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The *Steelworkers Trilogy* and Grievance Arbitration Appeals: How the Federal Courts Respond

Michael H. LeRoy†
Peter Feuille‡‡

In this empirical analysis, the authors examine 1,636 federal district and circuit court decisions concerning appeals from the arbitration process since the Supreme Court decided the *Steelworkers Trilogy*. They find that over the thirty-year period encompassed by the survey, courts have ordered arbitration and enforced awards seventy to seventy-four percent of the time. Contrary to the claims of many commentators, the authors also determine that courts have been increasingly unlikely to overturn awards on public policy grounds since the 1987 Supreme Court decision in *Misco*. The authors compare Reagan/Bush-era judicial decisions with prior rulings to determine if their conservative judicial appointments and anti-union stance influenced judicial deference to arbitrators’ awards. They conclude that since 1982 the circuit courts are less likely to uphold arbitration decisions. Finally, the authors note the disparity between the circuits in support of the arbitral process.

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INTRODUCTION

The Steelworkers Trilogy\(^1\) celebrated its thirtieth anniversary in 1990. At the time they were decided, the Supreme Court's rulings in these cases were hailed as an important public policy breakthrough in securing a speedy, efficient, conclusive, and privately negotiated system for the resolution of union-management grievance disputes.\(^2\) Since then, many commentaries have assessed the impact of the Trilogy; the conventional wisdom which has emerged is that these three decisions have effectively protected the grievance arbitration process from judicial intrusion.\(^3\) In recent years, however, the lower federal courts have been criticized for straying from the protective principles announced by the Court in the Trilogy decisions.\(^4\)

In this study we examine how the federal courts have responded to Trilogy-type claims over a thirty-year period. This study, which examines 1,636 federal district and circuit court decisions involving appeals from the grievance arbitration ("arbitration") process, is a more compre-

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2. For example, see the sympathetic treatment of the Trilogy decisions shortly after they were decided in David E. Feller, Recent Supreme Court Decisions and the Arbitration Process, 14 Proc. Nat'l Acad. Arb. 18 (1961).


hensive examination of what the federal courts have done in this area than any other published analysis.

Our findings show that in arbitrability and award-enforcement disputes, federal courts have ordered arbitration and confirmed awards in seven out of ten cases. In the special case of awards challenged on the ground that they violate public policy, our findings also show that courts have confirmed awards in approximately seven out of ten cases since 1987. This relatively high rate of award-enforcement is contrary to much commentary concerning the courts' propensity to overturn awards on public policy grounds.

I
THE STEELWORKERS TRILOGY AND ITS CONVENTIONAL WISDOM

The Trilogy decisions, announced by the Supreme Court on June 23, 1960, involved three grievance arbitration appeals brought by the United Steelworkers of America. In United Steelworkers of America v. American Manufacturing Co. (American Manufacturing), the union grieved and sought to arbitrate the employer's refusal to reinstate an employee who had been recuperating from a work-related injury while receiving worker's compensation. The union based its arbitration claim on both the seniority and broad grievance arbitration language in the contract. The district and circuit courts refused to order arbitration, and the latter labelled the grievance as "a frivolous, patently baseless one." 5 The Supreme Court reversed and ordered arbitration, stating that "whether the moving party is right or wrong is a question of contract interpretation for the arbitrator .... The courts, therefore, have no business weighing the merits of the grievance ...." 6

In United Steelworkers of America v. Warrior & Gulf Navigation Co. (Warrior & Gulf), the employer contracted out some maintenance work which contributed, in part, to some layoffs. The union grieved the contracting out and sought arbitration under the broad arbitration clause of the union's contract. The employer refused, citing the contractual silence on contracting out work as justification for their actions. The district court dismissed the union's suit to compel arbitration, and the circuit court affirmed. The Supreme Court reversed and ordered arbitration, holding that an "order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 7

5. 264 F.2d 624, 628 (6th Cir. 1959).
6. 363 U.S. at 568.
7. 363 U.S. at 582-83.
In *United Steelworkers of America v. Enterprise Wheel & Car Corp. (Enterprise)*, the union grieved the discharges of certain employees and sought arbitration. The arbitrator's award reinstated the employees and reduced their discharges to ten-day suspensions, but the labor agreement expired a few days before the arbitrator issued his award. The employer refused to comply with the award on the ground that the contract expiration meant that the arbitrator was without authority to reinstate these employees. The district court ordered the company to comply with the award, and the Supreme Court agreed, stating that:

the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overriding him because their interpretation of the contract is different from his.\(^8\)

As these three cases demonstrate, there are two standard methods for a reluctant employer or union (usually the employer\(^9\)) to resist arbitration under the typical arbitration language in a labor agreement.\(^10\) The first method is to refuse to arbitrate a specific grievance on the ground that there is no procedural or substantive obligation under the contract to do so. These *pre-arbitration* refusals to arbitrate were the subject of *American Manufacturing* and *Warrior & Gulf*. The second method is to refuse to comply with an arbitrator's award on the ground that it is sufficiently defective to warrant noncompliance. This *post-arbitration* refusal to comply with an award was the subject of *Enterprise*. As seen above, the Court took a very dim view of both arbitration resistance methods in situations where the parties negotiated labor agreements which provided for broad coverage of grievance disputes and for arbitrator decisions which would be final and binding.

These three Supreme Court decisions, made under the authority given to the federal courts thirteen years earlier by Section 301 of the Labor Management Relations (Taft-Hartley) Act of 1947,\(^11\) established a

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8. 363 U.S. at 599.
10. A threshold resistance method is to refuse to negotiate an arbitration clause in the labor contract, an option that has been sparingly used in the private sector given the almost universal adoption of arbitration in these contracts. See U.S. Bureau Of Labor Statistics, *Characteristics of Major Collective Bargaining Agreements July 1, 1976*, BULLETIN 2013 (1979).
11. 29 U.S.C. § 185 (1988). Section 301(a) essentially says that suits for violation of labor contracts may be brought in federal district court, and section 301(b) says, inter alia, that unions may sue or be sued in federal courts as an entity and on behalf of the employees they represent. The Court laid the foundation for the *Trilogy* rulings in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In *Lincoln Mills*, the union filed several work assignment grievances and sought arbitration of them. The employer refused to arbitrate. The district court ordered arbitration, but the court of appeals reversed. Lincoln Mills v. Textile Workers Union of Am., 230 F.2d 81 (5th Cir. 1956). The Supreme Court reversed the court of appeals and held that federal courts should fashion a body of substantive law to apply to suits brought under section 301(a). 353 U.S. at 456-57. The Court
strong federal policy favoring the use and finality of privately bargained arbitration procedures arising under collective bargaining agreements. In *American Manufacturing* and *Warrior & Gulf*, the Court established that unresolved grievances should be arbitrated regardless of the merits of the claim. In *Enterprise*, the Court indicated that, because the parties bargained for the arbitrator's resolution of the grievance and not the judiciary's, the courts had no business overturning the arbitrator simply because their judgment differed from his. In short, in each of these three decisions the Court strongly encouraged union, employer, and lower court compliance with the contractual promise to arbitrate unresolved grievances and to accept the resulting awards as final and binding.12

In the years since 1960, the *Trilogy* decisions have been praised for (1) encouraging unions and employers to use the peaceful arbitration process, rather than industrial trial by combat, to resolve grievances, and (2) protecting arbitration from judicial intrusion. For example, in a lengthy analysis prepared for the twentieth anniversary of the *Trilogy* in 1980, Professor Charles Morris said that the "*Trilogy* doctrine is still robust. It has grown, it has matured; it has come of age. Its acceptance in private sector labor relations is now commonplace; it has long ceased to be the subject of serious criticism."13 In particular, Morris devoted much of his analysis to a review of award-enforcement cases (under *Enterprise*) across federal circuits. He concluded that "in most of the courts the *Enterprise* standard is alive and well."14 Similarly, in their very detailed historical analysis of the development of labor arbitration in the United States, Professors Dennis Nolan and Roger Abrams concluded that the federal courts have "deferred their own processes pending arbitration, have ordered reluctant parties to arbitrate, and have refused to overturn arbitration awards except in extreme circumstances."15 Finally, James Kurtz examined the arbitration-related litigation that occurred in 1976 and concluded that during 1976 (1) the Supreme Court continued to express support for the use of arbitration to resolve grievance disputes, and (2) the federal courts continued to be sensitive about not usurping the role of the arbitrator in reaching final and binding decisions in grievance disputes.16 Other commentators have concluded that the *Trilogy* has protected the arbitration process from judicial intrusion as well.17

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14. Id. at 356-57.


17. For example, the National Academy of Arbitrators has consistently concluded that courts
Based on our prior research and on the findings presented later in this analysis, we conclude that the above-cited commentators, laudatory remarks for the *Trilogy* are generally accurate. Our research indicates that only a tiny fraction of private sector arbitration awards (i.e., less than one percent) are appealed to the federal courts, and that most post-arbitration attempts to escape from an arbitrator’s ruling are unsuccessful. Similarly, most refusals to arbitrate which are ultimately decided in federal court result in an order compelling arbitration. The opinions in these cases clearly indicate that deference to the arbitration process by the lower courts is firmly grounded in the *Trilogy*’s holdings and the supporting opinions that followed. Thus, the *Trilogy* deserves the credit it has received for elevating arbitration to a crucial role in the system of union-management self-government in American workplaces.

Nevertheless, during this same post-*Trilogy* period there has been continuing concern that the *Trilogy* and other Supreme Court decisions have been insufficient to protect the arbitration process from meddlesome judges who cannot resist the temptation to second-guess arbitrators. This concern with what is seen as unwarranted judicial intrusion is often accompanied by concern that successful appeals of awards by losing parties will create incentives for many more appeals, which in turn may practice deference in accordance with the *Trilogy*. With respect to courts responding to petitions to compel arbitration, the Law and Legislation Committee of the National Academy of Arbitrators concluded in 1976:

> The health of the arbitration process is graphically illustrated by the large number of cases wherein the courts hold in favor of a party who is seeking to compel arbitration or who is resisting a stay of arbitration, compared with the small number of decisions where arbitration is denied.  

*Arbitration and Federal Rights Under Collective Bargaining Agreements*, 30 *Proc. Nat’l Acad. Arb.* 260, 280 (1978). The same Committee reported that “in general, if the arbitration award is not (in) manifest disregard of the contract and draws its essence from the contract, it will be enforced by the courts in routine fashion.” Id. at 288. Furthermore, the Committee’s report praised courts for being “very sensitive about not usurping the role of the arbitrator in reaching a final and binding decision of a contract dispute.” Id. at 309.

More recently, Arbitrator Edgar Jones concluded that “courts of appeal have . . . interpret(ed) the ‘essence’ rationale in such a manner as to implement the determined effort of the Supreme Court to surround labor arbitration and the parties’ collective bargaining agreement with the strongest possible measure of insulation from the displacing intrusions of courts.” Edgar A. Jones, *A Mediation on Labor Arbitration and ‘His Own Brand of Industrial Justice’,* 35 *Proc. Nat’l Acad. Arb.* 1, 6 (1983).

In addition, an early commentary observed “. . . the courts have shown great deference to the arbitrator’s decision.” Jerry W. Markham, *Judicial Review of An Arbitrator’s Award Under Section 301 (a) of the Labor Management Relations Act*, 39 *Tenn. L. Rev.* 613, 645 (1972).

18. Feuille & LeRoy, supra note 3, at 42; see infra pp.102-03.
erode the finality and, hence, the usefulness of arbitration as a dispute resolution method. It is to this concern that we now turn.

II

THE TRILOGY AND JUDGES: TALES FROM THE DARK SIDE

The concern with the degree of judicial intrusion into arbitration can be traced to language in the Trilogy cases which indicates that the Court's rulings are not absolute. In Warrior & Gulf the Court recognized that certain subjects could be excluded from arbitration and thus be protected from a demand to arbitrate, provided that the exclusion either is expressly stated in the contract or is supported by other forceful evidence.21 In Enterprise the Court stated that the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement."22 When the arbitrator dispenses "his own brand of industrial justice" contrary to the agreement, the "courts have no choice but to refuse enforcement of the award."23

As this language illustrates, the Trilogy Court portrayed arbitration as a desirable dispute resolution process which deserves considerable deference but which nevertheless operates within certain boundaries regarding both use (i.e., the obligation to arbitrate) and disposition (i.e., the obligation to implement and comply with the arbitrator's ruling). Under Section 301 of Taft-Hartley the federal courts are the appropriate forum for resolving disputes regarding whether these boundaries have been exceeded. As a result, there has been continuing union-management litigation in the federal courts since 1960 over the duty to arbitrate grievances and over the extent to which awards merit compliance. This litigation has prompted continuing research and commentary regarding the extent to which the courts have departed from the Court's Trilogy directives. Not surprisingly, much of this commentary has come from arbitrators (including legal scholars who moonlight as arbitrators), especially in the aftermath of court decisions which deny enforcement of an appealed award. The cumulative volume of this commentary is impressive, and it appears to have become more frequent and strident during the past decade.24

21. "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . ." Warrior & Gulf, 363 U.S. at 584-85.
23. Id.
24. The annual proceedings of the National Academy of Arbitrators is the best single source for commentary about how the courts have intruded into the arbitration process. See, e.g., Gottesman, supra note 20; Gottesman, supra note 4; Edgar A. Jones, The Presidential Address: A Meditation on Labor Arbitration and 'His Own Brand of Industrial Justice', 35 Proc. Nat'l Acad. Arb. 1 (1983); Reinhardt, supra note 4; Robins, supra note 20. See also Heinsz, supra note 20; Edgar A. Jones, 'His Own Brand of Industrial Justice': The Stalking Horse of Judicial Review of Labor Arbitra-
A. When Courts Review Arbitration Issues

As noted above, the arbitration system can be dragged into court at two points: before arbitration occurs, when the arbitrability of a grievance is at issue; or after the issuance of an award, when compliance with the award is at issue. At either juncture, commentators have criticized the courts for unwarranted interference in the arbitration system.

1. Pre-arbitration Disputes

In an early empirical study, Professors Russell Smith and Dallas Jones analyzed litigation over arbitrability claims in federal and state courts which occurred soon before and after the Trilogy. They found more than twice as many arbitrability decisions in state and federal courts during 1963-1964 (106 cases) as they did during 1958-1959 (48 cases). They concluded that "[s]omewhat surprisingly, the [Trilogy] decisions seem not to have reduced the quantity of litigation in which issues of arbitrability have been raised." They did not conclude that the Trilogy had failed; rather, they noted that this increased litigation volume probably resulted from a desire to test the limits of arbitral jurisdiction. In addition, their data indicated that the percentage of court decisions ordering arbitration increased from 56% in 1958-1959 to 78% in 1963-1964, presumably as a result of the Trilogy.

In its 1964 decision in John Wiley and Sons, Inc. v. Livingston, the Supreme Court ruled that questions of whether "procedural" conditions to arbitration have been met are questions for the arbitrator rather than the courts to resolve. The Court reasoned that the grievance and arbitration provisions in the contract are included within the ambit of the customary arbitration clause, and thus disputes regarding the parties' compliance with these contractual procedures are grist for the arbitration mill. This decision was consistent with the desires of most unions and employers to have arbitration function as an informal and speedy process, and the result has been that issues of procedural arbitrability rou-
Questions of substantive arbitrability (i.e., whether the subject matter of a grievance is arbitrable) have also created controversy. In Warrior & Gulf, the Supreme Court explicitly relied on the federal courts' jurisdiction under Section 301 of Taft-Hartley as a license to resolve these substantive arbitrability claims. Frequently, though, parties have agreed to submit such questions to arbitrators, often because the pertinent labor contracts require arbitration at such times. In the absence of explicit contractual stipulations, however, it has not always been clear whether substantive arbitrability should be decided by arbitration or by the federal courts. In 1986 the Supreme Court provided additional guidance in this area in AT&T Technologies, Inc. v. Communications Workers of America. In this case, the defendant employer insisted that employee layoffs were not arbitrable grievances under the contract. The union sought an order compelling arbitration in federal district court. The court complied, ordering that the substantive arbitrability question be submitted to an arbitrator for resolution. The court of appeals affirmed. The Supreme Court reversed, holding that substantive arbitrability claims should be decided in federal court, not in arbitration. The Court observed that "the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."

This decision prompted one commentator to predict that Communications Workers would have the effect of encouraging courts to scrupulously review contract language to resolve arbitrability disputes, thereby enlarging the role of the courts beyond the scope envisioned in the Trilogy. This same commentator went on to predict that the courts would limit arbitration to issues which have no significant impact on management, which in turn would contribute to arbitration's decline as a dispute resolution mechanism.

It remains to be seen whether Communications Workers will have

35. "The Congress . . . has by Section 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate . . . ." 363 U.S. at 582.
36. See Elkouri and Elkouri, supra note 34, at 216-17.
40. 475 U.S. at 649.
42. Id. at 1315.
43. Id. at 1324-25.
such an inimical impact on arbitration's role in unionized work places, or whether this ruling has encouraged reluctant parties to pursue substantive arbitrability challenges in court rather than in arbitration. It is apparent, though, that this decision encourages reluctant parties to litigate substantive arbitrability claims, and also encourages federal district courts to carefully scrutinize labor agreements in order to fully resolve such claims rather than refer opposing parties to an arbitrator. By offering reluctant parties this courthouse invitation, the Court in Communications Workers sent a somewhat different message to unions, employers, and the federal courts than it sent in a string of earlier decisions, including the Trilogy, Teamsters Local 174 v. Lucas Flour,44 Wiley,45 Boys Market, Inc. v. Retail Clerks Local 770,46 Gateway Coal Co. v. United Mine Workers,47 and Nolde Bros., Inc. v. Bakery & Confectionery Workers Local 358,48 in which parties were encouraged to submit disputes to arbitration in a variety of circumstances.

44. 369 U.S. 95 (1962). In Lucas Flour, the employer discharged an employee for poor work, and the union responded by striking. The labor contract in effect at the time contained a broad arbitration clause but it did not contain a no-strike clause. The union argued that, in the absence of a no-strike clause, its strike did not violate the contract. The Court emphatically disagreed, holding that the contractual arbitration language covered this dispute, and a strike over this arbitrable matter violated the contract. Id. at 106.

45. 376 U.S. 543 (1964). In Wiley, a large publisher, Wiley, purchased a small publisher, Interscience. Interscience was unionized; Wiley was not. Wiley and Interscience's union could not agree on the effect of the merger on the collective bargaining agreement and on employee contractual rights. Shortly before the expiration of the contract, the union sued to compel arbitration. The Court ruled that successor employer Wiley had a duty to arbitrate with the union, and that questions of procedural arbitrability raised in litigation by Wiley should be submitted to the arbitrator for resolution. Id. at 550, 559.

46. 398 U.S. 235 (1970). The collective bargaining agreement at issue in Boys Market had a broad arbitration and no-strike clause. The union struck and refused to submit the matter to arbitration. The employer then obtained a court order compelling arbitration and enjoining the strike. The union argued that this injunction violated the prohibition in the Norris-LaGuardia Act against the issuance of injunctions in labor disputes. The Supreme Court disagreed, holding that "the core purpose" of Norris-LaGuardia is not sacrificed by the granting of injunctive relief to enforce the contractual obligation to arbitrate that the union freely undertook. Id. at 253.

47. 414 U.S. 368 (1974). In Gateway, a safety dispute arose at an underground coal mine. In spite of the broad arbitration clause in the contract, the union refused to arbitrate the dispute, calling a strike instead. The employer sued both to compel arbitration and to enjoin the strike, and the Supreme Court approved. The Court held that the broad arbitration language embraced safety disputes, and that arbitral expertise was just as appropriate in such disputes as in other disputes. Id. at 379-80.

48. 430 U.S. 243 (1977). In Nolde Bros., the union and employer reached impasse on a new contract after the existing collective bargaining agreement expired. The expired contract had a broad arbitration clause. After the union threatened to strike, the employer closed the plant, declined to pay the severance pay provided in the expired contract, and refused to arbitrate the union's severance pay claim on the ground that its obligation to arbitrate expired with the contract. The Supreme Court held that the union's grievance was arbitrable even though the grievance was filed after the contract expired. Id. at 255.
2. Post-arbitration Disputes

Most of the commentary on this subject has been prompted by court rulings that have overturned arbitration awards (i.e., post-arbitration appeals). Since Trilogy, the great majority of post-arbitration appeals have been based upon some variation of an Enterprise challenge to an award—namely, that the arbitrator's ruling was not sufficiently based on the language of the contract.49

Some commentaries have analyzed decisions rendered in various judicial circuits and have concluded that courts have displayed an increasing tendency to deny enforcement to appealed awards. For example, in commenting upon the Sixth Circuit, Professor Morris observed that "the courts in that circuit, if not also in other circuits, may eventually be inundated with arbitration review cases; thus, for a large number of grievances, arbitration will not be the final and binding determination . . . ."50 Another commentator analyzing Tenth Circuit decisions concluded that the court "will allow judicial intervention if it believes the arbitrator has modified express provisions in the labor contract. This reflects a trend in the lower federal courts towards a more interventionist philosophy regarding judicial review of arbitration awards."51 United Mine Workers President Richard Trumka has noted the Fourth Circuit's tendency to overturn union-favorable awards in the coal industry.52 Ninth Circuit Judge Stephen Reinhardt, in a recent analysis, found a "new judicial interventionism," particularly in the Sixth and Tenth Circuits.53 The common observation of these analyses is the willingness of the courts in these circuits to overturn awards, usually on Enterprise grounds.

B. Public Policy Appeals

Since the Trilogy cases were decided, there has been a sharp increase in the number of awards appealed on public policy grounds. Public policy appeals are different from Enterprise challenges, in that Enterprise challenges rest on the theory that an award does not reflect the contractual agreement, while public policy challenges rest on the theory that an award fails to conform to a public policy objective.

The idea that awards can be overturned on public policy grounds was developed well before the Trilogy. It is an extension of the common

49. See Feuille & LeRoy, supra note 3, at 43.
50. Morris, supra note 3, at 367.
52. Trumka, supra note 24.
53. Reinhardt, supra note 4, at 33 (discussing Detroit Coil v. Machinists, 594 F.2d 575 (6th Cir.), cert. denied, 444 U.S. 840 (1979) and Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977)).
law principle in contract law that prohibits enforcement of contracts which violate public policy. Our data demonstrate that public policy challenges to awards only gradually intruded upon labor arbitration, in part because the workplace of the 1960s was less regulated than the workplace of the 1980s.

The Trilogy did not directly address public policy challenges to award-enforcement; the first Supreme Court case to do so explicitly was W.R. Grace and Co. v. Local 759, Rubber Workers. In Grace the employer entered into a consent decree with the Equal Employment Opportunity Commission, the terms of which required that the employer maintain its extant proportion of women and blacks in the work force in the event of layoffs to remedy past sex and race discrimination at its Corinth, Mississippi plant. Within a year of entering into the decree, the employer found it necessary to lay off part of its work force and, consistent with the decree, protected females and blacks by laying off white males. Because these white males had seniority over the workers protected by the consent decree, the union grieved these layoffs. After resisting arbitration and finally being ordered to arbitrate these grievances by the Fifth Circuit, the employer submitted to several separate arbitrations regarding the layoffs. The arbitrator in the second arbitration ruled that the employer had breached the collective bargaining agreement, notwithstanding the consent decree, and ruled that the improperly laid off males were entitled to damages. The arbitrator notably did not order the employer to displace workers protected by the consent decree, but only ordered the employer to pay damages to the more senior workers who were displaced at the expense of the protected workers.

The Supreme Court upheld the arbitrator’s award, noting that “[i]f

54. One of the landmark Supreme Court cases in this area is W.R. Grace and Co. v. Local 759, Int’l Union of Rubber Workers, 461 U.S. 757 (1983), discussed infra text accompanying notes 56-60. The Grace Court stated: “As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy.” Id. at 766.

55. We analyzed our data to map the growth of public policy appeals of awards throughout the thirty year history of the Trilogy. We found that in the 1960s, employers challenged seven awards and unions challenged four awards using a public policy theory at the district court level; at the circuit court level, employers challenged five awards and unions challenged one award. In the 1970s, employers challenged 17 awards and unions challenged two awards using a public policy theory at the district court level; at the circuit court level, employers challenged six awards and unions challenged one award. In the 1980s, employers challenged 42 awards and unions challenged five awards using a public policy theory at the district court level; at the circuit court level, employers challenged 25 awards and unions challenged four awards. Growth in the actual number of public policy challenges to awards in the three decades following the Trilogy has been substantial, making such award-enforcement disputes far more visible in the 1980s than before. On the other hand, the proportion of public policy challenges relative to the total volume of award-enforcement appeals (i.e., basic Enterprise challenges alleging that the award fails to draw its essence from the contract) has been very small. See Feuille & LeRoy, supra note 3, at 43-44.


57. Id. at 763, 764.
the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it."

58. Id. at 766.

59. Id. (citing Muschany v. United States, 324 U.S. 49, 66 (1945)).

60. 461 U.S. at 770.

61. Id. at 771 (citation omitted).


63. Id. at 33.

64. Id. at 34-35.


66. 484 U.S. at 43 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).

67. See supra note 55.
attracted interest among commentators. Moreover, the only decisions issued by the Supreme Court in the 1980s that pertain to judicial review of post-arbitration awards (W.R. Grace and Misco) exclusively involved public policy challenges to the awards. Thus, because of the interest commentators and the Supreme Court have shown in public policy appeals, we devote substantial attention to our data on these particular appeals.

Most of the post-Misco commentary has negatively assessed Misco's impact on lower court responses to challenged awards. The usual criticism of Misco has been that the decision failed to enunciate a clear rule that would further insulate arbitration awards from results-oriented court decisions based on public policy. For instance, Professor Jan Vetter criticized Misco for failing to articulate a clear rule limiting public policy attacks on grievance awards, noting that

the decision in Misco left the controversy over ... public policy where it found it ... . The place public policy ought to have in judicial review of arbitral awards remains unclear and controversial. Meanwhile, apparently inconsistent decisions continue to accumulate in the lower courts.

Other commentators have noted that Misco has led to a proliferation of decisions that deny enforcement of awards on public policy grounds. Christopher Hexter, a union attorney, believes that Misco has left judges free to find public policy grounds upon which to vacate awards, and has concluded that post-Misco appellate decisions have "been very selective about the facts found by arbitrators—emphasizing those which justified the result they were seeking and diminishing those inconsistent with their goal." Professor Michael Gottesman has observed that since Misco was decided federal courts have been setting aside awards using the public policy rationale "at quite an extraordinary clip."


69. Vetter, supra note 4, at 77-78.

70. See Hexter, supra note 4 at 92-99 (citing Delta Air Lines v. Air Line Pilots Ass'n, 861 F.2d 665 (11th Cir. 1988); Stead Motors v. Automotive Machinists Lodge 1173, 843 F.2d 357 (9th Cir. 1988), rev'd, 886 F.2d 1200 (9th Cir.), cert. denied, 110 S. Ct. 2205 (1990); Iowa Elec. Light & Power Co. v. IBEW Local 204, 834 F.2d 1424 (8th Cir. 1987)).

71. Hexter, supra note 4, at 100. Hexter's conclusion is amplified in Note, Arbitration-Reinforcement of Arbitrator's Role in Maintaining Industrial Peace, 23 SUFFOLK U. L. REV. 78, 87 (1989) (observing that in Misco "[a]lthough the Supreme Court reinforces vital aspects of the labor arbitrator's power, it also specifically identifies a future issue for litigation, specifically, the determination of the scope of the mandate requiring that laws and legal precedents promulgate public policy. The Misco decision permits courts to interject their own perceptions of public policy through their construction of statutory and case law.").

72. Gottesman, supra note 4, at 89.
Professor Bernard Meltzer recently observed that *Misco* provided labor arbitration awards no more insulation from public policy challenges than do ordinary contracts.\(^{73}\) Another commentator noted that *Misco* broke virtually no new ground in defining rules to limit the public policy attacks upon grievance arbitration awards.\(^{74}\) Judge Harry Edwards has stated that “[a]n ill-defined exception will also encourage employers to resort to litigation as a regular course when faced with awards they do not like.”\(^{75}\) He predicted that “[a]rbitral finality will thus be significantly reduced, and unions will know that they will ultimately have to resort to strikes and other forms of economic warfare to settle grievances.”\(^{76}\)

C. External Law

Another common observation is that issues of individual rights under external law have eroded the finality of grievance arbitration awards. In a widely publicized paper delivered after the Supreme Court’s ruling in *Alexander v. Gardner-Denver Co.*\(^ {77}\), Professor David Feller predicted that the hybridization of arbitration, involving grievances that raise questions of external law, will erode the arbitration system, noting that “the exalted position that grievance arbitration has achieved in the whole system of industrial relations in this country is bound to suffer a substantial diminution in the years to come.”\(^ {78}\)

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the Court, in *Misco* as in *W.R. Grace*, placed the public policy defense against labor arbitration awards within the general traditions of contract law but provided scant guidance regarding the scope of that defense. The resultant uncertainty is the price tag for the flexibility afforded by that defense throughout all of contract law.

*Id.* at 257.

74. Note, *Public Policy Exception to the General Rule of Judicial Deference to Labor Arbitration Awards*, 57 U. Cin. L. Rev. 819, 844 (1989) (concluding that “much of the Court’s opinion did not provide new principles of law but reiterated what had been decided in the past. Of the four principles coming from the (Misco) holding, only the third requirement, that a violation of public policy be clearly shown, could be called new.”).


76. *Id.*

77. 415 U.S. 36 (1974). In *Alexander*, a black man was fired from his drill operator job for producing too much scrap. He grieved, and his union arbitrated his grievance. The arbitrator ruled he had been discharged for just cause. Alexander then pursued a Title VII claim by suing his employer in federal district court. The court granted summary judgment to the employer and the Tenth Circuit affirmed. 466 F.2d 1209 (10th Cir. 1972). The Supreme Court reversed, holding that an employee may pursue a claim through the grievance arbitration procedure and also may pursue the same claim *de novo* under Title VII in the federal courts notwithstanding an unfavorable arbitration award. 415 U.S. at 59-60.

sor Lewis Kaden similarly noted that the courts’ increased sensitivity to individual rights as well as the proliferation of public law impinging on the arbitrator’s role in the bargaining process has resulted in “uncertainty regarding the scope of judicial review of arbitration awards.”

Kaden concluded that “[e]ach development portends more frequent judicial intervention in the arbitration process.”

Even an arbitration statute not originally intended to apply to grievance awards, The Federal Arbitration Act, has served as external law impinging upon the rule of award finality. The Act appears to establish federal court jurisdiction apart from the Trilogy to review labor arbitration awards. Section 9 of the Arbitration Act permits a party to an award to apply to a court “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.”

The Act provides narrow authority for a court to vacate an award, namely, “[w]here the arbitrators exceeded their powers.” Professor Douglas Ray has argued that although it is anomalous to apply the Federal Arbitration Act to review labor arbitration awards because the Act was intended to apply to commercial rather than labor arbitration disputes, at least one federal circuit court has expressed a contrary view.

One recent commentary analyzed labor arbitration award enforce-
ment in the context of the emerging field of alternative dispute resolution, and noted with irony: "In this time of growing emphasis on the use of private means to solve socioeconomic differences between parties... it is almost paradoxical that perhaps never before has the labor arbitration system come under such intense judicial scrutiny."87

In sum, although no one disputes that the courts recognize the Trilogy as authority for the general principle of non-reviewability of arbitration awards, there appear to be increasing doubts that grievance arbitration remains as free from judicial interference as it once was.88 Naturally, most concern has focused on those cases where judges have overturned awards. Commentators have suggested various reasons for this apparent decline in award enforcement. Professor Michael Gottesman suggests that the federal bench of the 1980s had new personnel who were unfamiliar with the dictates of the Trilogy. He also proposes that judges appointed in the 1980s are uncomfortable with the idea of leaving anyone's judgment—including the judgement of arbitrators—essentially unreviewable.89 Judge Stephen Reinhardt argues that the reason courts are less deferential to awards is that “a fair number of judges are less sympathetic to labor and the union movement than were their predecessors.”90 Judge Jerre Williams suggests that there may be a tendency for losing parties at arbitration to carefully review the wording of an award with the hope of finding some inartful language upon which to base an appeal, and that some federal judges may respond to such appeals by vacating the award based on the same kind of semantic analysis of the arbitrator's reasoning.91 All of these proffered reasons are based largely on speculation, but their authors agree that the amount of judicial deference to arbitral judgments has declined in recent years.

III
THE TENSION-FILLED ROLE OF THE COURTS UNDER THE TRILOGY

The tension between labor arbitration autonomy and judicial review inheres in the very fabric of the Trilogy. In arbitrability disputes, the courts may be faithful to Warrior & Gulf by denying substantive arbitrability petitions only when “the most forceful” contractual evidence

87. Heinsz, supra note 20, at 244.
88. For example, former President of the National Academy of Arbitrators William Murphy, in an address to the North Carolina Department of Labor on December 6, 1986, remarked that the “frequency with which courts are reversing arbitrators has been increasing over the past... ten years... Maybe it’s a different breed of arbitrators... Nobody really knows why, but this is an observable phenomenon.”
89. Gottesman, supra note 4, at 90.
90. Reinhardt, supra note 4, at 36.
indicates that the parties intended to exclude particular subject matters from arbitration. Naturally, to reach such a conclusion the reviewing court must examine the pertinent contract language as well as relevant negotiating history and other collateral evidence. In other words, the court needs to look carefully at the same kind of evidence that otherwise would be reviewed in arbitration.

Judicial review of arbitration awards is fraught with even more tension. In *Warrior & Gulf* the Court adopted a new view of the arbitrator. "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." Thus, the Trilogy viewed the arbitrator as an intrinsic element of the collective bargaining process. "He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept," but "is rather part of a system of self-government created by and confined to the parties." The Court viewed arbitrators as crucial to this system of self-government because of their special competence:

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

Thus, in *Enterprise* the Court concluded that "it is the arbitrator's construction which [is] bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from

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92. It is conceivable that *Warrior & Gulf* can be followed carefully by courts that deny petitions to compel arbitrations, provided that managements succeed in negotiating restrictive arbitration clauses. Professor Russell Smith made this observation two years after the Trilogy was decided, and after he had surveyed numerous managements and unions on their adjustments following the Trilogy. Smith observed that the Trilogy has "limited the role of the courts in reviewing questions of arbitrability" but "there is evidence to some extent . . . [that] the process has been, or will be, weakened through contractual limitations on the arbitrator's authority." See Russell A. Smith, *The Question of 'Arbitrability'-the Roles of the Arbitrator, the Court, and the Parties*, 16 S.W. L.J. 1, 31-32 (1962).

93. Recall that under *Wiley*, questions of procedural arbitrability are to be referred to arbitrators. See supra note 45.

94. See Note, supra note 41, at 1311 ("courts . . . find themselves in a boggy middle ground, attempting to avoid a consideration of the merits qua merits while giving fair hearing to the parties' arguments regarding . . . arbitrability. Any decision regarding . . . arbitrability . . . thus involves the merits of the dispute to some extent; how much is too much becomes the problem.").

95. 363 U.S. 581.

96. *Id.* at 581 (quoting Harry Schulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955)).

97. *Id.* at 582.
his.\textsuperscript{98}

Notwithstanding this paean to arbitral competence, the \textit{Enterprise} Court made clear that the arbitrator's judgment is not absolutely unreviewable. "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."\textsuperscript{99} \textit{Enterprise} also states that an arbitral award is legitimate only so long as it "draws its essence from the collective bargaining agreement."\textsuperscript{100} The Court wished to spare arbitrating parties from an award which altogether deviated from the collective bargaining agreement, and therefore preserved a limited scope of judicial review as a safety valve. However, the Court emphatically wished to avoid "plenary review by a court of the merits [that] would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final."\textsuperscript{101} In enunciating its "essence" test, the Court unavoidably created an ambiguous role for reviewing courts.\textsuperscript{102}

This ambiguity stems from the paradox built into the essence test. In order to determine if the arbitrator's award draws its essence from the collective bargaining agreement, a reviewing court must make \textit{sub silen\-tio} a plenary review of the parties' contract, as well as the arbitrator's fidelity to the contract. Consequently, any court that orders or denies enforcement of an award on grounds that it does or does not draw its essence from the agreement has substituted its interpretation of the labor contract in place of the arbitrator's interpretation of the contract.\textsuperscript{103} In sum, no court can engage in the essence test without silently putting itself in the arbitrator's position.\textsuperscript{104}

\textsuperscript{98} Enterprise, 363 U.S. at 599.
\textsuperscript{99} Id. at 597.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 599.
\textsuperscript{102} Oddly, the general rule of non-reviewability might itself generate mistrust of the arbitration process. One management representative commented on the Trilogy, two years after it was decided:

\begin{quote}
In general, we are satisfied with the arbitration process. It provides a speedy, fair, and inexpensive means to resolve disputes. However, we are beginning to be concerned with the doctrine of non-reviewability (for all practical purposes) of arbitration decisions . . . .
\end{quote}

(T)he 1960 Trilogy and subsequent decisions have placed upon arbitrators a degree of responsibility that produces chills upon appropriate body locations. When one combines the doctrine of non-reviewability with the complex and explosive question of plant relocation, vesting of seniority rights, etc., you have the potential ingredients necessary for unions and/or employers to begin considering new tribunals of original and appellate jurisdiction.

In effect, I am suggesting that perhaps on the immediate horizon is the need for a middle ground regarding the reviewability of certain arbitration awards.

\textsuperscript{103} Professor William P. Murphy remarked:

\begin{quote}
If you read a great many of these cases reversing arbitrators, you'll be forced to come to the conclusion that what the courts are really doing under the rubric of the 'essence' test is what the Supreme Court told them they should not do, and that is to reverse arbitrators because of their disagreement with the merits of the arbitrator's award.
\end{quote}

Murphy, \textit{supra} note 88.
\textsuperscript{104} The paradoxical nature of the essence test has been observed by other commentators. For
Court review of both arbitrability and award enforcement claims, especially the latter, necessarily requires the court to weigh the same evidence that is ordinarily submitted to an arbitrator. In turn, the review of this kind of evidence necessarily requires the courts to make decisions that arbitrators regard as within their special sphere of expertise. Consequently, there is considerable tension between arbitration's role as a private and autonomous dispute resolution system and the judiciary's role as the public overseer of contractual relationships under law.

In the following pages we present the results of a study that analyzes how the federal courts have responded to these kinds of claims. This study has been motivated by three objectives. First, we examined the results of a large number of cases in order to determine the extent to which courts actually defer to the arbitration process. Our approach differs from other studies or analyses that focused on a few carefully selected cases in which the courts overturned awards or refused to order arbitration. Second, we compared judicial rulings since 1980 with decisions from earlier decades to see if the courts have become less deferential toward arbitration. Third, we compared rulings across federal judicial circuits to see if there is any merit to the claims that courts in some circuits have become less deferential toward arbitration than in other circuits.

IV
RESEARCH METHODS

Most of the published commentary on legal challenges to arbitration have relied primarily upon intensive textual analyses of various court decisions, including extended discussion of the workplace facts and judicial reasoning in the leading appellate rulings. In contrast, we have used a different approach. Instead of examining a small number of cases in detail, we have examined the outcome of a large number of federal court decisions in order to determine the central tendencies of judicial behavior in arbitration appeals.

In this analysis we have relied upon court opinions for information about the arbitration facts, the reasons for the appeal, the court’s ruling, and the reasons for the ruling. As this implies, we had no access to the parties’ contract, the arbitration award (except as summarized by the court decision), any evidence adduced at arbitration, or the record produced in district and/or circuit court. In turn, this data collection method places limits on the kinds of analyses we can perform. Specifi-
cally, we are precluded from offering our own normative judgments of any arbitration decisions or court rulings (i.e., we are unable to conclude how justified or ill-advised these specific decisions and rulings were). As a result, we make no attempt to determine the extent to which particular court decisions appear consistent or inconsistent with the *Trilogy* principles enunciated 30 years ago.

From 1988 through July 1990 we used LEXIS and WESTLAW to locate as many published federal court decisions as possible which involved either pre-arbitration appeals (refusals to arbitrate) or post-arbitration appeals (refusals to comply with award) which were decided after June 23, 1960, the date of the Supreme Court’s *Trilogy* decisions.\(^\text{105}\) Our search yielded 1,148 federal district court decisions and 480 federal circuit court decisions that resulted in a court order which compelled or denied arbitration or which enforced or vacated an arbitrator’s award in whole or in part.\(^\text{106}\) In view of the recent interest in appeals of arbitration awards on public policy grounds, we added four circuit and four district court 1991 decisions involving rulings on this issue. The decisions in our sample involved only cases arising in the private sector.\(^\text{107}\) It excluded unreported decisions, state court decisions, federal court decisions involving public employees and employers, cases which were filed in federal court but were settled prior to a judicial decision, and any reported decisions which our key-word search requests missed. In addition, arbitration challenges which alleged duty of fair representation violations were excluded.\(^\text{108}\) In other words, we cannot be certain how many arbitration appeals our search method missed, but we believe our sample includes most of the federal court arbitration decisions issued since the *Trilogy*.

Each court decision was analyzed using a lengthy survey form.\(^\text{109}\) This survey form was used to extract standardized information about the

\(^\text{105}\) Our survey searched for cases from June 24, 1960 through July 24, 1990, a period of exactly thirty years and one month.

\(^\text{106}\) Cases resulting in "other" decisions (i.e., decisions that did not compel arbitration or deny a petition to compel arbitration, or decisions that did not confirm or vacate a challenged award) were excluded from this analysis.

\(^\text{107}\) We did, however, include cases involving the U.S. Postal Service because the Postal Service has been a quasi-independent agency since the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (1970). Section 1208 of the Act, 29 U.S.C. § 167 (1988), is clearly patterned after Section 301 of the Taft-Hartley Act.

\(^\text{108}\) For an analysis of duty of fair representation decisions employing a similar methodology, see Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do In Fact*, 34 BUFF. L. REV. 89 (1985).

\(^\text{109}\) The text of each decision was analyzed either by one of the authors or one of the three research assistants. The survey form used in this analysis was revised after a pilot study to ensure that the survey items corresponded to the information available in the decisions. Lengthy training was conducted to ensure consistent responses across coders.
in the substance and disposition of each case. The data from each survey form were computerized and aggregated to facilitate analysis.

In the analyses which follow we divide our results into two periods: 1960-1981 and 1982-1990. We divide the time period in this way because we found in a previous investigation that the number of cases in our sample increased sharply during the 1980s. The Reagan Administration was unsympathetic to the aspirations of organized labor. During the years 1981-1988 the Reagan Administration appointed 47% of the federal bench. Approximately 90% of these appointees were Republicans. Relying partly upon the notion that federal judges tend to render decisions which are consistent with the ideological aims of their appointing presidents, some commentators have alleged that federal judges have become more willing to overturn arbitration awards in recent years. Considering that President Reagan did not take office until January 1981, that he acted to break the federal air traffic controllers' strike in August of that same year, and that his administration needed some time to find and appoint the judges it preferred, the resulting second period provides a time frame that is reasonably equivalent to the Reagan Administration years.

V Arbitrability Results

Table 1 presents data on arbitrability disputes resolved in federal courts from 1960 through 1990. District courts have consistently resolved arbitrability disputes in favor of ordering arbitration, consistent with the dictates of Warrior & Gulf; during the past thirty years. In the 1960-1981 period, district courts decided 92 arbitrability cases, and ordered arbitration in 73.9% of their decisions. The 1982-1990 period produced 52 decisions—more than half as many as in the preceding twenty-two years—and district courts ordered arbitration in 76.9% of these decisions. Altogether, in the period from 1960 to 1990, district courts ordered arbitration in 75% of their decisions.

Federal circuit courts produced a different pattern. The circuits or-

110. Feuille & LeRoy, supra note 3, at 40-41.
111. Sheldon Goldman, Reagan's Judicial Legacy: Completing the Puzzle and Summing Up, 72 JUDICATURE 318, 319 (1989). This percentage is for all Article III courts of general jurisdiction. Altogether, President Reagan appointed and the Senate confirmed 78 appeals judges and 290 district judges.
112. Id. at 321.
113. Gottesman, supra note 4; Reinhardt, supra note 4.
115. However, note that in Table 6, providing data on pre-Misco and post-Misco award enforcement, we further subdivided the 1980s into the period preceding Misco (1982-1987) and the period following Misco (1988-1990). We did this to make a preliminary assessment of the effect of Misco.
Table 1

District and Circuit Court Decisions Ordering Arbitration (1960-1990)

<table>
<thead>
<tr>
<th></th>
<th>Decisions Ordering Arbitration</th>
<th>Decisions Dismissing Petitions to Order Arbitration</th>
<th>Total Number of Decisions</th>
<th>Percent Decisions Ordering Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Courts 1960-1981</td>
<td>68</td>
<td>24</td>
<td>92</td>
<td>73.9%</td>
</tr>
<tr>
<td>District Courts 1982-1990</td>
<td>40</td>
<td>12</td>
<td>52</td>
<td>76.9%</td>
</tr>
<tr>
<td>TOTAL: District Courts 1960-1990</td>
<td>108</td>
<td>36</td>
<td>144</td>
<td>75.0%</td>
</tr>
<tr>
<td>Circuit Courts 1960-1981</td>
<td>23</td>
<td>7</td>
<td>30</td>
<td>76.7%</td>
</tr>
<tr>
<td>Circuit Courts 1982-1990</td>
<td>16</td>
<td>11</td>
<td>27</td>
<td>59.3%</td>
</tr>
<tr>
<td>TOTAL: Circuit Courts 1960-1990</td>
<td>39</td>
<td>18</td>
<td>57</td>
<td>68.4%</td>
</tr>
</tbody>
</table>

dered arbitration in 76.7% of the 30 cases they decided during the 1960-1981 period, a rate very similar to the compelled arbitration rate in the district courts during this same period. During the 1982-1990 period, however, the circuits ordered arbitration in only 59.3% of the 27 cases they decided. Although the circuit courts decided relatively few cases in each of these time periods, they were noticeably less likely to order arbitration during the 1980s than during the two preceding decades. They were also less likely to order arbitration than the district courts during the same time period.

Table 2 shows district courts grouped by their respective circuits and ranks those district courts by their tendency to order arbitration during the 1960-1990 period. This table needs to be interpreted cautiously due to the small number of decisions per circuit, which in turn permits a single decision to affect these results. We did not rank the district courts
in the Tenth, Eleventh, and District of Columbia Circuits for precisely this reason; the district courts across these three circuits decided only three arbitrability cases in our sample. Nevertheless, Table 2 identifies circuits where district courts are more likely and less likely to compel arbitration in arbitrability disputes.

**Table 2**

**District Courts Grouped by Circuits: Ranking of Courts Ordering Arbitration**

(1960-1990)

<table>
<thead>
<tr>
<th>Rank</th>
<th>Circuit Where Decision is Located</th>
<th>Decisions to Order Arbitration</th>
<th>Decisions Dismissing Arbitration Petitions</th>
<th>Total Number of Decisions</th>
<th>Percent Decisions Ordering Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Third</td>
<td>11</td>
<td>1</td>
<td>12</td>
<td>91.7%</td>
</tr>
<tr>
<td>2</td>
<td>Eighth</td>
<td>6</td>
<td>1</td>
<td>7</td>
<td>85.7%</td>
</tr>
<tr>
<td>3</td>
<td>Second</td>
<td>41</td>
<td>7</td>
<td>48</td>
<td>85.4%</td>
</tr>
<tr>
<td>4</td>
<td>Fourth</td>
<td>8</td>
<td>3</td>
<td>11</td>
<td>72.7%</td>
</tr>
<tr>
<td>5</td>
<td>Seventh</td>
<td>15</td>
<td>6</td>
<td>21</td>
<td>71.4%</td>
</tr>
<tr>
<td>6</td>
<td>Sixth</td>
<td>6</td>
<td>3</td>
<td>9</td>
<td>66.7%</td>
</tr>
<tr>
<td>7</td>
<td>First</td>
<td>5</td>
<td>3</td>
<td>8</td>
<td>62.5%</td>
</tr>
<tr>
<td>8</td>
<td>Ninth</td>
<td>10</td>
<td>7</td>
<td>17</td>
<td>58.8%</td>
</tr>
<tr>
<td>9</td>
<td>Fifth</td>
<td>4</td>
<td>4</td>
<td>8</td>
<td>50.0%</td>
</tr>
<tr>
<td>NO RANK*</td>
<td>Tenth</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>100.0%</td>
</tr>
<tr>
<td>NO RANK*</td>
<td>Eleventh</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0%</td>
</tr>
<tr>
<td>NO RANK*</td>
<td>D.C.</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>108</td>
<td>36</td>
<td>144</td>
<td>75.0%</td>
</tr>
</tbody>
</table>

* Circuit has too few cases to justify ranking.

Note: Due to the small number of cases in each circuit, the percentages in the right-hand column should be interpreted cautiously.

There is a striking variance in the tendency of district courts to order arbitration, controlling for the circuit in which the district court is located. For example, courts in the Fifth and Ninth Circuits ordered arbitration in fewer than 60% of their decisions, compared to courts in the Third Circuit, which ordered arbitration in approximately 90% of their decisions. Even accounting for the small number of decisions per circuit, the differences appear to be real, and not a function of small sub-sample size.¹¹⁶

There also appears to be no geographic pattern to the tendency of

¹¹⁶ For example, compare the Ninth Circuit with 17 decisions and its rate of ordering arbitration in 58.8 percent of its decisions, and the Third Circuit, with 12 decisions, and its rate of ordering arbitration in 91.7 percent of its decisions.
Table 3 presents data on district and circuit decisions which either enforce (in their entirety) or vacate (in whole or in part) arbitration awards. 

The table shows that district courts were more likely to enforce arbitration awards than circuit courts. For example, in the period 1960-1981, district courts had a 73.5% enforcement rate, compared to 70.4% for circuit courts. In the period 1982-1991, these rates were 71.8% for district courts and 70.5% for circuit courts.

* Decisions that did not result in the award being enforced or denied were omitted. 1991 cases include only decisions ruling on public policy challenges to awards.

There are also regional differences in enforcement rates. For example, the First and Fifth Circuits, located in New England and the South respectively, had lower enforcement rates compared to the Third and Eighth Circuits, located in the Mid-Atlantic and Midwest respectively.

VI

Award Enforcement Results

Table 3 presents data on district and circuit decisions which either enforce (in their entirety) or vacate (in whole or in part) arbitration awards. 

117 We performed a similar analysis of circuit court decisions on a circuit by circuit basis. However, we found that 57 such cases scattered across different circuits produced far too few decisions per circuit for a meaningful analysis, and thus this portion of our analysis has been omitted.
awards during the 1960-1991 period. These data are consistent with the pattern of court behavior observed in the resolution of arbitrability disputes. The district courts exhibited a stable pattern of enforcing arbitration awards throughout the thirty-year period. During 1960-1981, district courts enforced awards in 73.5% of their 506 decisions; from 1982-1991, they enforced awards in 70.4% of their 502 decisions; and altogether, district courts enforced awards in 71.8% of 1008 cases in our sample during this thirty-year period. The data not only indicate district court stability in enforcing awards over the thirty year period, but in addition, confirm that the number of these award enforcement appeals decided in federal district court have flourished during the 1980s compared to the preceding two decades.¹¹⁸

As with arbitrability disputes, the circuit courts have been less supportive of the arbitration process in the recent period compared to earlier years. In the 1960-1981 period circuit courts enforced awards in 74.9% of their 187 decisions, an enforcement rate that is consistent with district court behavior during this same period. During the 1982-1991 period, however, circuit court enforcement of awards dropped to 67.1% of 240 decisions, thereby pulling down the circuit enforcement rate for the entire period to about 70%. It is also noteworthy that the number of circuit court enforcement decisions was greater during the recent ten-year period (240 decisions) than during the earlier thirty-year period (187 decisions). This increased appellate activity parallels the increased number of these kinds of cases in district court. This activity also suggests that there may be a connection between the 1980s’ drop in the award enforcement rate at the circuit level and the sharply increasing number of appeals to both the district and circuit courts.

Table 4 presents a ranking of district courts grouped by their respective circuits according to their tendency to enforce awards. Given the fairly large number of decisions within each circuit, these data do not suffer from the “small numbers” problem which affected the results in Table 2. Table 4 suggests that district courts have distinct behavioral tendencies when grouped by their respective circuits. For example, during the entire period the district courts in the Second Circuit enforced 81% of 158 award enforcement disputes. In contrast, the Fifth Circuit district courts enforced awards only 59.4% of the time in 96 cases during the same period (We compared these circuits because both had a relatively high number of decisions.).

Further, Table 4 shows a geographic pattern in the propensity of

¹¹⁸. This conclusion is based upon two assumptions. First, we assume that the federal courts have been no more likely to publish decisions in award enforcement cases during the 1980s than during the two preceding decades. Second, we assume that the reporting services have been no more likely to report these kinds of cases during the 1980s than during the two earlier decades.
Table 4

DISTRICT COURTS GROUPED BY CIRCUITS:
RANKING OF COURTS ENFORCING ARBITRATION
(1960-1991)*

<table>
<thead>
<tr>
<th>Rank</th>
<th>Circuit Where District Court is Located</th>
<th>Decisions Enforcing Award</th>
<th>Decisions Vacating (or Denying Enforcement to) Award</th>
<th>Total Number of Decisions</th>
<th>Percent Decisions Enforcing Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Second</td>
<td>128</td>
<td>30</td>
<td>158</td>
<td>81.0%</td>
</tr>
<tr>
<td>2</td>
<td>Third</td>
<td>118</td>
<td>30</td>
<td>148</td>
<td>79.8%</td>
</tr>
<tr>
<td>3</td>
<td>Eighth</td>
<td>59</td>
<td>17</td>
<td>76</td>
<td>77.6%</td>
</tr>
<tr>
<td>4</td>
<td>D.C.</td>
<td>27</td>
<td>8</td>
<td>35</td>
<td>77.1%</td>
</tr>
<tr>
<td>5</td>
<td>First</td>
<td>69</td>
<td>25</td>
<td>94</td>
<td>73.4%</td>
</tr>
<tr>
<td>6</td>
<td>Seventh</td>
<td>74</td>
<td>27</td>
<td>101</td>
<td>73.3%</td>
</tr>
<tr>
<td>7</td>
<td>Sixth</td>
<td>80</td>
<td>31</td>
<td>111</td>
<td>72.1%</td>
</tr>
<tr>
<td>8</td>
<td>Ninth</td>
<td>67</td>
<td>41</td>
<td>108</td>
<td>62.0%</td>
</tr>
<tr>
<td>9</td>
<td>Fourth</td>
<td>23</td>
<td>15</td>
<td>38</td>
<td>60.5%</td>
</tr>
<tr>
<td>10</td>
<td>Fifth</td>
<td>57</td>
<td>39</td>
<td>96</td>
<td>59.4%</td>
</tr>
<tr>
<td>11</td>
<td>Tenth</td>
<td>13</td>
<td>11</td>
<td>24</td>
<td>54.2%</td>
</tr>
<tr>
<td>12</td>
<td>Eleventh</td>
<td>9</td>
<td>10</td>
<td>19</td>
<td>47.4%</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>724</td>
<td>284</td>
<td>1008</td>
<td>71.8%</td>
</tr>
</tbody>
</table>

* Decisions that did not result in the award being enforced or denied were omitted. 1991 cases include only decisions ruling on public policy challenges to awards.

district courts to enforce awards. District courts with low enforcement rates appear to be located in the South, Southeast, and West. The Fourth and Fifth Circuit district courts enforced awards about 60% of the time; Ninth Circuit district courts enforced awards in 62% of their cases; and Tenth Circuit district courts enforced awards only slightly more than half of the time (54.2%). In contrast, district courts with high enforcement rates appear to be located in the Northeast. Second Circuit district courts enforced awards 81% of the time and Third Circuit district courts were close behind with almost an 80% enforcement rate. District courts in the middle of the country were in the middle of our rankings. District courts in the Sixth and Seventh Circuits had similar enforcement rates of 72.1% and 73.3% respectively.

Table 5 ranks circuit courts by their propensity to enforce arbitration awards. The rankings are based on 427 decisions, less than half the size of the number of decisions at the district level. Because the number of decisions in some of the circuits is not large, Table 5 results should be interpreted cautiously. The geographic pattern observed for district courts is not reflected at the circuit level. For example, the Ninth Circuit, ranked eighth with an award-enforcement rate of 62% at the dis-
Table 5
CIRCUIT COURTS: 
RANKING OF COURTS ENFORCING AWARDS 
(1960-1991)*

<table>
<thead>
<tr>
<th>Rank</th>
<th>Circuit</th>
<th>Decisions Enforcing Award</th>
<th>Decisions Vacating (or Denying Enforcement to) Award</th>
<th>Total Number of Decisions</th>
<th>Percent Decisions Enforcing Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Third</td>
<td>32</td>
<td>7</td>
<td>39</td>
<td>82.1%</td>
</tr>
<tr>
<td>2</td>
<td>D.C.</td>
<td>11</td>
<td>3</td>
<td>14</td>
<td>78.6%</td>
</tr>
<tr>
<td>3</td>
<td>Eighth</td>
<td>35</td>
<td>11</td>
<td>46</td>
<td>76.1%</td>
</tr>
<tr>
<td>4</td>
<td>Fifth</td>
<td>41</td>
<td>14</td>
<td>55</td>
<td>74.5%</td>
</tr>
<tr>
<td>5</td>
<td>Ninth</td>
<td>47</td>
<td>19</td>
<td>66</td>
<td>71.2%</td>
</tr>
<tr>
<td>6</td>
<td>Seventh</td>
<td>30</td>
<td>13</td>
<td>43</td>
<td>69.8%</td>
</tr>
<tr>
<td>7</td>
<td>First</td>
<td>20</td>
<td>9</td>
<td>29</td>
<td>69.0%</td>
</tr>
<tr>
<td>8</td>
<td>Tenth</td>
<td>11</td>
<td>6</td>
<td>17</td>
<td>64.7%</td>
</tr>
<tr>
<td>9</td>
<td>Sixth</td>
<td>39</td>
<td>23</td>
<td>62</td>
<td>62.9%</td>
</tr>
<tr>
<td>10</td>
<td>Second</td>
<td>20</td>
<td>12</td>
<td>32</td>
<td>62.5%</td>
</tr>
<tr>
<td>11</td>
<td>Fourth</td>
<td>8</td>
<td>5</td>
<td>13</td>
<td>61.5%</td>
</tr>
<tr>
<td>12</td>
<td>Eleventh</td>
<td>6</td>
<td>5</td>
<td>11</td>
<td>54.5%</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>301</td>
<td>126</td>
<td>427</td>
<td>70.5%</td>
</tr>
</tbody>
</table>

*Decisions that did not result in the award being enforced or denied were omitted. 1991 cases include only decisions ruling on public policy challenges to awards.

district level in Table 4, is ranked fifth with an award-enforcement rate of 71.2% at the circuit level in Table 5; and the Second Circuit, ranked first with an award-enforcement rate of 81% at the district level in Table 4, is ranked tenth with an award-enforcement rate of only 62.5% in Table 5. These data imply that circuit court behavior in the enforcement of awards is not always consistent with district court enforcement in the same circuit.

Table 6 presents data on public policy challenges to disputed awards. The data indicate that over time, district courts have increasingly rejected public policy challenges to awards. In the 1960-1981 period, district courts enforced only 50% of awards challenged on public policy grounds. In the 1982-1987 period (immediately preceding Misco), district courts enforced a substantially greater percentage (65.6%) of awards challenged on public policy grounds. These public policy award enforcement percentages are somewhat lower than the overall court award percentages in Table 3.

The pattern for circuit court treatment of awards challenged on public policy grounds prior to the Misco decision diverges from that of the district courts. Circuit courts showed a marked proclivity for upset-
ting awards that were challenged on public policy grounds. In the 1960-1981 period, circuit courts enforced 64.7% of the awards challenged on public policy grounds. In the 1982-1987 period, however, circuit court enforcement of such awards dropped sharply to 33.3%.

In contrast, our data on the post-\textit{Misco} period (from December 1987 through December 6, 1991) show that at both the district and circuit levels, courts have tended to confirm awards challenged on public policy grounds. Our data include 23 decisions involving public policy challenges to awards since \textit{Misco} was decided in December 1987. Twelve of those decisions were made by appellate courts, and eleven by district courts. Our data lead us to the conclusion that since \textit{Misco} federal courts have been more reluctant than before to overturn awards based on public policy challenges.

Our conclusion rests upon quantitative and qualitative considerations. In the period 1988 through December of 1991, eight out of the eleven district decisions in our sample enforced awards challenged on public policy grounds (72.7%). This percentage is sharply higher than the award-enforcement rate of 65.6% in the preceding period 1982-1987, albeit the number of decisions is much smaller. Also, in the three years since \textit{Misco} was decided, circuit courts have enforced awards challenged on public policy grounds in eight out of twelve, or 66.7%, of their decisions. This percentage is up considerably from the award-enforcement rate of 33.3% in public policy challenges at the circuit level in the preceding period 1982-1987. In short, though the number of decisions involving public policy appeals since \textit{Misco} has been small (a total of 23),
our data indicate a discernible initial trend that courts at both the district and circuit levels have exercised more deference to awards challenged on public policy grounds than in the preceding six years.\(^\text{119}\)

This quantitative evidence is supported by qualitative considerations. *Misco*\(^\text{120}\) involved a representative industrial setting, a paper manufacturing plant. The Fifth Circuit, in vacating the arbitrator's award, relied upon common sense notions that public policy prohibits drug use in the workplace, illustrated by the fact that its decision cited no specific positive law to support its reasoning. Since *Misco*, many decisions involving public policy challenges to awards in our sample have been confined to workplace settings that are highly regulated by law, namely, workplaces operated by public utilities or their contractors, health care providers, airlines, and the Postal Service. Notably, these facilities are covered by industry-specific regulations which do not apply to most private workplaces.

At the district court level six decisions were set in the health care industry.\(^\text{121}\) These decisions involved health care employees (nurses and aides) who were discharged for improper performance of duties or alleged patient abuse or for striking illegally. In all six cases, an arbitrator reinstated the employees and the employer appealed the reinstatement order on the grounds that continued employment of these employees would violate public policy.\(^\text{122}\) Yet in four of these cases the courts ruled that no public policy prohibited the arbitrator's reinstatement of the discharged employee.

For example, the court in *Brigham & Womens' Hospital v. Massachusetts Nursing Association* concluded that "the hospital is arguably correct in asserting the regulations establish a public policy that registered nurses [RNs] be competent. Even assuming that there is such a policy,

\(^{119}\) It is natural to conclude that the Supreme Court's granting of certiorari in the *Misco* decision was probably a response to this substantial growth in public policy attacks on arbitration awards, as well as the circuit court tendency in the 1980s to overturn such a large number of arbitration awards. See infra the 1982-1987 data in Table 6.

\(^{120}\) 489 U.S. 29 (1987).


\(^{122}\) The employer in *Shelby* cited the National Labor Relations Act, 29 U.S.C. §§ 158(d), (g) (1988), which limit health care employees' right to strike. In *Maggio*, the employer relied upon N.Y. PUB. HEALTH L. §§ 2803(c), (d) (McKinney 1985) which required health care providers to report and ameliorate patient abuse. The employer in *Flushing* relied upon N.Y. EDUC. L. §§ 6903, 6512, 6509 (McKinney 1985 & Supp. 1987) which prohibited the unlicensed practice of nursing. The employer in *Brigham* relied upon MASS. REGS. CODE 244 § 3.02 (1986) which established the general responsibilities and functions of a registered nurse.
however, the hospital has not shown reinstatement of (the nurse) would violate that policy."

In Cabrini Medical Center v. Local 1199, Drug, Hospital & Health Care Employees the court similarly concluded that "Misco requires that the public policy sufficient to vacate an award must be both 'well[-]defined and dominant.' It is difficult to conclude that New York's declaration against abuse satisfies the first of these requirements." In only one case, Russell Memorial Hospital Association v. United Steelworkers of America, did the district court rule that reinstatement of the nurse would be inconsistent with state health care statutes ensuring professional nursing care, and thus vacated the award.

Also, in Shelby County Health Care Corp. v. American Federation of State, County & Municipal Employees, Local 1733, the court vacated an arbitrator's award reinstating a hospital employee who had been discharged for engaging in an impromptu strike. The court cited sections 158 (d) and (g) of the National Labor Relations Act as public policies violated by the award (these sections limit health care employees’ right to strike).

Two district court decisions involved utility employees who were reinstated by arbitrators after they were discharged for misconduct. In BPS Guard Services, Inc. v. International Union, United Plant Guard Workers of America, a guard who had been assigned to the fire-watch left her post momentarily to get an aspirin. BPS discharged her. Her grievance proceeded to arbitration, where an arbitrator ruled that she was discharged without just cause and reinstated her. BPS argued that federal nuclear regulatory policy barred the award reinstating the guard, but the court disagreed and confirmed the award, noting that:

[in] this case, the arbitrator's decision makes no finding that (the discharged employee) is likely to engage in similar safety violations in the future . . . . As a result, this court has no factual basis on which to make a finding that (the employee's) reinstatement is likely to violate the public policy favoring strict adherence to nuclear safety regulations.

A different result occurred in Georgia Power Co. v. International Brotherhood of Electrical Workers, Local 84, where a utility employee who operated hazardous machinery was reinstated by an arbitrator after

123. 684 F. Supp. at 1125.
124. 731 F. Supp. at 618.
125. Specifically, MICH. COMP. LAWS. ANN. §§ 333.17201-33.17242 (West 1980) which regulate the practice of nursing, and inter alia, provide for license revocation for professional misconduct.
126. The court distinguished this nurse's misconduct from the misconduct in Flushing Hospital and Maggio by noting that here the nurse's "reinstatement would be akin to that of an alcohol drinking airline pilot . . . and the thoughtless nuclear power plant operator." 720 F. Supp. at 587.
129. Id. at 897.
he tested positive for marijuana use during work. Citing a variety of
government policies proscribing drug use at work (e.g. Drug Free Workplace
Act, Nuclear Regulatory Commission rules, Department of Transportation
rules), the court vacated the arbitration award that reinstated the
employee without backpay, subject to his completion of a rehabilitation
program and passing future drug tests. The court stated “it is [the em-
ployee’s] employment which makes his conduct contrary to public
policy.”131

Of the eleven district court decisions in our post-Misco sample, only
four did not involve highly regulated workplaces like nuclear power
plants and hospitals. In Ferran v. Columbia University132 a security
guard was discharged by a private university after he was called to jury
duty only in the afternoons but took the entire day off and refused to
report for morning duty at his employer’s urging. Departing from the
norm apparent in other cases in our survey, the arbitrator sustained the
discharge and the union sued to vacate the award on public policy
grounds.133 The union’s public policy argument was that a New York
statute requiring employers to accommodate an employee’s jury duty
would be violated by the arbitrator’s award.134 The court, however, was
unpersuaded since Ferran was available for work in the mornings, and
confirmed the award.135

An arbitrator reinstated a bakery delivery driver who allegedly sexu-
ally assaulted a customer’s employee in Stroehmann Bakeries, Inc. v. Lo-
cal 776 International Brotherhood of Teamsters,136 on the ground that the
company did not sufficiently investigate the alleged assault. Concluding
that “public policies exist with regard to sexual harassment in the work-
place” and “the arbitrator’s decision to reinstate [the employee] violates
such policies and sends a message to Stroehmann employees and to the
public that complaints of sexual assault are not treated seriously,”137 the
court vacated the award and ordered an arbitration de novo. It is inter-
esting to note that public policy concerning sexual harassment generally
applies to employment relationships, and the victim in this instance was a
customer’s employee rather than a fellow employee. The court did not
state, for example, what specific sexual harassment policy the award
violated.

In a similar case involving an allegation of sexual harassment
against a co-employee, a court denied a motion to vacate an award reinstating the employee. In *Chrysler Motor Corp. v. International Union, Allied Industrial Workers of America,* a male employee with a good work record put down his phone receiver, rushed over to a nearby female employee, grabbed her breasts, and once back on the phone stated, "Yup, they're real." He was discharged, but the arbitrator reduced his termination to a thirty day suspension without pay. The employer cited caselaw, Title VII, and state law concerning sexual harassment of employees in the workplace and dominant public policies violated by the reinstatement award. But in a careful analysis, the court reasoned: "Courts cannot merely determine that there is a 'public policy' against a particular sort of behavior in society generally and, irrespective of the findings of the arbitrator, conclude that reinstatement of an individual who engaged in that sort of conduct in the past would violate that policy." Following the reasoning of *Stead Motors II*, the court observed that there is no public policy prohibiting the reinstatement of an employee found to have sexually harassed a co-employee.

In *Glass, Molders, Pottery & Allied Workers International Union, Local Union No. 4 v. Owen-Illinois, Inc.*, Owens-Illinois sold a metal closure plant to Anchor Hocking three months before a labor agreement covering workers at that plant expired. The purchase agreement expressly absolved Anchor Hocking from any liability arising under the expiring labor contract. After assuming ownership of the plant, Anchor Hocking bargained a new agreement with the union, to become effective immediately after Owens-Illinois' labor agreement expired. For the last three months of the expiring labor agreement, the company kept wage rates intact but made changes such as eliminating severance pay and personal days off, decreasing employer contributions to retiree benefits, and increasing employee contributions to insurance plans. In an arbitration against Owens-Illinois, the union was awarded damages for breach of the collective bargaining agreement. Owens-Illinois sought to vacate the award in part on the ground that it violated public policy under the National Labor Relations Act shielding successor employers from being bound by existing collective bargaining agreements. The court concluded, however, "that the Union does not seek specific performance from Anchor. Rather, it is seeking contractual damages from Owens for breach of the successorship clause by Owens' failure to bind Anchor to the collective bargaining agreement." Finding no public policy under the National Labor Relations Act violated by the award, the court held

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139. *Id.* at 1360.
140. *Id.* at 1363.
142. *Id.* at 972.
that the award could not be vacated on those grounds. At the circuit court level we found similar characteristics—employers whose workplaces are regulated to an unusual degree by positive law and courts that more often than not defer to awards that are at least arguably inconsistent with the aims, if not the letter, of such positive laws. In Daniel Construction Co. v. Local 257, International Brotherhood of Electrical Workers, the contractor building a portion of a nuclear power plant subjected its employees to a battery of psychological exams to spot potential security risks. The tests were personality tests, not drug tests. One hundred fifty-seven employees were judged to be potential security risks based on their exams, and were thus discharged. The union grieved their discharges to arbitration, and, subsequently, an arbitrator ruled that the employees were discharged without just cause because the exam lacked sufficient validity. Although the arbitrator did not reinstate the grievants, he did order that they receive full backpay. The district court confirmed the award. The employer challenged the award on public policy grounds, but the Eighth Circuit confirmed the district court’s finding that “Daniel makes the unwarranted and unsupported assumption that the [Nuclear Regulatory Commission] actually evaluated, expressly approved or otherwise decided that the plan in question . . . complied with [Nuclear Regulatory Commission] regulations regarding appropriate security screening procedures.”

In another utility case, Florida Power Corp. v. International Brotherhood of Electrical Workers, Local Union 433, an employee was arrested while off-duty for driving under the influence of alcohol, possession of cocaine, and concealment of a firearm. Florida Power subsequently discharged the employee for off-duty misconduct, but the arbitrator reinstated the employee with backpay. Although Florida Power raised a public policy argument for sustaining the discharge, the court confirmed the arbitrator’s award. Communications Workers of America v. Southeastern Electric Cooperative of Durant, also involved

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143. Id. at 972-73.
144. 856 F.2d 1174 (8th Cir. 1988), cert. denied, 489 U.S. 1020 (1989).
145. Id. at 1179.
146. Id.
147. Id. at 1175.
148. Id. at 1182. The Eighth Circuit distinguished Daniel Construction from its Iowa Electric Light decision, noting that a “key difference in this case, however, is that no public safety concerns are implicated by the arbitrator’s award of backpay, as opposed to an order returning a potentially dangerous employee to the workplace.” Id.
149. 847 F.2d 680 (11th Cir. 1988).
150. Id. at 681.
151. The court dismissed the company’s public policy claim tersely. Id. (“The Supreme Court’s decision in Misco clearly establishes that the district court erred by vacating the arbitration award” on public policy grounds.)
152. 882 F.2d 467 (10th Cir. 1989).
an employee of a utility company. In *Communications Workers* the utility discharged an employee for allegedly sexually assaulting a customer of the utility while on duty. The arbitrator concluded the assault was not grievous enough to warrant discharge and reinstated the employee.\(^{153}\) The utility argued that "‘a valid and well[-]defined’ public policy of preventing ‘assault and sexual oppression of women’ must override the arbitrator’s factual findings and award.”\(^{154}\) Nevertheless, the Tenth Circuit confirmed the award, concluding that "[w]hile Southeastern agrees that *Misco* controls our review, it gives a broader reading to the Court’s statement of the public policy exception and implicitly requires we expand the narrow focus of appellate review.”\(^{155}\) In these three utility cases we see public policy attacks on awards in a highly regulated industry that is affected with a strong public interest; we see employers basing their challenges on positive laws rather than supposed notions of public policy: and we see courts deferring to the arbitrator’s judgment, even where courts are troubled by awards.

The United States Postal Service also has a workplace that is highly regulated by federal law.\(^{156}\) In *United States Postal Service v. National Association of Letter Carriers*,\(^{157}\) an angry postal service employee fired gunshots into the unoccupied car of his postmaster and was thereupon discharged. Nevertheless, an arbitrator reinstated the employee, and the Postal Service persuaded a district court, acting before *Misco* was decided, to vacate the award on public policy grounds.\(^{158}\) The case was appealed to the Third Circuit, which rendered its decision after *Misco*

\(^{153}\) The arbitrator concluded that "‘a one-time offense, albeit it was a sexual offense of a serious nature in a sensitive industry, should not lead to discharge.’” *Id.* at 468.

\(^{154}\) *Id.* at 469. The employer also cited a Tenth Circuit decision for the proposition that the award violates a well defined public policy of deterring sexual harassment in the workplace. In the case cited by the employer, *Williams v. Maremont Corp.*, *Id.* at 1476 (10th Cir. 1989), the court upheld the company’s termination of a supervisor who, according to one male and three female employees, pulled down his zipper and said, "If you want it, here it is.” *Id.* at 1477. He also allegedly said "he would f— right out here at Maremont for $50.00 cause nothing would embarrass him.” *Id.*

\(^{155}\) 882 F.2d at 468-69. The court continued: "We are not free, *Misco* teaches us, to reject factual findings with which we disagree or the arbitrator’s interpretation of the contract. ‘So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.’ As long as the arbitrator ‘is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.’” *Id.* (citations omitted).

\(^{156}\) See 39 U.S.C. § 1005 (1988) which provides that "procedures established by the Postal Service and approved by the Civil Service Commission" shall apply to postal service employees. In addition to these procedures, there is a detailed statutory overlay of prohibited postal employee activity. See 39 C.F.R ch. 1 § 447.91 (1990), enumerating over 35 prohibited activities.

\(^{157}\) 839 F.2d 146 (3rd Cir. 1988).

was decided. The Third Circuit reversed the district court, finding that no public law specifically barred the employment of an individual who shot at his supervisor's car and ordered the district court to confirm the award.

Only four circuit courts since Misco have vacated awards on public policy grounds (that number includes the now-reversed Stead I, thus leaving only three decisions in our sample vacated on public policy grounds). In Iowa Electric Light & Power Co. v. Local 204, International Brotherhood of Electrical Workers, an employee was discharged for momentarily breaching the safety containment system at a nuclear plant, but the arbitrator reinstated him. The district court vacated the award on public policy grounds before Misco was decided.

Two weeks after Misco was decided, the Eighth Circuit affirmed the district court's order to vacate the award, noting "that the unmistakable public policy favoring the strict observance of federally mandated safety regulations at nuclear power plants requires that the arbitrator's award . . . be vacated." In Delta Air Lines v. Airline Pilots Association, a pilot drank heavily hours before flying, boarded his jet drunk, and flew a route with passengers on board. He was detained by the airline at the flight's scheduled destination, was determined to be legally drunk after the flight, and was discharged. An arbitrator, however, conditionally reinstated him. Acting after Misco was decided, the Eleventh Circuit affirmed the district court's order vacating the reinstatement award, concluding that "[i]n our investigation, we have not encountered any statute, law, ordinance or court precedent to the effect that flying under
the influence of alcohol is consistent with public policy."

A male compositor in a newsroom who had touched and brushed up against female employees on several occasions was discharged in *Newsday, Inc. v. Long Island Typographical Union, No. 915.* He was discharged for his first offense in 1983, but the company voluntarily reinstated him. He was discharged again for several similar offenses in 1988, but was reinstated by an arbitration award that cited the need for progressive discipline. The Second Circuit affirmed the district court’s vacatur of the award on public policy grounds, basing its ruling on the existence of a clear and dominant public policy proscribing sexual harassment in the workplace.

Several appellate decisions depart from the pattern of highly regulated workplaces observed to this point. In *Stead Motors v. Automotive Machinists Lodge 1173 (Stead II),* an auto mechanic was discharged for failing to tighten a car’s wheel lug nuts properly. An arbitrator found that no just cause supported the discharge and reinstated the mechanic. The employer challenged the reinstatement, and a district court ruled (before *Misco* was decided) that California driving laws were violated by implication with the reinstatement of the mechanic. The union appealed the ruling, and after *Misco* was decided a three judge panel of Ninth Circuit judges affirmed the lower court’s vacation of the award (*Stead I*). However, the Ninth Circuit *en banc* reversed its decision and ordered the lower court to confirm the award in *Stead II.*

The *Stead II* court distinguished the factual record before it from *Delta Airlines* and *Iowa Electric Light,* and was remarkably critical of the Eleventh Circuit’s *Delta Airlines* decision. The court concluded that “the critical inquiry is not whether the underlying act for which the employee was disciplined violated public policy, but whether there is a public policy barring reinstatement of an individual who has committed a wrongful

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166. 861 F.2d at 674.
167. 915 F.2d 840 (2d Cir. 1990).
169. 886 F.2d 1200 (9th Cir.), *cert. denied,* 110 S. Ct. 2205 (1990).
170. *Id.* at 1203.
171. *Stead Motors v. Automotive Machinists Lodge 1173,* 843 F.2d 357, 359 (9th Cir. 1988) (*Stead I*), rev’d, *Stead Motors v. Automotive Machinists Lodge 1173,* 886 F.2d 1200 (9th Cir.) (*Stead II*), *cert. denied,* 110 S. Ct. 2205 (1990). The court in *Stead I* reasoned that California’s public policy “regarding automobile safety and maintenance” would be violated. The court cited Section 24002 of the California Vehicle Code which makes it “‘unlawful to operate any vehicle or combination of vehicles which is in an unsafe condition’” and *CAL. BUS. & PROF. CODE* § 9880 et seq. (Deering 1984) which provides for inspection and certification of auto repair shops.
172. 886 F.2d 1200, 1217.
173. “[W]e must conclude that the Eleventh Circuit’s opinion in *Delta* is, to a large extent, simply inconsistent with the law as expressed in *Grace* and *Misco.*” *Id.* at 1215.
In Interstate Brands Corp. v. Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a driver of a bakery trick was indefinitely suspended after his employee learned of his arrest for drug possession and use while operating a motor vehicle. The drug use incident occurred in a nearby state while the driver was off-duty. The company suspended the employee until he could prove that he was innocent of the drug possession and use charges. However, an arbitration award reinstated him. On appeal, the district court vacated the arbitrator's award on the ground that the arbitrator exceeded his authority under the contract. In dicta the district court also stated that the award violated the public policy proscribing drug users from operating motor vehicles. The Interstate court reversed the district court and ruled specifically that the award did not violate a clear and dominant public policy: "The district court failed to identify any law or legal precedent with which that arbitrator's reinstatement would conflict." The court explained that "(w)hile it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy, it does not follow, however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards."

McKesson, a chemical distribution firm, sold its operations to a competitor, Van Waters, in Van Waters & Rogers, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 70. Truck drivers of both firms were represented by different Teamsters local unions; following Van Waters' absorption of former McKesson drivers, the firm placed those drivers on the bottom of the seniority list. Subsequently, some former McKesson drivers were laid off, and McKesson's local union grieved Van Waters' failure to integrate former McKesson drivers according to their McKesson hiring date. Van Waters' collective bargaining agreement contained a clause stating "if a purchase, sale, merger, transfer... [occurs] between companies, either of which are parties to the agreement, seniority should be established at the new operation based on the original hiring date recognized by the last employer." An arbitrator cited this language to support his award of

\[174. \text{Id. at } 1215.\]
\[175. 909 \text{ F.2d } 885 \text{ (6th Cir. 1990).}\]
\[176. \text{Id. at } 888 \text{ (appellate court's summary of the district court's decision).}\]
\[177. \text{Id. at } 893.\]
\[178. \text{Id.}\]
\[179. 913 \text{ F.2d } 736 \text{ (9th Cir. 1990).}\]
\[180. \text{Id. at } 743 \text{ (emphasis in original) (quoting arbitration decision).}\]
damages to former McKesson drivers whose seniority was not properly integrated.

In addition to claiming that the arbitrator exceeded his authority, Van Waters claimed that the award violated the clear and dominant public policy of exclusive employee representation under the National Labor Relations Act. However, in affirming the lower court’s confirmation of the award, the appeals court found that “Van Waters agreed to assume McKesson’s obligations under the Local 70 collective bargaining agreement,”181 and therefore, ruled that the award did not violate any public policy.

In *United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*,182 an employee grieved her employer’s failure to recall her from layoff when a position opened. The employee filed her grievance in May 1984, and one month later, the union informed the company of its intention to arbitrate the grievance. Inexplicably, the union did not proceed with arbitration, and in July 1985 informed the grievant that her grievance failed to state a violation of the contract. The grievant appealed the local union’s decision to the international union’s executive board, which reinstated her grievance. In August 1986 her grievance was arbitrated, and the arbitrator found that the company violated the contract by not recalling her. However, the arbitrator assessed a backpay award against the union on the ground that it was responsible for the delay and accrual of damages. The union challenged the award as a violation of the public policy favoring resolution of labor grievances through arbitration. The appeals court rejected this argument and confirmed the award, noting that “[w]e fail to see how the enforcement of the arbitrator’s award in this case has any significant tendency toward undermining the policy favoring the arbitration of labor disputes.”183

The *Misco* Court’s message to vacate awards on public policy grounds only where those awards violate well-defined and dominant public policies seems to have penetrated the thinking of most courts in our sample. Our textual evidence indicates that most courts are reading *Misco* not only for its narrow interpretation of the public policy exception, but for its language that admonishes courts not to overturn awards simply because of judicial disagreement with an arbitrator’s rationale or decision. For instance, our analysis shows that courts after *Misco* have tolerated arbitration awards that would make the arbitral reinstatement of Isaiah Cooper in the *Misco* decision mild by comparison. In the post-*Misco* period, courts have been willing to confirm awards that reinstate workers who sexually assault customers; fire gunshots at the boss’s car;

181. *Id.*
182. 889 F.2d (10th Cir. 1989).
183. *Id.* at 948.
drive while drunk; conceal a firearm; and possess cocaine while being employed at a public utility; and leave their guard duty post at nuclear plants. Further, in the brief time since Misco was decided, one circuit court (the Ninth) already reversed itself in favor of enforcing an award (Stead II) it earlier had vacated (Stead I), and in doing so strongly criticized another circuit's (the Eleventh's) vacation of an award on public policy grounds (Delta Airlines). In addition, a disproportionate number of these post-Misco public policy appeals have come from highly regulated workplaces indicating that the message of Misco has permeated throughout the bar; most of these appeals are based upon statutory law specific to these workplaces and very few are based upon common sense or otherwise vague notions of public policy. In sum, even though the number of post-Misco cases in our sample is not large, our evidence clearly indicates that the Supreme Court's unanimous decision in Misco has pushed the lower courts in the direction of increased deference to awards appealed on public policy grounds.

CONCLUSION

The passage of thirty years has provided an ample number of federal court decisions with which to assess judicial adherence to the Trilogy. More than 1,600 rulings in 30 years of post-Trilogy cases provide a strong empirical foundation upon which to assess the federal courts' responses to these arbitration appeals. Our empirical results support the following conclusions:

1. The high percentage of decisions in which courts have ordered arbitration in arbitrability disputes and enforced awards in enforcement disputes suggests that the courts have usually granted private sector grievance arbitration the operational autonomy envisioned by the Trilogy. For instance, over the entire three decade period of this study, district courts have ordered arbitration and enforced awards 70% to 74% of the time. Similarly, circuit courts in the pre-1982 period behaved very much like district courts, ordering arbitration and enforcing awards about 75% of the time. In practice, this means that particular parties have faced long odds against succeeding with either kind of appeal.

2. Since 1982 the odds of a successful appeal have improved somewhat. The district court award enforcement rate slipped slightly compared to earlier years, but the more notable change occurred at the circuit level. In the 1982-1989 period the circuit courts were noticeably less deferential toward the arbitration process compared to the prior period, ordering arbitration only 59% of the time and enforcing awards 67% of the time.

3. There is substantial evidence that the circuit courts, as well as the district courts grouped by circuit, engage in differential patterns of sup-
port for the arbitral process. Some circuits, most notably the Third, have exhibited a very strong record at both the district and circuit levels during the past thirty years of ordering arbitration and enforcing awards. In contrast, courts in other circuits, such as the Fourth and Fifth, have demonstrated much less support for arbitration. These results indicate that the lower courts’ application of the Trilogy is far from uniform across the country. This lack of uniformity creates the potential for forum-shopping by reluctant parties with operations in numerous geographic regions.

4. Prior to Misco in 1988, challenges to awards based on public policy grounds were more successful in overturning awards than challenges on more conventional grounds, such as claims that the award did not draw its essence from the labor agreement or that the arbitrator exceeded his authority (Enterprise challenges). However, our 1988 through December 1991 data suggest that the Misco decision has altered both district and circuit court behavior toward awards challenged on public policy grounds in favor of award enforcement. Thus, our sample of cases refutes the claim made by many post-Misco commentators who claim that Misco has gone largely unheeded by district and circuit courts.

5. If the reported cases we have located accurately represent the total volume of arbitration appeals litigation, our data indicate that the number of appeals from the arbitration increased dramatically during the 1980s. In spite of this growth in arbitration appeals, however, we estimate that less than one percent of private sector arbitration awards are appealed. Even after allowing for the difficulty of precisely measuring the rate of arbitration appeals to the courts, our data indicate that award enforcement litigation remains something of an aberration in the arbitration universe. Just as the vast majority of grievances are not arbitrated, the court cases analyzed here are not representative of the arbitration cases which gave rise to them.

6. In recent years much of the published commentary on federal court post-Trilogy behavior has taken on an increasingly alarmist tone and has decried what some commentators see as excessive judicial interference in arbitration. Our results provide only limited support for this view. Instead, our findings indicate that some (but not all) federal circuits appear less likely to heed the Trilogy’s commands of judicial deference to arbitration than in earlier decades. In addition, our results indicate that the district courts have tended to be more consistently

184. Feuille & LeRoy, supra note 3, at 41.
185. Id.
187. See supra notes 20 and 24 and accompanying text.
supportive of the arbitration process than the circuit courts. Nevertheless, our data show that district court deference to arbitration is not blind, as evidenced by the fact that district courts have overturned awards in more than one-fourth of their decisions.

In sum, our data provide ammunition to commentators on both sides of the judicial review of arbitration debate. On the one hand, our results from the district courts and some of the circuit courts indicate that the federal judiciary has not exposed the arbitration process to a fundamentally changed and hostile environment in the 1980s compared to the earlier post-Trilogy period. Indeed, we believe that the central judicial tendency exhibited in these data has been considerable deference toward the tenets of the Trilogy throughout this thirty-year period. On the other hand, our post-1981 decisions from the circuit courts support those commentators who decry excessive judicial intervention in arbitration. In other words, our results indicate that the Trilogy deference doctrine remains alive and well, but in recent years has eroded around its edges (with the exception of awards attacked on public policy grounds, which are now enforced with greater regularity since Misco).

It is one thing to have documented these litigation result patterns, but it is altogether another matter to explain why they occurred. The post-1981 decline in federal court deference to the arbitration process (with the exception of post-Misco public policy decisions), especially among the circuit courts, occurred during a period when the private sector unionization rate and the annual number of strikes plummeted, and when employers frequently used strikes as an opportunity to replace strikers. Moreover, this was the era that gave rise to concession bargaining, a trend which saw many private sector unions giving up earlier gains or else settling for quite modest improvements. Finally, in this period the balance of bargaining power shifted in favor of employers.

188. In 1980 the percentage of union members among employed wage and salary workers in the private sector was 20.1 percent. See Roy J. Adams, Changing Employment Patterns of Organized Workers, 108 MONTHLY LAB. REV. 26 (February 1985). By 1990 this rate had fallen to 12.1 percent. See U.S. BUREAU OF LABOR STATISTICS, 38 EMPLOYMENT AND EARNINGS 229 (January 1991). For wage and salary workers employed by the government, the corresponding 1980 and 1990 union membership rates were 35.9 percent and 36.5 percent, respectively. All of these union membership figures tend to underestimate somewhat the unionized share of the employed labor force, for there are many workers who are covered by union contracts who are not union members. For instance, in 1990 13.4 percent of employed private sector wage and salary workers and 43.3 percent of employed public sector wage and salary workers were "represented by unions." Id. Nevertheless, the fact remains that during the 1980s union membership declined dramatically in the private sector.


191. For a general account of the changes in union-management relations, see THOMAS A. KOCHAN, HARRY CHARLES KATZ, & ROBERT B. McKERSIE, THE TRANSFORMATION OF AMERI-
Elsewhere we have shown that the arbitration appeal process is primarily an employer-driven phenomenon. The vast majority of the pre-arbitration appeals involve employer refusals to arbitrate; similarly, the vast majority of appealed awards involve arbitrator rulings for unions. Additionally, both the district and circuit courts have been more likely to vacate a union-favorable award than one which favors the employer. In other words, during a decade when union fortunes were on the decline, unions faced a growing number of employer-generated appeals from the arbitration process as well as a declining willingness of the federal courts, to give Trilogy-type deference to arbitration. As noted above, this trend coincided with the tenure of the Reagan Administration.

We are reluctant, however, to attribute causality to this confluence of events. It is not possible from our data to determine whether it was the presence of a conservative Republican administration, the type of judges appointed by such an administration, the shift in collective bargaining power away from unions, the elements present in the 1980s arbitration appeals compared to those in earlier decades, or some other factor(s) which caused the recent decline in judicial deference to arbitration. As a result, a complete examination of the reasons underlying this documented loosening of the Trilogy's strictures must await additional research.

Can Industrial Relations (1986). For an account of the wrenching changes in the steel industry and how they affected the relationship between large steel companies and the United Steelworkers of America, see John P. Hoerr, and the Wolf Finally Came: The Decline of the American Steel Industry (1988). For a different perspective on why unions have declined, see Michael Goldfield, The Decline of Organized Labor in the United States (1987).

192. See Feuille & LeRoy, supra note 3, at 43.