSTPONE THE HEARING," or "ARBITRATORS EXCEEDED THEIR POWERS," or "IMPERFECTLY EXECUTED."

[403] *See* United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960) (reference to industrial self-government).

[404] McClure v. Montgomery County Community Action Agency, 1975 WL 181652 (Ohio App. 2 Dist. 1975).

[405] *E.g.,* Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 146 (2d Cir. 2004).

[406] In Madden v. Kidder Peabody & Co., 883 S.W.2d 79 (Mo. App. 1994), an employee sued but was ordered by the court to arbitrate his claim. After he prevailed and was awarded $250,000, the employer sued to vacate the award, but the court denied the motion.

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

included (1) party who won the award, (2) state or federal court, (3) first court ruling on motion to confirm or vacate an award, and (4) appellate ruling, where appropriate. Other data were analyzed for companion studies.[408] For the present study, I added a new variable for method of selecting state judges. The source for this information, the American Judicature Society, is an independent, national, nonpartisan organization of judges, lawyers, and other members of the public who seek to improve the justice system.[409] The organization maintains a comprehensive database on each state's method for selecting judges. I used this database to categorize court rulings on disputed awards by whether the judge was selected in (1) partisan elections, (2) nonpartisan elections, or (3) appointment.[410]

Six states use partisan judicial elections for trial, appellate, and supreme court positions: Alabama, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia.[411] An additional five states use partisan elections for trial judgeships, but provide for gubernatorial selection of appellate and supreme court justices who are selected from a list compiled by a nominating commission: Illinois, Indiana, Missouri, New York, and Tennessee.[412]

C. Results and Findings

My database consists of 292 arbitration awards that involved a legal claim asserted by an employee or employer (Table 1). At the conclusion of these arbitrations, one or both parties challenged the award. As a result, 170 federal district courts and 121 first-level state courts made a ruling to enforce, or partially enforce, or vacate the award. In

Table 1
How Do Employees and Employers Fare in Arbitrations?

Employee Wins Entire Award	152 (52.1%)	Average (Mode): $15,000 Range: $252 - $38,232,827 N = 108 Missing Cases: 184
Employee Wins Part of Award	26 (8.9%)	
Employer Wins Entire Award	114 (39.0%)	Average (Mode): $31,123 Range: $2,000 – 11,500,000 N = 45 [Amounts Include Forum Fees Payable by Employees]
Total	292	

[408] Michael H. LeRoy & Peter Feuille, *Happily Never After: When Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 205 (2008) reporting on a recent spurt of award-review cases, exemplified by the finding that 62% of federal district award-review courts decisions occurred since 2000.

[409] American Judicature Society, at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.

[410] *Id.*

[411] *Id.*

[412] *Id.*

90 federal cases, and 102 state cases, appellate courts ruled on these lower court judgments. They enforced, partially enforced, or vacated the awards. Altogether, the database has 483 court rulings that reviewed disputed employment arbitration awards. For analysis in this study, I focused only on state court rulings. An employee won a court ruling if the judgment vacated an award that favored the employer, or confirmed an award that favored the individual worker.

Finding No. 1: **Employees were successful in arbitrations**. Employees prevailed in more than half the arbitrations, winning the entire award in 52.1% of cases (Table 1). They partially won 8.9% of the awards, and lost in 39.0% of the cases.

Finding No. 2: **Employees won multi-million dollar awards**. In 21 cases, arbitrators awarded employees one million dollars or more (Table 2). Three arbitrations produced awards greater than $10 million.

Finding No. 3: **In first-level reviews of disputed awards, employees lost more frequently before partisan judges compared to appointed and non-partisan judges**. When awards were initially reviewed by appointed state judges, employees won in whole or part in 52.7% of these cases while employers prevailed in 47.3% of the rulings (Table 3). In contrast, employees won only 32.1% of state court decisions when judges came to the bench in partisan elections, while employers won 67.9% of the cases.

Finding No. 4: **In appellate reviews of disputed awards, employees and employers had similar win-rates before partisan judges compared to appointed and non-partisan judges**. In appellate cases reviewed by appointed and non-partisan judges, employees won 43.2% of these cases while employers prevailed in 56.8% of the rulings (Table 4). Similarly, employees won all or part of appeals in 50.0% of state court decisions when judges came to the bench in partisan elections.

Table 2
Summary of Million Dollar Employment Arbitration Awards

Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175 (D.C. Cir. 1991)	$ 38,233,079
Sawtelle v. Waddell & Reed, Inc., 789 N.Y.S.2d 857 (N.Y. 2004)	$ 26,827,499
Caci Dynamic Systems v. Spicer, 2005 WL 831469 (E.D. Va. 2005)	$ 10,567,478
In re Heritage Organization, LLC, 2006 WL 2642204 (N.D.Tex. 2006)	$ 6,161,270
Pourzal v. Prime Hospitality Corp., 2006 WL 3230024 (D.V.I. 2006)	$ 4,178,555
Harty v. Cantor Fitzgerald & Co., 881 A.2d 139 (Conn. 2005)	$ 2,697,342
Barcume v. City of Flint, 132 F.Supp.2d 549 (E.D. Mich. (2001)	$ 2,253,270
Window Concepts, Inc., 2001 WL 1452790 (R.I. Super)	$ 1,904,145
Eaton Vance Dist. v. Ulrich, 692 So.2d 915 (Fla. App. 2 Dist. 1997)	$ 1,875,000
Dezego v. A.G. Edwards & Sons, Inc., 2008 WL 215979 (M.D. Fla. 2008)	$ 1,800,000
Ball v. SFX Broadcasting Inc., 165 F.Supp.2d 230 (N.D.N.Y. 2001)	$ 1,723,918
Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132 (6th Cir. 1996)	$ 1,691,250
Castleman v. AFC Enterprises, Inc., 995 F.Supp. 649 (N.D. Tex. 19997)	$ 1,678,622
Rosenszweig v. Morgan Stanley & Co., Inc., 494 F.3d 1328 (11th Cir. 2007)	$ 1,649,860
Schoch v. InfoUSA, Inc., 341 F.2d 785 (8th Cir. 2008)	$ 1,632,000
Ovitz v. Schulman, 133 Cal.App.4th 830 (Cal. 2005)	$ 1,500,000
Halikas v. Warburg Dillon Reed LLC, 759 N.Y.S.2d 288 (N.Y. Sup. 2000)	$ 1,422,000
Siegel v. Prudential Ins. Co. of America, 67 Cal. App.4th 1270 (Cal. 1998)	$ 1,338,016
Blake v. Transcommunications, Inc., 2004 WL 955893 (D.Kan. 2004)	$ 1,300,000
Palowitch v. Cap Gemini Ernst & Young, 2004 WL 2964426 (N.Y. 2004)	$ 1,125,000
Prudential-Bache Securities, Inc., 72 F.3d 234 (1st Cir. 1995)	$ 1,028,000

Table 3 Who Wins When Employment Arbitrations Are Appealed to Trial Courts? Partisan Elections and Pro-Employer Judgments			
	Employee Wins All or Part	**Employer Wins**	**Total**
Appointment or Non-Partisan Election of Judges	**49** **52.7%**	**44** **47.3%**	**93**
Partisan Election of Judges *Alabama, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia, Illinois, Indiana, Missouri, New York, and Tennessee*	**9** **32.1%**	**19** **67.9%**	**28**
Total	**58** **47.9%**	**63** **52.1%**	**121**

Table 4 Who Wins When Employment Arbitrations Are Appealed to Appellate Courts? Partisan Elections and Pro-Employer Judgments			
	Employee Wins All or Part	**Employer Wins**	**Total**
Appointment or Non-Partisan Election of Judges	**38** **43.2%**	**50** **56.8%**	**88**
Partisan Election of Judges *Alabama, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia*	**7** **50.0%**	**7** **50.0%**	**14**
Total	**45** **44.1%**	**57** **55.9%**	**121**

Finding No. 5: **State court rulings on employment awards trended up after 2000, while federal court rulings showed no clear growth trend**. This trend was clearly visible in appellate cases (Figure 2), where there were 6 cases in 2000, 5 in 2001, and 4 in 2002 with activity rising to 21 in 2005, 10 in 2006, and 16 in 2007. Federal appellate activity was flat in the period, varying between 9 cases in 2001, 2002, and 2003, and 2 cases in 2006. In first-level courts, state rulings increased from 2 in 2004, 9 in 2005, 11 in 2006, and 10 in 2007. The data suggest that state courts are increasingly used as forums to challenge awards.

V. Conclusions

This study is more about the possibilities than the realities of corporate influence over the judicial process for reviewing arbitrator rulings. Returning to the liability avoidance model in Figure 1, many of the employers in my database avoided lawsuits by requiring employment arbitration.[413] I found evidence that a smaller, though uncounted, subset

Figure 1
Judicial Rulings by Year of Decision
First-Level Federal and State Courts on
Disputed Employment Arbitration Awards

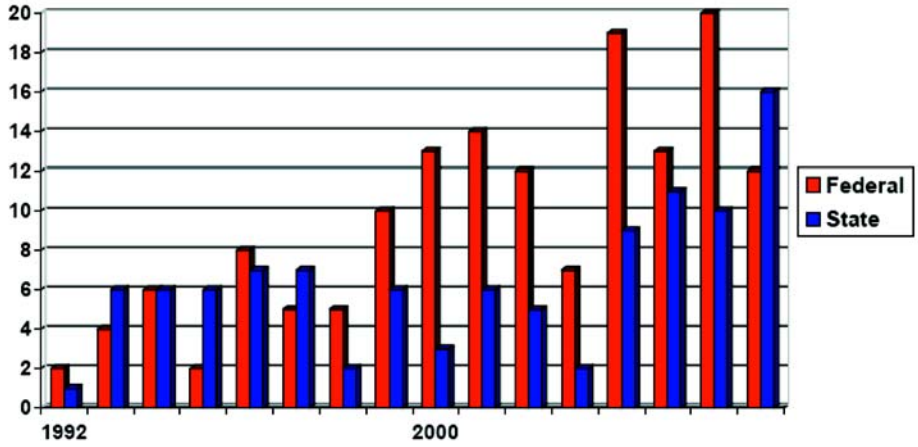
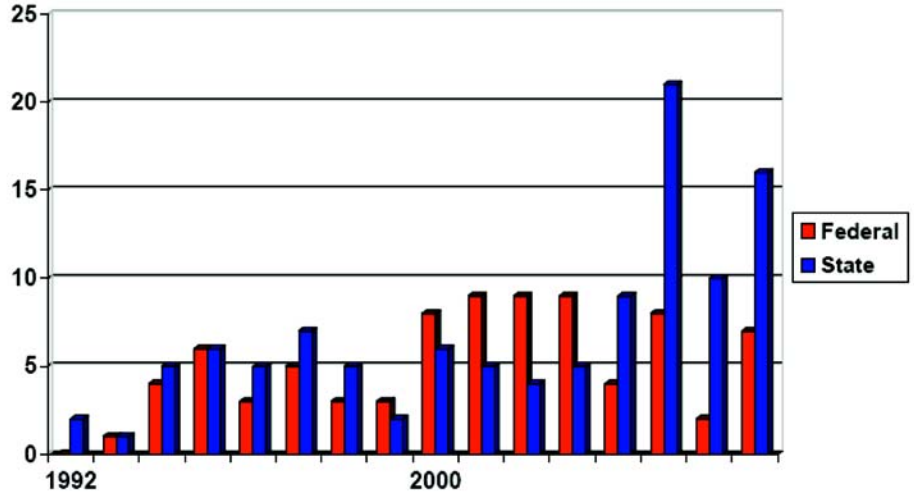


Figure 2
Judicial Rulings by Year of Decision
Appellate Federal and State Courts on
Disputed Employment Arbitration Awards



[413] Baldeo, *supra* note 76.

invoked favorable arbitration rules. Throughout this time, the FAA allowed employers to pre-designate a court to review an award.[414]

Turning to the new stage in the liability avoidance model, I found modest and suggestive statistical evidence that employers fare better when arbitration awards are reviewed by judges who are elected in partisan campaigns. This result is consistent with my theory that some employers expand their influence over the dispute resolution process by strategically supporting state judges who run for office in political campaigns -but this is hardly proof that my model reflects reality.

Turning to specifics, judges who run in partisan elections ruled more often for employers than individual employees when they reviewed arbitration awards. The most compelling finding was at the first stage of award review, where employees won only 31.0% of state court decisions before partisan judges compared to a win-rate of 49.2% before appointed judges, and a 50.0% win-rate before judges who were elected in nonpartisan races.

The results are consistent with studies that show that partisan elections have an effect on judicial decision-making in tort and regulatory cases.[415] Also, my statistical results raise a question about *Caperton*'s observation that judicial bias is an "extraordinary situation:"[416] What is the statistical definition of extraordinary? Is the *Caperton* influence scenario a one-in-a- million-case, a one-in-ten-thousand-case, or something less rare? No one knows, but *Caperton* was alert to point out that improper influence can occur without bribing a judge. A campaign donor's pivotal role in electing a judge can cause the judge to "feel a debt of gratitude ... for [the] extraordinary efforts to get him elected."[417] Given the nearly 20 percentage point difference in employee winrates before partisan and other state judges, this study should lead to more study and scrutiny of the debt-of-gratitude phenomenon that worried *Caperton*.

Important caveats must be added, however, to my preliminary conclusions. While I observed a partisan effect for first-level review of awards, I could not determine whether that judge accepted campaign support from employers, and if so, to what extent. It is likely that some of the judges who ruled for employers were not influenced by donors, but because of their party affiliation they decided cases through a more ideological prism that appointed judges.[418] Moreover, when judges were disciplined for announcing their campaign positions, they focused on hot-button issues such as abortion, same-sex marriage, welfare, and deterrence of rape.[419] Employment arbitration does not appear to have the same salience as a campaign issue. On

[414] United States Arbitration Act, *supra* note 134, at § 9.

[415] *See* Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J. OF LAW AND ECONOMICS 157 (1999); Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. LAW & ECONOMICS REV. 341 (2002) (partisan-elected judges are more likely to redistribute wealth in torts cases from out-of-state businesses to in-state plaintiffs who are voters); and Andrew F. Hanssen, I*ndependent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J. OF LAW, ECO. & ORG. 534 (2000) (partisan-elected judges are less likely to vote for challengers to a regulatory status quo).

[416] Caperton, *supra* note 1, at 2262.

[417] *Id*.

[418] To the extent that judges rule on the basis of ideology, the effect appears to be limited to controversial issues such as death penalty and civil rights cases. *See* Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POLITICAL SCIENCE REV. 323 (1992); and Cass R. Sunstein, et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA, LREV. 301 (2004).

[419] *See* Buckley, *supra* note 192.

the other hand, some disputed awards in my study involved expensive tort claims,[420] and it is possible that the partisan results in this study reflected judicial concern for this more general campaign issue.

Similarly, the finding of no partisan effect at the appellate level is not conclusive, and requires several caveats. The sub-sample of 99 cases is small. More fundamentally, appellate court decisions are produced in panels. To date, there is no evidence that all judicial candidates in partisan elections raise war chests and take open campaign positions. The point is suggested by the facts in *Caperton*. Although all the West Virginia justices were subject to a partisan election, only one came under suspicion for bias. This means that even in rare cases where one judge may be unduly influenced, he can be outvoted by more neutral judges on an appellate panel. This would mute the effect of campaign spending in appellate campaigns, unless the questionable justice cast the deciding vote.

My study also shows steadier growth rate in state award-review cases, compared to federal courts. But this trend is too short-term and mild to conclude that employers are strategically shifting venue for these appeals from federal to state courts. My research shows, however, that as more states change the arbitration laws for reviewing awards, interest groups are becoming involved in the legislative process. When Nevada adopted the Revised Uniform Arbitration Act, it excluded the model statute's provision for punitive damages in awards. The insurance industry lobbied for this total exclusion, arguing that it gave arbitrators too much power.[421] In Maryland, business groups blocked passage of the RUAA because they objected to a provision that would allow for class actions in arbitrations.[422] 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.[423]

These examples tend to bolster my liability avoidance model. They show that politics are filtering into state regulation of arbitration procedures. This, in turn, implies that corporate interest groups could be motivated to draft consumer and employment arbitration clauses that provide for review in favorable state courts - especially those where judicial accountability to donors can be created by allowing for partisan campaigning.

As long as rulings such as *Republican Party of Minnesota*, *Weaver,* and *Buckley* stand, my model will be viable. Federal courts seem determined to protect the marketplace of political speech that brings judicial candidates and voters together. But this also makes for a more efficient marketplace to make targeted campaign contributions. As money becomes a more potent influence in state courts, the likely losers are ordinary employees who prevail at arbitration and await court rulings on their awards. Their employer, or an employer interest group, may have contributed to the judge's campaign. *Caperton* tried to address this concern, stating that "[i]f the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the

[420] *See* Sawtelle, *supra* note 120.

[421] *RUAA and UMA Legislation from Coast to Coast*, *supra* note 148.

[422] *Id.*

[423] *Id.*

judge may think it necessary to consider withdrawing from the case."[424] Sadly, Justice Benjamin was incapable of withdrawing from a case where the appearance of his bias was obvious. When a judge's self-restraint is pitted against self-interest in the heat of a political campaign, my findings suggest that *Caperton*'s wisdom may not protect the employee from the ordinary influence of obligation that accompanies a donor's large contribution.

Appendix I: Table of State Cases in the Empirical Database

Ales v. Gabelman, Lower & Whittow, 728 N.W.2d 838 (Iowa 2007)

Antenna Products Corp. v. Cosenza, 2006 WL 1452102 (Tex. App.- Dallas 2006)

Anthony v. Kaplan, 918 S.W.2d 174 (Ark. 1996)

Autrey v. Ultramar Diamond Shamrock Corp., 2002 WL 102198 (Tex.App.- Dallas 2002)

Azpell v. Old Republic Ins. Co., 584 A.2d 950 (Pa. 1991)

Bailey v. American General Life & Acc. Ins. Co., 2005 WL 3557840 (Tenn. Ct. App. 2005)

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