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EIGHTY-FOURTH CLEVELAND-MARSHALL FUND VISITING SCHOLAR LECTURE

THE REVOLUTION IN LAW THROUGH ARBITRATION

THOMAS E. CARBONNEAU*

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I. INTRODUCTION

My subject is arbitration. I explore how its re-emergence during the last forty years[1] has revolutionized the thinking about, and the practice of, law. The development of a "strong federal policy favoring arbitration"[2] cast aside traditional acceptations about law and adjudication.[3] The rule of law—the human civilization

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[1] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 77-189 (2d ed. 2007) [hereinafter CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007]; THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 26-46 (2007) [hereinafter CARBONNEAU, NUTSHELL]; Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231 (1990) [hereinafter Carbonneau, *Plea for Statutory Reform*].

[2] E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 290 (2002). *See also* J. Alexander Sec., Inc. v. Mendez, 511 U.S. 1150, 1150 (1994) (O'Connor, J., dissenting); Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n., 457 U.S. 702, 708 (1982); Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368, 377-82 (1974).

[3] The pattern of judicial decision-making has shifted from rights protection to guaranteeing greater access to some form of adjudication. As a result, law and adjudication have become less sacramental. *See generally* THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 49-242 (3d. ed. 2003) [hereinafter CARBONNEAU, CASES

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associated with law and the legal process—has been profoundly, perhaps irretrievably, altered by the rise of arbitration. The landmark cases in labor and employment arbitration—*Alexander v. Gardner-Denver Company*[4] (the "old time religion") and *Gilmer v. Interstate/Johnson Lane Corporation*[5] (the "new age" thinking)—attest to the enormous distance that separates past and present concepts of legal due process and fundamental rights. Administrative and managerial considerations have never weighed more heavily upon basic legal values. Their sacramental character has, in fact, been irreversibly tarnished. Process factors have curtailed the reverence for rights. Practicability has emerged as the dominant force in the definition and implementation of law.[6] Instrumental beliefs with historical

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AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION]; CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 57-182.

[4]415 U.S. 36 (1974). *See, e.g.*, T. Christopher Baile, *Reconciling* Alexander *and* Gilmer*: Explaining the Continued Validity of* Alexander v. Gardner-Denver Co. *in the Context of Collective Bargaining Agreements*, 43 ST. LOUIS U. L.J. 219 (1999); Robert B. Fitzpatrick, *Is* Wright v. Universal Maritime Service Corp. *the Death Knell for* Alexander v. Gardner-Denver*?*, ALI-American Bar Association Continuing Legal Education (Dec. 3, 1998); Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining* Alexander v. Gardner-Denver *in the Wake of* Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591 (1997); Lynette T. Oka, *Disarray in the Circuits After* Alexander v. Gardner-Denver Co., 9 U. HAW. L. REV. 605 (1987).

[5]500 U.S. 20 (1991). *See, e.g.*, Joseph B. Stulberg, *Introduction:* Gilmer v. Interstate/Johnson Lane Corporation*: Ten Years After*, 16 OHIO. ST. J. ON DISP. RESOL. 463 (2001); Martin J. Oppenheimer & John F. Fullerton, III, *The Role of the Union in the Arbitration of Statutory Employment Claims*, 55-MAY DISP. RESOL. J. 71 (2000); George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.*: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177 (1998); Susan A. FitzGibbon, *Focus on Arbitration After* Gilmer*: Reflections on* Gilmer *and* Cole, 1 EMP. RTS. & EMP. POL'Y J. 221 (1997); Jennifer A. Marler, *Arbitrating Employment Discrimination Claims: The Lower Courts Extend* Gilmer v. Interstate/Johnson Lane Corp. *to Include Individual Employment Contracts*, 74 WASH. U. L.Q. 443 (1996); Robert Perkovich, *Does* Gilmer v. Interstate/Johnson Lane Corp. *Compel the Consideration of External Law in Labor Arbitration?: An Analysis of the Influence of the Americans with Disabilities Act on Arbitral Decisionmaking*, 25 STETSON L. REV. 53 (1995); Andrew Kielkopf, Gilmer v. Interstate/Johnson Lane Corp.: *An Employee Perspective*, 22 CAP. U. L. REV. 803 (1993); Patrick D. Smith, *Arbitration—The Court Opens the Door to Arbitration of Employment Disputes:* Gilmer v. Interstate/Johnson Lane Corp., 17 J. CORP. L. 865 (1992); Jenifer A. Magyar, *Statutory Civil Rights Claims in Arbitration: Analysis of* Gilmer v. Interstate/Johnson Lane Corp., 72 B.U. L. REV. 641 (1992); Edward P. Radetic, Gilmer v. Interstate/Johnson Lane Corporation*: The Supreme Court Endorses Mandatory Arbitration of ADEA Claims*, 35 ST. LOUIS U. L.J. 741 (1992); Jennifer R. Dowd, *Enforcing Arbitration Agreements in Age Discrimination Suits:* Gilmer v. Interstate/Johnson Lane Corp., 33 B.U. L. REV. 435 (1992); Michael G. Holcomb, *The Demise of the FAA's "Contract of Employment" Exception?*, 1992 J. DISP. RESOL. 213 (1992).

[6]The purpose of judicial litigation and adjudication is no longer to buttress constitutional rights or to engage in rights protection. Given population growth and resource constriction, the purpose of the legal system has become simply to provide a forum for the resolution of disputes arising out of various transactions. *See* CARBONNEAU, NUTSHELL, *supra* note 1, at 4; THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 5-9 (2004) [hereinafter CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2004].

foundations[7] have virtually disappeared as the legal system countenances exclusively the necessity of operational efficacy. American law and citizenship have undergone a drastic transformation as a result of the judicial re-evaluation of arbitration.

While statistical accounts are not readily available[8] or even reliable, arbitration has developed significantly in terms both of presence and importance in the last several decades. The AAA (American Arbitration Association) reports, for example, that it does in excess of 100,000 Alternate Dispute Resolution ("ADR") cases

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[7]The Supreme Court has found that substantive and procedural due process can be achieved through arbitration. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3914.17 (2007); *see also, e.g.*, Robert W. Abel, *The Unanswered Question from* Green Tree Financial Corp. v. Randolph*: How Much is Too Much Before the Costs of Arbitration Become a Barrier to Due Process?*, 56 U. MIAMI L. REV. 1009 (2002); Stuart M. Boyarsky, *The Confirmation of Punitive Awards in Arbitration: Did Due Process Disappear?*, 6 PEPP. DISP. RESOL. L.J. 229 (2006); Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006); R. W. Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235 (1961); Llewellyn Joseph Gibbons, *Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1 (2002); Jay E. Grenig, *When Due Process is Due: The Courts and Labor Arbitration*, 1995 DET. C.L. MICH. ST. L. REV. 889 (1995); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003); Penelope Hopper, *Railroading Essential Rights: The Status of Judicial Review of Alleged Due Process Violations in Arbitration Hearings Under the Railway Labor Act*, 1995 J. DISP. RESOL. 169 (1995); Michael J. Molony, Jr., *A-Mazing! A Due Process Protocol for Mediation and Arbitration of Employment Law Disputes*, 44 LA. B.J. 126 (1996); Karl E. Neudorfer, *Defining Due Process Down: Punitive Awards and Mandatory Arbitration of Securities Disputes*, 15 OHIO ST. J. ON DISP. RESOL. 207 (1999); Terri Schallenkamp, *A Jury Trial is Not Required in California State Courts to Meet the Constitutional Guarantee of Due Process When the Existence of an Arbitration Agreement Covered by the United States Arbitration Act is at Issue:* Rosenthal v. Great Western Financial Services Corp., 25 PEPP. L. REV. 196 (1997); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997); Arnold M. Zack, *Arbitration as a Tool to Unclog Government and the Judiciary: The Due Process Protocol as an International Model*, 7 WORLD ARB. & MEDIATION REP. 10 (1996); *Constitutional Law—Due Process—Compulsory Arbitration*, 34 YALE L. J. 909 (1925).

[8]These are some of the best studies: NATIONAL ARBITRATION FORUM, ADR PREFERENCE AND USAGE REPORT (2006), http://www.adrforum.com/users/naf/resources/GPSoloADR PreferenceAndUsageReport.pdf; NATIONAL ARBITRATION FORUM, ADR PREFERENCE OF USAGE SURVEY, (2006), http://www.adrforum.com/users/naf/resources/2006TIPSSurvey.pdf; ERNST & YOUNG, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES (2005), http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/ 2005ErnstAndYoung.pdf; HARRIS INTERACTIVE, ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION (2005), http://www.adrforum.com/rcontrol/documents/Research StudiesAndStatistics/2005HarrisPoll.pdf; ROPERASW, LEGAL DISPUTE STUDY: INSTITUTE FOR ADVANCED DISPUTE RESOLUTION (2003), http://www.adrforum.com/rcontrol/documents/ ResearchStudiesAndStatistics/2003Roper Poll.pdf; NATIONAL ARBITRATION FORUM, THE CASES FOR PRE-DISPUTE ARBITRATION AGREEMENTS: EFFECTIVE AND AFFORDABLE ACCESS TO JUSTICE FOR CONSUMERS, EMPIRICAL STUDIES AND SURVEY RESULTS (2004), http://www. adrforum.com/rcontrol/documents/Research StudiesAndStatistics/2004EmpiricalStudies.pdf.

annually—a significant boost from what had been its traditional workload.[9] JAMS does business in the hundreds of millions of dollars annually.[10] Law firms, like White & Case and Baker & McKenzie, have international commercial arbitration departments.[11] Arbitration has become the standard fare in law firms at all levels and in most fields.

It is not a hyperbole to state that civil justice or adjudication in the United States (or in international cases) is achieved primarily through arbitration. Party-appointed arbitrators—conducting private proceedings and rendering private awards that may or may not contain reasons and may or may not be published or be otherwise generally available—establish the standards of fairness and legality in a host of civil areas (commercial, employment, securities, and consumer matters). Arbitration is endorsed by most European jurisdictions[12] as the common currency of the

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[9]*See generally* American Arbitration Association, http://www.adr.org/about (last visited Mar. 3, 2008).

[10]*See generally* JAMS—The Resolution Experts, *JAMS Announces Milestone Move to New York Times Building*, http://www.jams-endispute.com/FeatureFull.asp?Feature1ID=101 (last visited Mar. 3, 2008) (stating that JAMS is "the nation's largest private provider of mediation and arbitration services").

[11]*See* White & Case LLP, International Arbitration, http://www.whitecase.com/internationalarbitration (last visited Mar. 3, 2008); Baker & McKenzie, Dispute Resolution, http://www.bakerandmckenzie.com/BakerNet/Practice/DisputeResolution/default.htm (last visited Mar. 3, 2008).

[12]Thomas E. Carbonneau & Jeanette A. Jeaggi, AAA HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR (Juris Publishing 2006); THOMAS E. CARBONNEAU & VRATISLAV PECHOTA, IUS ARBITRALE INTERNATIONAL - ESSAYS IN HONOR OF HANS SMIT (Juris Publishing 1992); Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002); Thomas E. Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 TUL. MAR. L.J. 131 (1997); Thomas E. Carbonneau, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 TUL. J. INT'L & COMP. L. 193 (1994); Thomas E. Carbonneau & Andrew W. Sheldrick, *Tax Liability and Inarbitrability in International Commercial Arbitration*, 1 J. TRANSNAT'L L. & POL'Y 23 (1992); THOMAS E. CARBONNEAU & JEAN ROBERT, *THE FRENCH LAW OF ARBITRATION* (1983). *See also* ALBERT JAN VAN DEN BERG, YEARBOOK COMMERCIAL ARBITRATION SET (2001); *see, e.g.*, Bernard Hanotiau, *Survey of a New Statute Amending Belgian Legislation on Arbitration*, 8 AM. REV. INT'L ARB. 327 (1997); Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045 (1986); Maud Piers, *How EU Law Affects Arbitration and the Treatment of Consumer Disputes: The Belgian Example*, 59-JAN DISP. RESOL. J. 76 (2005); Xiaoyang Zhang, *Settlement of Commercial Disputes with Foreign Elements Involved in Arbitration: Legal Theories and Practice in the United Kingdom*, 12 FLA. J. INT'L L. 167 (1998); David L. Zicherman, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches*, 50 U. PITT. L. REV. 667 (1989); *French Arbitration Experts Discuss Proposed Amendments to French Law on Arbitration*, 13 WORLD ARB. & MEDIATION REP. 266 (2002); *1998 Act Offers Comprehensive Blueprint for Arbitration in the United Kingdom*, 7 WORLD ARB. & MEDIATION REP. 175 (1996).

international marketplace. While Asian and the Middle Eastern jurisdictions[13] distrust arbitration—sometimes, to the point of opposition—Latin and South American jurisdictions[14] have seen an explosion of interest in the process. Through NAFTA[15] and ICSID,[16] arbitration facilitates the resolution of investment disputes

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[13]*See* Philip J. McConnaughay, *Introduction* to INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA xxv, xxv-xl (Philip J. McConnaughay & Thomas B. Ginsburg eds., 2d ed., 2006).

[14]*See, e.g.*, NIGEL BLACKABY ET AL., INTERNATIONAL ARBITRATION IN LATIN AMERICA (2003); JAN KLEINHEISTERKAMP, INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA (2005); *Focus on Arbitration in Latin America*, INTERNATIONAL DISPUTES QUARTERLY, (White & Case International Arbitration Group) Fall 2007.

[15]NAFTA stands for the North American Free Trade Agreement. *See, e.g.*, Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003); Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT'L 393 (2000); Pierre Bienvenue, *The Enforcement of International Arbitration Agreements and Referral Applications in the NAFTA Region*, in COMMERCIAL MEDIATION & ARBITRATION IN THE NAFTA COUNTRIES 149 (L.M. Diaz & N.A. Oretskin eds., 1999); S. Benton Cantey, *International Arbitration to Resolve Disputes Under NAFTA Chapter 11: Investment*, 8 TULSA J. COMP. & INT'L L. 285 (2001); Joseph de Pencier, *Investment, Environment and Disputes Settlement: Arbitration Under NAFTA Chapter Eleven*, 23 HASTINGS INT'L & COMP. L. REV. 409 (2000); Patrick G. Foy, *Effectiveness of NAFTA's Chapter Eleven Investor-State Arbitration Procedure*, 18 ICSID REV.: FOREIGN INVESTMENT L. J. 44 (2003); Celine Levesque, *Investor-State Arbitration Under NAFTA Chapter 11: What Lies Beneath Jurisdictional Challenges*, 17 ICSID REV.: FOREIGN INVESTMENT L.J. 320 (2002); Daniel Q. Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 WORLD ARB. & MEDIATION REP. 13 (2002); Symposium, *Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter Eleven*, 23 HASTINGS INT'L & COMP. L. REV. 303 (2000); HANS SMIT & VLADISLAV PECHOTA, INTERNATIONAL ARBITRATION TREATIES (2d ed. 2005); J. C. Thomas, *The North American Free Trade Agreement (NAFTA)*, in ARBITRATION WORLD: JURISDICTIONAL COMPARISON 93 (J. William Rowley ed., 2004); NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (Todd Weiler ed., 2004).

[16]ICSID stands for the International Centre for Settlement of Investment Disputes. *See, e.g.*, INTERNATIONAL ARBITRATION BETWEEN PRIVATE PARTIES AND GOVERNMENTS (G. Aksen & R. von Mehren eds., 1982); C.F. Amerasinghe, *The Jurisdiction of the International Centre for Settlement of Investment Disputes*, 19 INDIAN J. INT'L L. 166 (1979); James C. Baker & Lois J. Yoder, *ICSID Arbitration and the U.S. Multilateral Corporation: An Alternative Dispute Resolution Method in International Business*, 5 J. INT'L ARB. 81 (1988); Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REV.: FOREIGN INVESTMENT L.J. 287 (1987); JOY CHERIAN, INVESTMENT CONTRACTS AND ARBITRATION: THE WORLD BANK CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (1975); Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, 3 ARB. INT'L 28 (1987); Paul D. Friedland, *Provisional Measures in ICSID Arbitration*, 2 ARB. INT'L 335 (1986); ANNULMENT OF ICSID AWARDS (E. Gaillard & Y. Banifatemi eds., 2004); Carolyn B. Lamm & Abby Cohen Smutney, *The International Centre for Settlement of Investment Disputes: Responses to Problems and Changing Requirements*, 12 MEALEY'S INT'L ARB. REP. 20 (1997); K. NATHAN, THE ICSID CONVENTION: THE LAW OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (2000); Antonio R. Parra, *The Practices and Experience of the ICSID*, *in* CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION 37 (1993); Christoph Schreuer, *International and Domestic Law in Investment Disputes: The Case of*

and allows trade with China in the form of the CIETAC arbitral mechanism.[17] Arbitration can tame political and mixed political-legal controversies.

Despite its depth and size, the revolution in law through arbitration has barely been noticed by the affected community. Arbitration is the proverbial elephant in the room. Annual International Monetary Fund and World Bank meetings receive greater attention and inspire more passionate protests.[18] Buildings have not been left in smoldering ruins. The Justices do not announce their rulings on arbitration wearing the wired spectacles of the erstwhile revolutionary. There are no rituals for the partisans in which they chant verses from the Uniform Law on Arbitration or landmark court cases. Crowned monarchs are not paraded on the *guillotine*. Practitioners and lower courts are aware of arbitration, but they have simply adapted to it as their business dictates. Law schools, the truly glacial visionaries of the legal profession, have glanced at arbitration with a blind eye. At best, they see it as a peripheral international development deserving only an inaudible whisper among the shouts for primacy in the established curriculum.

Although the Justices are a very unlikely group of radicals bent on anarchistic upheaval, the U.S. Supreme Court has spearheaded the revolution.[19] In fact, the revolution has been conducted, and its story told, by the U.S. Supreme Court. At every stage of arbitration's ascendancy, the Court has provided the necessary doctrinal pronouncements and political muscle to confirm the gains achieved and to advance the process to the next level of its reformation.[20] The most elevated oracle of American law ironically made the redefinition of American law and procedure tenable and then compelling. As is often the case, the revolution was itself a contradiction in terms: To maintain the rule of law, the Court divested the courts and the law of their established authority and invested that power and function in a

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ICSID, 1 AUSTRIAN REV. INT'L & EUR. L. 89 (1996); Ibrahim F.I. Shihata, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV.: FOREIGN INVESTMENT L.J. 299 (1999); INTERNATIONAL INVESTMENT LAW & ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005).

[17]CIETAC stands for the China International Economic and Trade Arbitration Commission. *See, e.g.*, Cederic Chao & James Schurz, *International Arbitration: Selecting the Proper Forum*, 17 MEALEY'S INT'L ARB. REP. 41 (2002); Sally A. Harpole, *Factors Affecting the Growth (or Lack Thereof) of Arbitration in the Asia Region*, 20 J. INT'L ARB. 89 (2003); Huang Yanmin, *The Ethics of Arbitrators in CIETAC Arbitrations*, 12 J. INT'L ARB. 5 (1995); SELECTED WORKS OF CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION AWARDS (1989-1995; updated to 1997) (P. Leung Mei-fun & Wang Sheng-chang eds., 1998); Vladislav Pechota, *China International Economic and Trade Arbitration Commission (CIETAC)*, *in* W.A.R. 4315 (Hans Smit & Vladislav Pechota eds., 2002); Wang Sheng-chang, *Practical Aspects of Foreign-Related Arbitration in China*, 1997 Y.B. SWEDISH & INT'L ARB. 45 (1997).

[18]*See* Michael E. Ruane, *Protesters Link War, Warming; Latest Rally Tied to IMF, World Bank Meetings Focuses on Climate Change*, WASH. POST, Oct. 23, 2007, at B1; Clarence Williams & Michael E. Ruane, *Violence Erupts at Protest in Georgetown; Rallies Target World Bank, IMF*, WASH. POST, Oct. 20, 2007, at B1.

[19]CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 77-189.

[20]*Id.*

private process of adjudication with nearly unlimited jurisdictional reach.[21] The revolutionary character of the case law on arbitration arises from the challenge it poses to the constitutional imperatives that prevailed prior to its articulation. The case law rulings were the rough equivalent of a Roman Catholic Pontiff proclaiming established Church creeds to be merely one possible belief system among many others, including agnosticism and atheism. The declared judicial policy on arbitration was, in effect, theological blasphemy.

The courts are the gatekeepers of arbitration dogma. The decisional law of the U.S. Supreme Court, however, reveals that the Court believes the gate opens only in one direction.[22] The general U.S. judicial stance, as a result, is that the recourse to arbitration must be sustained in nearly all circumstances.[23] Even the principle of freedom of contract yields to the arbitration imperative: Party choice-of-law cannot defeat the reference to arbitration.[24] There are periodic dissensions, especially in

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[21] *Id.*

[22] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) and *infra* note 73; Doctor's Assoc. v. Casarotto, 517 U.S. 681, 687 (1996) and *infra* note 74; Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-64 (1995). *See also* Henry Gamble Appel, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 12 OHIO ST. J. ON DISP. RESOL. 233 (1996); Norman B. Arnoff, *In the Wake of* Mastrobuono, 950 PRAC. L. INST./CORP. 825 (1996); Joshua M. Barrett, *Federal Arbitration Policy After* Mastrobuono v. Shearson Lehman Hutton, Inc., 32 WILLAMETTE L. REV. 517 (1996); Perry E. Casazza, *Nevada's* Mastrobuono: *How the 2001 Legislature Threw Another Wrench into the Punitive Damages Machine of Arbitration Law*, 51 DRAKE L. REV. 189 (2002); John P. Cleary, *Filling* Mastrobuono*'s Order: The NASD Arbitration Policy Task Force Ensures the Enforceability of Punitive Damages Awards in Securities Arbitration*, 52 BUS. LAW. 199 (1996); Keith Highet, *International Decisions*, 89 AM. J. INT'L L. 601 (1995); Andrew C. Glass, *The Validity of Arbitral Awards of Punitive Damages*, 1 HARV. NEGOTIATION L. REV. 193 (1996); John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc., 38 HARV. INT'L L.J. 59 (1997); Heather J. Haase, *In Defense of Parties' Rights to Limit Arbitral Awards Under the Federal Arbitration Act:* Mastrobuono v. Shearson Lehman Hutton, Inc., 31 WAKE FOREST L. REV. 309 (1996); Paul Lansing, *The Future of Punitive Damage Awards in Securities Arbitration Cases After* Mastrobuono, 8 DEPAUL BUS. L.J. 201 (1996); Edward B. Micheletti, Mastrobuono v. Shearson Lehman Hutton, Inc.*: Another Piece of the Federal Arbitration Act Policy Puzzle*, 21 DEL. J. CORP. L. 1027 (1996); Peter M. Mundheim, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of* Mastrobuono, 144 U. PA. L. REV. 197 (1995); Jordan L. Resnick, *Beyond* Mastrobuono*: A Practitioner's Guide to Arbitration, Employment Disputes, Punitive Damages, and the Implications of the Civil Rights Act of 1991*, 23 HOFSTRA L. REV. 913 (1995); G. Richard Shell, *Federal Versus State Law in the Interpretation of Contracts Containing Arbitration Clauses: Reflections on* Mastrobuono, 65 U. CIN. L. REV. 43 (1996); Victor Williams, *Punitive Damages in Arbitration:* Mastrobuono *and the Need for Creation of a National Court of Commercial Appeals*, 100 COM. L.J. 281 (1995); Note, *An Unnecessary Choice of Law:* Volt, Mastrobuono*, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250 (2002); *Award of Punitive Damages Upheld Under* Mastrobuono, 51-SEP. DISP. RESOL. J. 147 (1996).

[23] Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178-79 (3d Cir. 1999). *Harris* addresses the consumer arbitration issues in regard to the disparity in bargaining power between two parties. *Id.* at 179-81. The court found that an arbitration clause, granting the right to litigation to only one of the contracting parties was enforceable under the FAA. *Id.* at 183.

[24] *Mastrobuono*, 514 U.S. at 62-64.

employment and consumer cases,[25] but arbitration agreements are enforceable in the vast majority of cases—even when they are unilateral and adhesionary in character.[26] Manifest unfairness is not necessarily a defense to enforceability.[27] Moreover, arbitrators and service providers are immune from suit.[28] There is no arbitral malpractice, unless the arbitrator simply refuses to act.[29] The watchwords of

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[25]*See* Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002). The court in *Ting* held that it was illegal to use a mandatory arbitration clause to make it difficult for consumers to sue AT&T. *Id.* at 923-26. The same court also held electronic arbitration agreements as substantively unconscionable in *Comb v. PayPal, Inc*., 218 F. Supp. 2d 1165 (N.D. Cal. 2002), and *Acorn v. Household International, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002). *See also* Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001) (found an arbitration agreement invalid as an illusory promise when an employer required an employee to enter into a contract with an arbitral service provider); Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000) (established a five-point minimum requirement standard for a legally enforceable arbitration agreement in the employment context); Hayes v. County Bank, 713 N.Y.S.2d 267 (N.Y. Sup. Ct. 2000) (held that the FAA permits setting aside arbitration agreements on unconscionability grounds, and a payday loan scheme with such a contract was found to be unconscionable); Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000) (held that a usury violation is not arbitrable; it is a matter for the courts). Given the decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2003), the decision in *Party Yards* is at least suspect, if not in fact reversed. Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999) (ruled that an arbitration agreement was unenforceable when it functioned as a condition of employment or continued employment and deprived the weaker party of any recourse because of the costs of arbitration); Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) (held that that an arbitration clause in cellphone contracts was unconscionable because it was unilaterally prepared and sent to customers with a monthly bill); *but see* Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005); Engalla v. Permanente Medical Group, Inc., 938 P.2d 903 (Cal. 1997) (found an arbitration agreement void because its terms did not accurately represent the actual conduct of the arbitral proceedings and allowed the stronger party to overreach upon the weaker party by acting as the self-interested administrator of the proceedings); Alexander v. Gardner-Denver, Co., 415 U.S. 36 (1974) (ruled that an employee is not bound by an arbitration agreement in the collective bargaining agreement in terms of the resolution of personal rights claims).

[26]*Harris*, 183 F.3d at 183-84.

[27]One court reasoned that "[the] substantive federal law stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate." 183 F.3d at 180. The court further stated that, "[i]t is of no legal consequence that the arbitration clause gives Green Tree the option to litigate arbitrable issues in court, while requiring the Harrises to invoke arbitration." *Id.* at 181.

[28]THE IMMUNITY OF ARBITRATORS (Julian D. M. Lew ed., 1990); *see also, e.g.*, Martin Domke, *The Arbitrator's Immunity from Liability: A Comparative Survey*, 3 U. TOL. L. REV. 99 (1971); Mark. W. Levine, Note, *The Immunity of Arbitrators and the Duty to Disclose*, 6 AM. REV. INT'L ARB. 197 (1995); Richard J. Mattera, Note, *Has the Expansion of Arbitral Immunity Reached Its Limits After* United States v. City of Hayward*?*, 12 OHIO ST. J. ON DISP. RESOL. 779 (1997); Andrea Mettler, *Immunity vs. Liability in Arbitral Adjudication*, 47 ARB. J. 24 (1992); Michael D. Moberly, *Immunizing Arbitrators From Claims for Equitable Relief*, 5 PEPP. DISP. RESOL. L.J. 325 (2005).

[29]*See* Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C., 44 Cal. Rptr. 3d 782, 785 (2006).

arbitration doctrine appear to be: inviolable autonomy and absolute decisional sovereignty.

Courts cannot assume more aggressive or activist regulatory roles in regard to arbitration because experience demonstrates the wisdom of the Court's absolute support for arbitration. The Court refuses to admit any exception to its policy of enforcement because limited incursions into the territory would inevitably lead to wholesale migrations. Allowing the camel to peer under the tent will almost certainly bring about its collapse. Judges are likely to find fault with the arbitrators' performance ever more readily and frequently if for no other reason than that disagreement is the lifeblood of legal discourse. *Halligan*[30] and *Exxon Shipping*[31] illustrate the nefarious consequences of a more than limited judicial involvement in arbitration. In the end, the judicial role should be confined to policing the process for denials of justice in circumstances of fraud or corruption.

Nonetheless, there is constant pressure to alter the dynamics of the process and to provide for greater rights protection—*e.g.*, the use of the unconscionability defense,[32]

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[30]Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998). *See* Mark B. Rees, Note, Halligan v. Piper Jaffray*: The Collision Between Arbitral Autonomy and Judicial Review*, 8 AM. REV. INT'L ARB. 347 (1997).

[31]Exxon Shipping Co. v. Exxon Seamen's Union, 11 F.3d 1189 (3d Cir. 1993). *See, e.g.*, Thomas E. Claps, *An Arbitration Award Reinstating Helmsman Who Tested Positive for Marijuana Use May Be Vacated for Contravening Public Policy Against the Operation of Sea Vessels by Drug Users* – Exxon Shipping Company v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993)*, 24 SETON HALL L. REV. 541 (1993); Gregory T. Mayes, *The Third Circuit Defines the Public Policy Exception to Labor Arbitration Awards* – Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993)*, 67 TEMP. L. REV. 493 (1994).

[32]Courts have previously found arbitral agreements to be unconscionable. *See, e.g.*, Comb v. Paypal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002); Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002); Powertel Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999); Brower v. Gateway 2000, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998). The U.S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), however, held that arbitration is neither inferior to judicial litigation nor unfair. *Id*. at 34. Thus, it usually is not sufficient (except in a few California state law cases) to establish that an adhesionary arbitration agreement is procedurally unconscionable. Such an assertion states no more than that the adhesion contract is adhesionary. Ordinarily, establishing the oppressive quality of the material terms (or substantive unconscionability) is essential to a determination of unconscionability. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION, *supra* note 3, at 392.

The conscionability of arbitration in consumer disputes can be judged according to the following principles:

1. "All parties are entitled to a fundamentally-fair ADR process," including (in Principle 12) adequate notice; the opportunity to be heard; to present relevant evidence; and the right to an appropriate exchange of relevant information prior to the hearing (Principle 13).

2. Consumers should be given adequate information at the time of the contract about the nature of the chosen program.

3. All neutrals should be neutral, and consumers should have an equal voice in selecting them for their case.

common law grounds for vacatur,[33] actions to clarify awards,[34] and opt-in provisions for enhanced judicial review[35]—all developments that increase judicial supervision of the arbitral process' operation and results. This minority trend is most apparent in California—previously at both the federal and state court level, but now principally

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> 4. The competency of neutrals is expected and is an obligation of the independent agencies that administer the arbitration.
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> 5. In low-value cases where arbitration itself would be more expensive for the consumer than small claims court, the consumer should retain the right to take a matter to the small claims process.
>
> 6. The cost of arbitration to the consumer should be reasonable in relation to the deal, even if that means the other party must subsidize the cost.
>
> 7. The location of arbitration proceedings must be convenient to the consumer.
>
> 8. All time limits should be reasonable, and defaults out of the process should be allowed where the limits are exceeded or abused.
>
> 9. Consumers should be allowed to appear with legal counsel or other representatives whom they choose.

Id. at 392-93 (parsing the actual language of the AAA's Consumer Protocol).

[33]The common law grounds for vacatur of arbitral awards in the United States are: (1) manifest disregard of the law, (2) irrational determinations, or (3) enforcement of the award violates public policy. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2004, *supra* note 6, at 33-34. For examples of manifest disregard of law, *see, e.g.*, Baravati v. Josephthal, Lyon & Ross, 28 F.3d 704 (7th Cir. 1994); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930 (2d Cir. 1986); Rodriguez v. Prudential-Bache Sec., 882 F. Supp. 1202 (D.P.R. 1995); Fine v. Bear, Stearns & Co., 765 F. Supp. 824 (S.D.N.Y. 1991). For examples of irrational determinations, *see, e.g.*, Eljer Mfg. v. Kowin Dev. Corp., 14 F.3d 1250 (7th Cir. 1994); Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775 (11th Cir. 1993); Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992). For examples when enforcement of the award would have violated public policy, *see, e.g.*, *Rodriguez*, 882 F. Supp. at 1208; *Exxon Shipping*, 11 F.3d at 1191; *Brown*, 994 F.2d at 782-83.

[34]Section 11 of the FAA does not authorize such an action, rather actions to clarify an award arose through judicial decisions. CARBONNEAU, NUTSHELL, *supra* note 1, at 246. Actions seeking clarification undermine the efficiency of arbitration. *Id.* at 247. Actions to clarify are similar to vacatur for manifest disregard of the law, both of which are antagonistic to the functionality of arbitration. *See* Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126 (2d Cir. 2003).

[35]The Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits oppose the enforceability of opt-in provisions. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2004, *supra* note 6, at 34. These courts reason that parties cannot create federal jurisdiction by contract. *See, e.g.*, Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001); Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991). Opt-in provisions alter the concept of bargained-for arbitration by "radicalizing" the guiding principle of contract freedom. CARBONNEAU, NUTSHELL, *supra* note 1, at 243-46. The FAA makes no mention of opt-in provisions. *Id.* at 245. Nonetheless, opt-in provisions find their strongest support in the principle of freedom of contract. *Id.*

in state court rulings.[36] The opposition to the federal concept of arbitration is evidenced in key California Supreme Court cases, like *Engalla*[37] and *Armendariz*,[38] in which the court put doctrines other than arbitrability first and risked running afoul of the federal preemption mandate. To some extent, the California resistance is incomprehensible in light of the state's long-standing acquaintance with arbitration and ADR, the size of the industry in the state, and the large number of former state judges who have found a calling in the arbitration business.[39] Having trained and

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[36]After *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), the Ninth Circuit tempered its opposition of arbitration. California state courts, however, still reach determinations in employment arbitration cases that strongly disfavor the recourse to arbitration. *See, e.g.*, Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007); Murphy v. Check 'N Go of Cal., Inc., 67 Cal. Rptr. 3d 120 (Cal. Ct. App. 2007); Marcario v. County of Orange, 65 Cal. Rptr. 3d 903 (Cal. Ct. App. 2007); Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007); Matthau v. Superior Court, 60 Cal. Rptr. 3d 93 (Cal. Ct. App. 2007).

[37]Engalla v. Permanente Med. Group, Inc., 938 P.2d 903 (Cal. 1997). *See, e.g.*, John W. Corrington, *Where a Health Maintenance Organization Makes Contractual Promises of Expeditious Claim Processing in an Arbitration Agreement, with the Knowledge They Are Likely False and with the Intent to Induce Reliance on the Part of the Insured, the Insured May Seek Remedies in Court, Including Rescission of the Agreement. And, a Court May Deny a Petition to Compel Arbitration Based on Theories of Fraud in the Inducement or Waiver of the Agreement:* Engalla v. Permanente Medical Group, Inc., 25 PEPP. L. REV. 235 (1997); Russell Evans, Note, Engalla v. Permanente Medical Group, Inc.*: Can Arbitration Clauses in Employment Contracts Survive a "Fairness" Analysis?*, 50 HASTINGS L.J. 635 (1999); Jim Moore, Note, *Bad Facts, Good Law – Thoughts on* Engalla v. Permanente Medical Group, 26 W. ST. U. L. REV. 135 (1999).

[38]Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000). *See, e.g.*, *California Supreme Court Decides* Armendariz, 11 WORLD. ARB. & MEDIATION REP. 267 (2000); Shane Anderies, Note, *Mandatory Arbitration Clauses in Individual Employment Contracts After* Duffield v. Robertson Stephens & Co.*: A Note on* Armendariz v. Foundation Health Psychcare Services, Inc., 34 U.S.F. L. REV. 765 (2000); Bernard Finnegan, Note, *The California Supreme Court Framework for Mandatory Arbitration Agreements:* Armendariz v. Foundation Health Psychcare Services, Inc., 36 U.S.F. L. REV. 571 (2002); Earl Greene III, Armendariz v. Foundation Health Psychcare Services, Inc.*: The California Supreme Court Searches for a Middle Ground*, 1 J. AM. ARB. 105 (2001); S. Kathleen Isbell, Note, *Compulsory Arbitration of Employment Agreements: Beneficent Shield or Sword of Oppression?* Armendariz v. Foundation Health Psychcare Services, Inc., 22 WHITTIER L. REV. 1107 (2001); Jennifer LaFond, Note, *The Private Enforcement of Public Laws in* Armendariz v. Foundation Health Psychcare Services, 29 PEPP. L. REV. 401 (2002); Aaron Rudin, Armendariz v. Found. Health Psychcare Servs., Inc., 30 SW. U. L. REV. 613 (2001); Mark S. Ross, *Compulsory Arbitration of Employment Disputes After* Armendariz, 651 PRACTISING LAW INSTITUTE/ LITIGATION 251 (2001).

[39]Unless the arbitrator is a technical expert and the dispute a highly involved technical matter, procedural and substantive rights may not be compromised in arbitration. At their core, arbitral proceedings provide a reasonably complete hearing of the matter in which all essential issues are addressed. The arbitral hearing is not unlike a bench trial in which the absence of a jury alleviates the need for elaborate rule frameworks through which information is filtered. In fact, especially in California, arbitrators often are retired judges who have extensive familiarity with legal procedures for trial. Non-jury trials and less formalistic procedures may constitute a better vehicle for rights protection than constitutionally elaborate proceedings. Rights protection taken to its adversarial extreme resulted in the impossibility of vindicating legal rights through judicial litigation. The success, and perhaps the irreversibility,

experienced jurists act as arbitrators in the state should assuage the concerns of California judges about fairness and rights protection. The temptation to do what courts generally do must be resisted to preserve the advantages, utility, and functionality of arbitration. Any judicial intrusion compromises arbitration's benefits and essential attributes—operational efficiency and functionality.

II. HISTORICAL ANTECEDENTS

In the nineteenth and through part of the twentieth century, courts and legislatures perceived arbitration as a renegade, even bastardized form of adjudication. Optimally, it could be applied only in specialized fields. As a makeshift form of trial, arbitration was adequate only for self-regulated industries involved in the sale of commodities or other basic commercial activities.[40] Prior to the enactment of the U.S. Arbitration Act (also known as the Federal Arbitration Act or FAA)[41] in 1925, courts also perceived arbitration as a competitor for adjudicatory business.[42] In this sibling contest, courts wanted to retain primacy, if not exclusivity, in matters of litigation. Accordingly, courts disparaged arbitration; they invented reasons to distrust the arbitrators' abilities to apply the law and to protect essential legal rights.

Court rulings, therefore, tried to undermine the agreement to arbitrate. Early on, courts would only enforce an arbitration agreement if the arbitral tribunal had already rendered an award.[43] Legislatures joined in the dance of hostility around arbitration by voiding the contract validity of the arbitral clauses and providing exclusively for the enforceability of the submission to arbitration.[44] The submission

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of the movement to arbitration is inextricably tied to the dispute resolution failure of the court system. As the adage provides, justice delayed is justice denied.

[40]*See* Wilko v. Swan, 346 U.S. 427 (1953); MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION 10 (1968).

[41]U.S. Arbitration Act, Ch. 213, § 1, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 (2006)).

[42]The early judicial hostility towards arbitration is easily summed up:

> [W]hen [courts] are asked to . . . compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.

CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION, *supra* note 3, at 49 (citing Tobey v. County of Bristol, 23 F. Cas. 1313, 1320-21 (C.C.D. Mass. 1845) (No. 14,065)). *See also, e.g.*, Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147 (1921); Walter B. Kennedy, *Law and the Railroad Labor Problem*, 32 YALE L.J. 553 (1923).

[43]CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION, *supra* note 3, at 49.

[44]The typical civilian approach to arbitration at the turn of the century was to uphold as legal only the submission to arbitration and to deny enforceability to the arbitral clause. Because parties in dispute were unlikely to agree to arbitration, this rule, in effect, invalidated the reference to arbitration. *See* Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1 (1980); Thomas E. Carbonneau, *The Reform of the French*

could only be entered into after a dispute had arisen, and parties were unlikely to agree to arbitration when their relationship had degenerated into turmoil. By limiting access to arbitration and eventually allowing courts to question the rulings of arbitrators,[45] legislation eliminated the gravamen for arbitration; both the motive and the consideration for recourse had been extinguished. Courts achieved the standing they sought; they monopolized the work of justice. By containing the arbitral process, courts proclaimed the singularity of the judicial protection of legal rights. Further, they touted their exclusive ability to act for the public interest.

III. THE FAA

The FAA was enacted as special interest legislation.[46] It was a far cry from a comprehensive statute on arbitration. Its goals were modest—to rehabilitate arbitration for groups within the commercial community. The impetus for its enactment centered around a recent New York state law on arbitration.[47] The New York Chamber of Commerce believed that a federal law on arbitration was necessary to complement the state legislation that favored arbitration.[48] In the age of *Swift v. Tyson*,[49] federal courts needed a federal statute on arbitration to enforce arbitration agreements when they ruled in litigation on the basis of diversity.[50] The FAA, therefore, was not a sequel to the Magna Carta; it represented, in fact, a small

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Procedural Law on Arbitration: An Analytical Commentary on the Decree of May 14, 1980, 4 HASTINGS INT'L & COMP. L. REV. 273 (1981).

[45]British law allows courts to revise arbitral awards that are clearly wrong on the law. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION, *supra* note 3, at 24. In the United States, the Fifth and Third Circuits allow parties to contract for judicial review of arbitral awards. *See, e.g.*, Gateway Techs. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995); New Eng. Utils. v. Hydro-Quebec, 10 F. Supp. 2d 53 (D. Mass. 1998).

[46]*See* Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 39-57 (1984); Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263 (1988) [hereinafter Carbonneau, *The Reception of Arbitration*]. *See also* JON O. SHIMABUKURO, CRS REPORT FOR CONGRESS, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENT (2003) http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-3879; Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995).

[47]The New York business community wanted to avoid the procedural intricacies and delays of judicial litigation. Carbonneau, *The Reception of Arbitration in United States Law*, *supra* note 46, at 268. It sought a commercially reasonable and knowledgeable dispute resolution process, which provided efficient, workable resolutions. *Id.* Arbitration was the remedy chosen. *Id.* The New York Chamber of Commerce persuaded the U.S. Congress to follow the New York legislative example and the FAA was born. *Id.*

[48]*See supra* notes 46-47 and accompanying text.

[49]Swift v. Tyson, 41 U.S. 1 (1842). *Swift* provided for the application of a general federal common law by federal courts. *See, e.g.*, Coker B. Cleveland, Note, Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*: Is* Swift v. Tyson *Dead?*, 25 AM. J. TRIAL ADVOC. 145 (2001).

[50]*See supra* notes 46-48.

concession to the commercial interests in New York City. In effect, the FAA reinforced the mercantile interest in self-regulation and customized adjudicatory procedures. It represented a legislative acknowledgement of the self-governing ethos of trade and commerce—a ceding of power to affected groups permitting expedient solutions to commercial and transactional disputes.

The FAA's actual impact upon the legal system was unexpected both in terms of size and intensity. The evolution and progressive interpretation of the statute, in effect, resulted in a redefinition of civil justice, a modification of the Bill of Rights, and the implicit emendation of the U.S. Constitution. Arbitration, modestly validated in 1925, was to have an enormous destiny in a later age of limited resources, greater litigation, and more populous urban growth. Like the Federal Sovereign Immunities Act[51] and the New York Arbitration Convention,[52] the FAA is a "marvel of compression."[53] It is a statute that achieves its regulatory purpose on the basis of an economical text.[54] The FAA's central provisions are §§ 1, 2, 3, and 10—2 and 10 are all that is really necessary. The statute has a total of sixteen provisions, most of which are quite brief.

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[51]28 U.S.C. §§ 1602-11 (2006). The Foreign Sovereign Immunities Act is "[a]n Act [t]o define the jurisdiction of the United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes." THOMAS E. CARBONNEAU, CASE AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION 158 (2005) (*citing* the Foreign Sovereign Immunities Act). *See also, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993); Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Frolova v. U.S.S.R., 761 F.2d 370 (7th Cir. 1985); Texas Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981); Playa Larga v. I Congreso del Partido, (1983) 1 A.C. 244 (H.L.); *In re* Sedco, Inc., 543 F. Supp. 561 (S.D. Tex. 1982); Victory Transp. v. Comisaria General De Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964); Robert von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978).

[52]Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517. The New York Convention is entered into force in U.S. law under 9 U.S.C. §§ 201-08. The Convention provides a uniform law on both the validity of arbitration agreements and the enforceability of arbitral awards. *See, e.g.*, Spier v. Calzaturificio Tecnia, S.p.A., 77 F. Supp. 2d 405 (S.D.N.Y. 1999); Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997); *In re* the Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996); Hamid G. Gharavi, *Chromalloy: Another View*, 12-1 MEALEY'S INT'L ARB. REP. 16 (1997); Hamid G. Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention*, 6 J. TRANSNAT'L L. & POL'Y 93 (1996); Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on Chromalloy*, 12-4 MEALEY'S INT'L ARB. REP. 12 (1997); Gary H. Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin*, 11-9 MEALEY'S INT'L ARB. REP. 17 (1996).

[53]*Texas Trading*, 647 F.2d at 306.

[54]The statute provides comprehensive regulation of the arbitration process through sixteen relatively cryptic provisions. Of the sixteen provisions, four provide the near totality of the relevant law: Sections 2, 3, 4, and 10.

Section One establishes the statute's scope of application.[55] The FAA applies in the traditional areas of federal jurisdiction: Interstate and foreign commerce, and maritime transactions. The text of the provision expressly excludes employment contracts from its scope of application. This restriction emerged from the special protections that applied under federal law for certain classes of employees and from the drafters' perception that the disparity of the parties' positions in employment relationships did not permit truly consensual recourse to arbitral adjudication. The restriction would later be construed narrowly and differently by the U.S. Supreme Court. As noted in the earlier discussion,[56] the federal statute was meant merely to serve as a gap-filler in a system in which the assertion of judicial jurisdiction was controlled by *Swift v. Tyson*.

Of the provisions of the FAA, "[s]ection 2 is the centerpiece provision of the legislation."[57] It validates arbitration agreements as contracts. In particular, the waiver of recourse to judicial process before any dispute arises is not against public policy. Arbitration agreements are ordinary contracts and lawful; contracting parties are free to submit their disputes to arbitration because it is part of their freedom to contract. Section Three provides that a valid contract of arbitration forecloses access to courts.[58] This eliminates the courts' authority to rule on disputes that are subject to arbitration. The federal district court determines whether a valid contract of arbitration exists and whether it governs the dispute in question. An affirmative finding usually results in a stay, rather than a dismissal, of the judicial proceedings, allowing the court to assist in the operation of the arbitral process when necessary. FAA § 3 enables the courts to perform a critical jurisdictional function at the threshold of the process—in effect, determining whether the arbitrators have the authority to rule. A more contemporary view, and a truer measure, of arbitral autonomy would allow the arbitrators to rule on their own jurisdiction first under the *kompetenz-kompetenz* doctrine.[59]

Section Four establishes that courts may compel arbitration once they determine that a valid contract of arbitration exists and they are asked to do so by an interested

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[55]9 U.S.C. § 1 (2006). *See* EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT (2006); IAN R. MACNEIL, AMERICAN ARBITRATION LAW (1992); I. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT; *see also, e.g.*, Citizens Bank v. Alafabco, 539 U.S. 52 (2003); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); United States v. Lopez, 514 U.S. 549 (1995); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Southland Corp. v. Keating, 465 U.S. 1 (1984); Lenz v. Yellow Transp., Inc., 431 F.3d 348 (8th Cir. 2005); Hill v. Rent-A-Center, Inc., 398 F.3d 1286 (11th Cir. 2005); Palcko v. Airborne Express, Inc., 372 F.3d 588 (3d Cir. 2004).

[56]Swift v. Tyson, 41 U.S. 1 (1842). *See supra* note 49 and accompanying text.

[57]9 U.S.C. § 2 (2006); CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 99.

[58]9 U.S.C. § 3 (2006); CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 115. *See also* sources cited *supra* note 55.

[59]This doctrine is defined as "jurisdiction to rule on jurisdictional challenges involving the validity and scope of the arbitration agreement." CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 27.

party.[60] It also makes reference to a jury trial proceeding to determine the existence of the agreement to arbitrate. Despite the impracticality and consequently inactive status of the latter,[61] the provision generally endeavors to establish a cooperative relationship between the judicial and arbitral processes**.** Section Ten is second only to Section Two in doctrinal and historical significance.[62] It establishes the basis for the judicial supervision of arbitral awards. The supervisory role of the courts is limited; it encompasses only looking for fundamental procedural irregularities that evidence corruption in the arbitral proceeding: bribery, evident partiality of the arbitrator, a lack of notice or opportunity to defend, and the excessive exercise of adjudicatory authority by arbitrators.[63] The grounds for judicial supervision are intended to prevent miscarriages of justice. The narrowness and exceptional character of the grounds indicate that a presumption in favor of enforcement applies and can be rebutted only in extraordinary circumstances. Review of the merits of arbitral determinations is excluded under the express language of FAA § 10, although parties may provide for it in their contracts in some federal circuits (so-called opt-in provisions)[64] and courts may have recourse to common law grounds for vacatur to assess arbitrator rulings.[65]

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[60] 9 U.S.C. § 4 (2006); *See, e.g.*, Alan S. Kaplinsky, *Arbitration and Class Actions: A Contradiction in Terms*, 1590 PRACTISING L. INST. 427 (2007); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Discover Bank v. Vaden , 396 F.3d 366 (4th Cir. 2005); Champ v. Siegel Trading Co., 55 F.3d 269, 274-77 (7th Cir. 1995); Gipson v. Cross Country Bank, 354 F.Supp. 2d 1278 (M.D. Ala. 2005); Green Tree Consumer Disc. Co. v. Jarvis, No. 01-2479 (E.D. Pa. 2001).

[61] According to the statutory language, a party can demand a jury trial on the merits to determine the existence of the arbitral clause. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 118. *See* Pyle v. Wells Fargo Fin., No. 04AP-6, 2004 WL 2065652, at *2 (Ohio Ct. App. Sept. 16, 2004).

[62] 9 U.S.C. § 10. Section 10 gives a federal district court jurisdiction to confirm or set aside an arbitral award through vacatur. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2004, *supra* note 6, at 108-11. The courts have fully embraced their limited role in arbitration. *Id.* The statutory grounds avoid the substantive review of arbitral awards, and limit the courts' supervision to incidents of fundamental procedural unfairness. *Id.*

[63] Corruption in the arbitral procedure, the arbitrators, or the determination justifies the judicial vacatur of an arbitral award. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, 124-27.

[64] Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213 (2005) [hereinafter Carbonneau, *Crossroads of Legitimacy*]; Thomas Carbonneau, *Debating the Proper Role of National Law Under the New York Arbitration Convention*, 6 TUL. J. INT'L & COMP. L. 277 (1998); James M. Gaitis, *Unraveling the Mystery of* Wilko v. Swan*: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1 (2007); Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61 DISP. RESOL. J. 16 (2007); Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN'S L. REV. 99 (2007); Marisa Marinelli & Christelette Hoey, *As Judicial Tolerance for Appeals Wanes, Litigants are Risking Sanctions When Seeking to Vacate Awards*, 25 ALTERNATIVES TO HIGH COST LIT. 51 (2007); Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739 (2007); Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429

In effect, the core statutory provisions attribute a supportive yet passive role to the courts in regard to arbitration. The judiciary supplies coercive public jurisdictional authority when the arbitral process is at an impasse. The courts uphold the contract reference to arbitration and otherwise allow arbitration to function according to its own operational dynamic and systemic exigencies. The FAA recognizes both the specialty and self-regulatory character of commercial justice.

IV. THE POST-*ERIE* FAA

The serenity that surrounded the parochial objectives of the FAA's original enactment would eventually be disturbed. The statute would seep out of its circumstantial confines. The U.S. Supreme Court would progressively use the FAA as a roadmap to a new legal civilization.[66] Sometime after the enactment of the FAA, *Erie*[67] ended the rule of *Swift v. Tyson*. *Erie*'s impact upon the FAA was considerable. According to *Erie* federalism, the FAA became secondary to state law in diversity circumstances when state law governed the litigation. In fact, state law would generally apply unless the litigation involved matters that raised federal question jurisdiction. The FAA did not provide federal question jurisdiction. Therefore, it appeared that federal courts sitting in diversity would apply state law to contract litigation and would also be obligated to apply a state's arbitration law in the case. That state's arbitration statute could well be antagonistic or at least less favorable to arbitration than the FAA.

The FAA, however, was no longer a mere gap-filler, but rather the repository of a nascent federal policy. It was imperative that federal courts maintain their allegiance to federal law in matters of arbitration. Federalization was the means to achieve that end.[68] The Court began to realize that arbitration was no longer just a commercial

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(2004); Michael P. O'Mullan, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 FORDHAM L. REV. 1121 (1995); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147 (1997).

The Supreme Court will soon review private parties' ability to modify the statutory standard for judicial review in *Hall Street Assoc. v. Mattel, Inc.*, No. 06-989, 128 S.Ct. 644 (Nov. 16, 2007).

[65] *Supra* note 33 and accompanying text.

[66] *See* Carbonneau, *Plea for Statutory Reform, supra* note 1, at 231.

[67] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). *Erie* overruled *Swift v. Tyson* stating that there is no federal common law, and that Congress cannot declare substantive rules of common law applicable in the states. *Id.* at 78. State law applied in cases of diversity jurisdiction unless the controversy was governed by the Constitution or an act of Congress. *Id. See, e.g.*, Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235 (1999).

[68] The author has previously reasoned that:

> The application of state arbitration laws by federal courts sitting in diversity could have fragmented any national consensus on arbitration and undermined the FAA's clear mandate to make arbitration an autonomous and viable alternative adjudicatory process. . . . Because *Erie* mandated the application of state law in all diversity cases but those in which the U.S. Constitution or federal legislation was controlling, courts could hold that the FAA was applicable as a federal enactment, ruling – in effect – that

remedy, but presented a solution to the paucity of judicial resources and to the cancerous effect of adversarial litigation upon the processing of claims. Transforming arbitration from a specialized form of justice for merchants to a society-wide framework of adjudication resolved the operational deficiencies of a dysfunctional court system. Many state laws did not favor arbitration,[69] and the Court felt that it was imperative that arbitration be validated as an adjudicatory method in all circumstances.

The holding in *Prima Paint*[70] was the first step in the federalization of the law of arbitration and in establishing a single national law of arbitration. The U.S. Supreme Court responded to the question of whether federal courts sitting in diversity should apply the FAA by stating that Congress had the authority to instruct Article III courts on how they should rule on a particular substantive question.[71] The FAA constituted that instruction. The federal statute applied even though state law governed other aspects of the litigation. The hegemony of the FAA extended to any interstate commerce matter. A full policy of federalization would be achieved through the

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> the FAA represented more than the enactment of merely procedural regulations and that it actually created substantive federal rights.

CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 155-56.

[69]*See* MARTIN DOMKE ET AL., *Scope of United States Arbitration Act-Preemption of Contrary State Law*, *in* DOMKE ON COMMERCIAL ARBITRATION, §7:7 (2007); Edmond Seferi, *FAA and Arbitration Clauses – How Far Can it Reach? The Effect of* Allied-Bruce Terminix, Inc. v. Dobson, 19 CAMPBELL L. REV. 607 (1997) (citing ALA. CODE § 8-1-41(3) (1984)); *Ex Parte* Clements, 587 So. 2d 317, 320 (Ala. 1991) ("[U]nless the FAA is applicable, predispute arbitration agreements are void in Alabama as against public policy."); State v. Neb. Ass'n of Pub. Employees, 477 N.W. 2d 577 (Neb. 1991) (ruling that a state statute adopting the Uniform Arbitration Act was void as violating the state constitution); MISS. CODE ANN. § 11-15-101 (West 1992) (arbitration contracts void as against public policy except in construction contracts).

[70]Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). *See, e.g.*, Pierre H. Bergeron, *At the Crossroads of Federalism and Arbitration: The Application of* Prima Paint *to Purportedly Void Contracts*, 93 KY. L. J. 423 (2005); Alfred Croce, *The Sixth Circuit Rules on the Severability of Arbitration Provisions under* Prima Paint *and the Application of the Parol Evidence Rule Under Ohio Law in* Glazer v. Lehman Brothers, Inc., 4 J. AM. ARB. 159 (2005); Zeb-Michael Curtin, *Rethinking* Prima Paint *Separability in Today's Changed Arbitration Regime: The Case for Inseparability and Judicial Decisionmaking in the Context of Mental Incapacity Defenses*, 90 IOWA L. REV. 1905 (2005); Andre V. Egle, *Back to* Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement,* 78 WASH. L. REV. 199 (2003); Mikel D. Johnson, Case Note, *Contracts – Into the Void: Minnesota Limits Application of the* Prima Paint *Doctrine* – Onvoy, Inc. v. Shal, LLC, 31 WM. MITCHELL L. REV. 579 (2004); Nancy R. Kornegay, Prima Paint *to* First Options*: The Supreme Court's Procrustean Approach to the Federal Arbitration Act and Fraud*, 38 HOUS. L. REV. 335 (2001); *Supreme Court to Review Florida Court's Rejection of* Prima Paint, 60 DISP. RESOL. J. 4 (2005).

[71]THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 158; CARBONNEAU, NUTSHELL, *supra* note 1, at 95-105; *see also, e.g.*, Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea of Change*, 31 Wake Forest L. Rev. 1 (1996); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 Va. L. Rev. 1305 (1985); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004).

Court's later pronouncements in the federalism trilogy[72] and reaffirmed unequivocally in *Allied-Bruce Terminix Cos. v. Dobson*[73] and *Doctor's Associates, Inc*.[74]

V. THE IMPACT OF COLLECTIVE BARGAINING AGREEMENT ARBITRATION

The U.S. Supreme Court's rulings on labor arbitration presaged much of the decisional transformation of the FAA. The Court envisaged labor arbitration as a means of avoiding labor strikes and resolving other strife in the workplace.[75] The

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[72]The federalism trilogy consists of: *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). The Court in *Moses Cone* stated: "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. *Keating* extended the preference toward arbitration and created a duty upon not only federal courts, but also state courts to apply the federal policy on arbitration. *Keating*, 465 U.S. at 10. Finally, *Byrd* included the proclamation that "the Act leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Byrd*, 470 U.S. at 213.

[73]Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995). *See, e.g.*, Megan P. Davis, Case Comment, *From Procedural Law to Preemption: The Supreme Court's Transformation of the Federal Arbitration Act*, 1 HARV. NEGOTIATION L. REV. 169 (1996); Janet M. Grossnickle, Note, Allied-Bruce Terminix Cos. v. Dobson*: How the Federal Arbitration Act Will Keep Consumers and Corporations Out of the Courtroom*, 36 B.C. L. REV. 769 (1995); Donald E. Johnson, *Has* Allied-Bruce Terminix Cos. v. Dobson *Exterminated Alabama's Anti-Arbitration Rule?*, 47 ALA. L. REV. 577 (1996); Lauri Washington Sawyer, Allied-Bruce Terminix Companies v. Dobson*: The Implementation of the Purposes of the Federal Arbitration Act or an Unjustified Intrusion into State Sovereignty?*, 47 MERCER L. REV. 645 (1996); Edmond Seferi, *FAA and Arbitration Clauses – How Far Can it Reach? The Effect of* Allied-Bruce Terminix, Inc. v. Dobson, 19 CAMPBELL L. REV. 607 (1997); Henry C. Strickland, Allied-Bruce Terminix, Inc. v. Dobson*: Widespread Enforcement of Arbitration Agreements Arrives in Alabama*, 56 ALA. LAW. 238 (1995); Scott R. Swier, *The Tenuous Tale of the Terrible Termites: The Federal Arbitration Act and the Court's Decision to Interpret Section Two in the Broadest Possible Manner:* Allied-Bruce Terminix Companies, Inc. v. Dobson, 41 S.D. L. REV. 131 (1996); Jay A. Yurkiw, *Allied-Bruce Terminix Cos. v. Dobson*, 12 OHIO ST. J. ON DISP. RESOL. 223 (1996).

[74]Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996). *See, e.g.*, Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years After* Doctor's Associates, Inc. v. Casarotto, 54 CLEV. ST. L. REV. 249 (2006); David Ling, *Preserving Fairness in Arbitration Agreements: States' Options After* Casarotto, 2 HARV. NEGOTIATION L. REV. 193 (1997); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001 (1996).

[75]The Court reasoned that "[t]he question is not whether in the mind of the court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 567 (1960). In another case the Court explained:

> But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of

grievance machinery, including arbitration, under the collective bargaining agreement ("CBA") avoided the antagonism and bloodshed of company and worker confrontations. The CBA was the basis for self-governance in the workplace.[76] The Court's regard for, and support of, labor arbitration engendered many of the contemporary doctrines of arbitration law, most of which were announced in the *Steelworkers Trilogy*[77]: (1) the recourse to arbitration is based upon the parties' contractual consent; (2) courts enforce arbitration agreements as they are written, *i.e.*, pursuant to their terms; (3) courts decide threshold jurisdictional questions unless the parties clearly agree otherwise; (4) the parties bargain for arbitrator rulings—therefore, merits review is generally excluded from the process of judicial supervision; and (5) given the utility and importance of arbitration, there is a presumption in favor of arbitrability.[78] The decisional content of the *Steelworker's Trilogy* became the model for the FAA's regulation of arbitration.[79]

> solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties . . . .
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> . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). Finally, the Court explained its support for arbitrators:

> [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level – disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). *See also, e.g.*, William B. Gould, IV, *Judicial Review of Labor Arbitration Awards – Thirty Years of the* Steelworkers Trilogy: *The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1989); Ann C. Hodges, *The* Steelworkers Trilogy *in the Public Sector*, 66 CHI.-KENT L. REV. 631 (1990); Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78 (1991); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration From the* Steelworkers Trilogy to Gilmer, 44 HASTINGS L.J. 1187 (1993).

[76]In the Court's view: "[t]he collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective [bargaining] agreement covers the whole employment relationship." *Warrior & Gulf Navigation*, 363 U.S. at 578-79 (citation omitted).

[77]*United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960), form the *Steelworkers Trilogy.* These three cases state the essence of the federal law of labor arbitration. CARBONNEAU, NUTSHELL, *supra* note 1, at 164. The *Trilogy* also established arbitration as the principal method for resolving disputes between union and management arising from collective bargaining agreements. *Id. See also supra* note 75.

[78]AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 648-651 (1986) (summarizing the essential tenets of the judicial doctrine on labor arbitration).

[79]Courts can scrutinize labor arbitration awards for public policy violations. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 304. In *United*

The rules of labor arbitration not only affirmed arbitral autonomy, but also supplied guard rails to counteract possible arbitrator abuse of power. CBA arbitration allowed judicial review of the merit of awards on the basis of arbitrator disregard of the agreed-upon contract—the CBA.[80] Court supervision for manifest disregard of the law limited arbitrator decisional sovereignty. Arbitrators could not simply dispense their own brand of industrial justice. Their rulings needed to stay within the four corners of the collective bargaining agreement established by the union and management.[81] In addition to claims based upon "manifest disregard of the law," the grounds for showing "irrationality," and the "public policy exception" were elaborated to prevent or counter the untoward use of decisional authority by arbitrators.[82] Rogue arbitrators could not denature the foundational instrument in individual adjudications; determinations there had to reflect a basic commitment to essential, agreed-upon principles.

Labor and commercial arbitration, however, were subject to different statutory regimes. Section 301 of the Labor Management Relations Act of 1947 established a preference for the arbitral resolution of labor disputes.[83] Commercial arbitration,

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Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987), the Court noted that the judicial authority to review arbitral awards arises from the right of courts to refuse to enforce immoral or illegal acts. *Id.* at 42. The Court adapted, however, the public policy exception to the federal policy on arbitration. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 305. The Court will only vacate a labor arbitration award when it violates public policy arising from laws and legal precedents, not simply from a diffuse sense of what might constitute public policy. *Id.* Therefore, the judicial supervision of labor arbitration awards conforms to the federal policy favoring arbitration. *Id.*

[80] A labor arbitration award must "draw[] its essence from the collective bargaining agreement." *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. If an arbitrator strays beyond the CBA, a court can vacate the award. CARBONNEAU, NUTSHELL, *supra* note 1, at 171-72. *See also,* Jay E. Grenig, *When Due Process is Due: The Courts and Labor Arbitration*, 1995 DET. C.L. MICH. ST. UNIV. L. REV. 889 (1995); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91 (2000).

[81] CARBONNEAU, NUTSHELL, *supra* note 1, at 171-72.

[82] *See, e.g.*, Mark Berger, *Judicial Review of Labor Arbitration Awards: Practices, Policies and Sanctions*, 10 HOFSTRA LAB. L.J. 245 (1992); Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1988); Jeffrey Alan Goldenberg, *Judicial Review of Labor Arbitration Awards Reinstating Dangerous Employees*, 1990 U. CHI. LEGAL F. 625 (1990); Gould, *supra* note 75; Timothy J. Heinsz, *Judicial Review of Labor Arbitration Awards: The* Enterprise Wheel *Goes Around and Around*, 52 MO. L. REV. 243 (1987); Joan Parker, *Judicial Review of Labor Arbitration Awards:* Misco *and Its Impact on the Public Policy Exception*, 4 LAB. LAW 683 (1988); Mitchell H. Rubinstein, *Altering Judicial Review of Labor Arbitration Awards*, 2006 MICH. ST. L. REV. 235 (2006); William E. Smith, *Judicial Review of Labor Arbitration Awards in Rhode Island*, 3 ROGER WILLIAMS U. L. REV. 165 (1998); and Elizabeth Tenorio, Comment, *Modifying the Standard of Judicial Review of Labor Arbitration Awards: A Comparison to Administrative Review Hearings*, 1997 J. DISP. RESOL. 245 (1997).

[83] The Court further explained "that § 301 enables the federal courts 'to fashion a body of federal law for the enforcement of . . . collective bargaining agreements.' . . . The legislation thereby expressed 'a federal policy that federal courts should enforce. . . agreements [to arbitrate] on behalf of or against labor organization. . . ." CARBONNEAU, THE LAW AND

along with employment and consumer arbitration, were governed by the FAA.[84] There was nonetheless a great deal of interface and borrowing between the two statutory frameworks in terms of decisional doctrines. In fact, courts in labor arbitration rulings first recognized the need for arbitral autonomy and for a unitary national law of arbitration.[85] There was a basic common denominator in the law of arbitration despite the *sui generis* character of these forms of arbitration. Distinguishing them progressively became a formalistic exercise. Any prospective revision of the applicable statutory frameworks should attempt to create a single regime of governance for arbitration given the essential commonality of doctrine.

VI. The Influence of Transborder Arbitration

A series of cases on international litigation and arbitration, which can be dubbed a trilogy in their own right, had a significant impact upon the contemporary development of arbitration law under the FAA. In a number of significant respects, the *Bremen*,[86] *Scherk,*[87] *Mitsubishi*,[88] (and *Vimar*)[89] cases represented a pure policy

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PRACTICE OF ARBITRATION 2007, *supra* note 1, at 301 (*citing* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 451, 455 (1957)). *See also* texts cited *supra* note 82.

[84]Section 1 of the Federal Arbitration Act states that the Act does not apply to employment contract disputes. NUTSHELL, *supra* note 1, at 59. *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), was decided in disregard of the express statutory text and lead to the creation of the field of employment arbitration. CARBONNEAU, NUTSHELL, *supra* note 1, at 28.

[85]The Sixth Circuit explained:

> [T]he exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are. We believe this interpretation comports with the actual language of the statute and the apparent intent of the Congress which enacted it. The meaning of the phrase 'workers engaged in foreign or interstate commerce' is illustrated by the context in which it is used, particularly the two specific examples given, seamen and railroad employees, those being two classes of employees engaged in the movement of goods in commerce.

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 600–01 (6th Cir. 1995). Thus, this narrow reading of FAA § 1, and the holding in *Gilmer*, 500 U.S. 20, allowed employment contracts to be submitted to arbitration.

[86]M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). *See* Elizabeth Jackson, *Recent Development, Civil Procedure: The Enforceability of Forum Selection Clauses under* M/S Bremen v. Zapata Off-Shore Co., 25 AM. J. TRIAL ADVOC. 377 (2001).

[87]Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). *See* Gail Elaine Papermaster, Note, *Will the Courts* Scherk *the Little Old Lady in Dubuque? The Impact of* Scherk v. Alberto-Culver *on the Individual Investor in a Global Securities Market*, 21 TEX. INT'L L.J. 129 (1985).

[88]Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). *See, e.g.*, Charles H. Brower, II, Mitsubishi*, Investor-State Arbitration, and the Law of State Immunity*, 20 AM. U. INT'L L. REV. 907 (2005); Lisa M. Ferri, Note, *International Arbitration-Commerce-Arbitrability of Antitrust Claims Arising from International Commercial Disputes Recognized Under Federal Arbitration Act* – Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985)*, 17 SETON HALL L. REV. 448 (1987); Ronald E. M. Goodman, Note, *Arbitrability and Antitrust:* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 23 COLUM. J. TRANSNAT'L L. 655 (1985); Monroe Leigh, Judicial Decision,

play by the Court. In effect, the Court took it upon itself to adapt the U.S. legal system to the exigencies of international (now global) commerce.[90] It fulfilled its legislative design by exempting international transactions from the reach of domestic law, which supplied a purely internal form of regulation that often conflicted with

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Federal Arbitration Act – Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Arbitrability of Antirust Claims Arising From an International Transaction, 80 AM. J. INT'L L. 168 (1986); Robert B. von Mehren, *From* Vynior's *Case to* Mitsubishi*: The Future of Arbitration and Public Law*, 477 PRAC. LAW INST./COMMERC. LAW & PRAC. COURSE HANDBOOK SERIES 177 (1988); Lauri Newton, Comment, *Arbitration and Antitrust: A Leg up for International Arbitration [*Mitsubishi Motors Corp. v. Soler Chrsyler-Plymouth, Inc., *105 S. Ct. 3346 (1985)]*, 25 WASHBURN L.J. 536 (1986); Jill A. Pietrowski, Comments, *Enforcing International Commercial Arbitration Agreements – Post*-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 36 AM. U. L. REV. 57 (1986); Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of* Mitsubishi, 39 VA. J. INT'L L. 647 (1999); Lisa Sopata, Note, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*: International Arbitration and Antitrust Claims*, 7 NW. J. INT'L L. & BUS. 595 (1986); Michael R. Voorhees, *International Commercial Arbitration and the Arbitrability of Antitrust Claims:* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 14 N. KY. L. REV. 65 (1987); *Tenth Circuit Refines Arbitrability of Antitrust Claims Under* Mitsubishi, 6 WORLD ARB. & MEDIATION REP. 110 (1995).

[89]Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, Her Engines, 515 U.S. 528 (1995). *See, e.g.*, Elizabeth A. Clark, Note & Comment, *Foreign Arbitration Clauses and Foreign Forum Selection Clauses in Bills of Lading Governed by COGSA:* Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 1996 BYU L. REV. 483 (1996); Stuart C. Gauffreau, Note, *Foreign Arbitration Clauses in Maritime Bills of Lading: The Supreme Court's Decision in* Vimar Seguros Y Reaseguros v. M/V Sky Reefer, 21 N.C. J. INT'L L. & COM. REG. 395 (1996); C. Christine Fahrenback, Note, Vimar Seguros Y Reaseguros v. M/V Sky Reefer*: A Change in Course: COGSA Does Not Invalidate Foreign Arbitration Clauses in Maritime*, 29 AKRON L. REV. 371 (1996); Kimberly D. Gilbert, Case Comment, *Conflicts of Law: Validating Foreign Arbitration Clause in Maritime Bill of Lading* – Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, *29 F.3d 727 (1st Cir. 1994), aff'd, 115 S. Ct. 2322 (1995)*, 29 SUFFOLK U. L. REV. 265 (1995); Cherie L. Lacour, *The Enforceability of Foreign Arbitration Clauses Under the Carriage of Goods by Sea Act After* Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 4 TULSA J. COMP. & INT'L L. 127 (1996); Brandon L. Milhorn, Note, Vimar Seguros Y Reaseguros v. M/V Sky Reefer*: Arbitration Clauses in Bills of Lading Under the Carriage of Goods by Sea Act*, 30 CORNELL INT'L L.J. 173 (1997); Mark S. Rubin, Note, *The Validity of Foreign Arbitration Clauses in Bills of Lading Governed by COGSA:* Vimar Seguros Y Reaseguors, S.A. v. M/V Sky Reefer, 19 TUL. MAR. L.J. 499 (1995). *See also* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003).

[90]The U.S. Supreme Court has never decided a case directly involving the New York Convention. The U.S. ratification of the Convention in 1970 did inspire the Court to establish American rules of private international law, including those applying to international commercial arbitration. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 354-365. *See Bremen*, 407 U.S. 1; *Scherk*, 417 U.S. 506; *Mitsubishi*, 473 U.S. 614; *Vimar*, 515 U.S. 528. *See also, e.g.*, John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U. J. INT'L L. & POL. 361 (1986); Daniel A. Losk, Note, *Section 1782(A) After* Intel*: Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 CARDOZO L. REV. 1035 (2005); Pietrowski, *supra* note 88; *Practice and Perspective*, 9 WORLD ARB. & MEDIATION REP. 137 (1998).

domestic schemes in other, implicated countries. It achieved stability in the international marketplace by allowing international merchants to self-regulate through contract. In the Court's view, there was no other effective source of law at the transborder level. National courts contributed to the international rule of law by enforcing contracts as written. This subservience included enforcing arbitration agreements to which the parties had agreed.[91]

The U.S. Supreme Court's elaboration of the U.S. rules of private international law had a significant bearing upon the content and ultimate development of U.S. arbitration law. The Court's rulings recognized the special adjudicatory needs of international transactions and the utility of arbitration in satisfying these needs. Effective adjudication required dislodging national judicial jurisdiction, and effective adjudication was always better than elaborate but ineffective adjudication. Also, the elevated stature of some of the affected rights did not preclude the reference to arbitration because a policy of preclusion would have undermined the rule of law. The Court concluded, therefore, that the FAA sustained the arbitrability of statutory claims in a transborder (and later in a domestic) context.[92]

The Court's endorsement of international commercial arbitration eventually coalesced with arbitration's expanding domestic jurisdictional reach. To promote its policy objectives, the Court soon forgot how unique it believed transborder processes were when it initially decided the international cases. It simply integrated the international rule without any notice or fanfare into the domestic decisional law on arbitration.[93] Unlimited subject-matter arbitrability thereby became a basic principle of U.S. arbitration law.[94] In fact, unless the arbitration agreement itself provided expressly otherwise, a broad arbitration agreement established, as a matter of law,

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[91]The Court explained: "[t]he threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause." *Bremen*, 407 U.S. at 12. The Court ruled in favor of enforcing the arbitration agreement stating that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 516-17. This clearly evidenced the Court's intent to favor the enforcement of contracts for international commercial arbitration.

[92]The Court quoted *Mitsubishi* stating, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the Act in controversies based on statutes." Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (*citing Mitsubishi*, 473 U.S. at 626-27) (internal quotation marks omitted).

[93]*McMahon* held that claims under the Exchange Act and RICO (Racketeer Influenced and Corrupt Organizations Act) were arbitrable. *McMahon*, 482 U.S. 220; CARBONNEAU, NUTSHELL, *supra* note 1, at 149. The integration of international arbitral principles into U.S. law continued in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

[94]To differing degrees, *Scherk* and *Mitsubishi* held that international arbitrators could rule on statutory claims that arose in the context of international contracts. *Scherk* focused more upon the enforcement of the arbitral clause. CARBONNEAU, NUTSHELL, *supra* note 1, at 115. The Court eventually ignored the international character of these holdings, and converted the idea of statutory arbitrability into a general principle of U.S. arbitration law. *Id. See, e.g.*, *McMahon*, 482 U.S. 220; *Rodriguez de Quijas*, 490 U.S. 477.

that the parties had submitted both statutory and contractual claims to arbitration.[95] The principle of statutory arbitrability was incorporated into domestic law despite its origins in international commerce and the FAA's deafening silence on the issue. The U.S. law of arbitration became absolutely unitary, merging state and federal law as well as domestic and international doctrines on arbitration. Moreover, as noted earlier,[96] the core principles of labor arbitration were now embedded in the U.S. law of arbitration: Freedom of contract prevailed including the contract-established duty to arbitrate; parties could remove the courts' ability to decide jurisdictional challenges and delegate that power to arbitrators; and courts avoided trespassing into the domain of arbitration by engaging in limited and narrow supervision of arbitral agreements and awards.[97]

VII. THE NEW FORMS OF ARBITRATION

As it developed its new mission, arbitration's methodology of dispute resolution became conversant with nearly all civil disputes. In the securities context, arbitration was no longer just an inside-the-business mechanism to resolve professional disputes between brokerages and exchanges. Rather, it became an industry-wide dispute resolution process applying to employees and investors as well.[98] In effect, in order to work in the business or to buy shares, individuals were obligated to agree to arbitrate their disputes. Acquiescence to arbitration was the price of admission. The public regulation of the financial marketplace was subordinated to the policy favoring arbitration.

Employment arbitration also became well-established.[99] The employment contract exception in FAA § 1 was narrowed to a small group of employees.[100] The rule of statutory arbitrability even allowed civil rights claims that arose in the workplace to be decided by arbitration.[101] Nonetheless, employment arbitration gave

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[95]The author previously noted in his work:

> Therefore, a broad reference to arbitration ("any dispute arising under this contract") encompasses—as a matter of law—contract problems relating to performance, delivery, consideration, conformity to specifications, excuse and other defenses, as well as statutory claims pertaining to the public regulation of commercial conduct (bankruptcy, antitrust, securities, and tax). A broad reference to arbitration also encompasses civil rights claims.

CARBONNEAU, NUTSHELL, *supra* note 1, at 16.

[96]*Steelworkers Trilogy*, *supra* notes 77-79.

[97]*Id.*

[98]Arbitration has long been used to resolve disputes between brokers and stock exchanges. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 248. Securities arbitration has now been extended to include disputes between customers and employees. *Id. See* Wilko v. Swan, 346 U.S. 427 (1953); *McMahon*, 482 U.S. 220; *Rodriguez de Quijas*, 490 U.S. 477.

[99]*See generally*, THOMAS E. CARBONNEAU, EMPLOYMENT ARBITRATION 2d (JurisNet, LLC 2006) (hereinafter CARBONNEAU, EMPLOYMENT ARBITRATION).

[100]*See supra* note 85.

[101]Claims involving rights under the Civil Rights Act of 1964 are arbitrable. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 355. The Court in *Gardner-Denver* allowed an employee access both to an arbitral and a judicial forum

rise to the most controversial issue in the field of arbitration, namely, whether adhesionary and unilateral agreements to arbitrate were legally enforceable contracts.[102] At least for a vocal minority of courts, unconscionability became an effective barrier to arbitration in such employment circumstances.[103] The challenge generated debate about the distribution of the costs in arbitration and the mutual character of the obligation to arbitrate.[104] Dissenting views gave rise to a few safeguarding modifications, like the payment of all arbitral costs by the stronger party in some cases.[105] The U.S. Supreme Court, however, did not share these reservations about the legitimacy of arbitration.[106]

Arbitration also became a fixture in consumer transactions.[107] Many of the fairness issues that surfaced in connection with employment arbitration also emerged

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to resolve statutory claims, even though the CBA contained an anti-discrimination provision and a valid agreement to arbitrate. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The *Gilmer* court, however, advanced a different rule more protective of arbitration than the vindication of legal rights. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[102]The issue relating to the enforceability of unilateral adhesion contracts containing arbitration agreements was addressed in *Harris.* The court in *Harris* found that such contracts were fully and unequivocally enforceable under the Federal Arbitration Act. Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3rd Cir. 1999).

[103]CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 308 nn. 35–37.

[104]CARBONNEAU, NUTSHELL, *supra* note 1, at 190–93 (*discussing* Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79 (2000)); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003); Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001); Shankle v. B-G Maintenance Mgmt. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999); Cole v. Burns Int'l Security Servs., 105 F.3d 1465 (D.C. Cir. 1997); Fuller v. Pep Boys-Manny, Moe & Jack of Del., Inc., 88 F. Supp. 2d 1158 (D. Colo. 2000)).

[105]The court in *Cole* ruled that the payment of arbitral costs by the employer was essential to the enforceability of an arbitration agreement. 105 F.3d 1465. Forcing the employee to pay all or part of the arbitrator's fee would constitute a de facto violation of the employee's statutory rights. *Id.* This decision was followed by the ruling in *Shankle*, holding that arbitration agreements are void when the arbitral fees were cost prohibitive to the employee. 163 F.3d 1230.

[106]The Supreme Court stated that the fact that a consumer bears some of the costs of the arbitral process,

> [a]lone is plainly insufficient to render [the arbitration agreement] unenforceable. To invalidate the agreement would undermine the liberal federal policy favoring arbitration agreements and would conflict with this Court's holdings [for example,] that the party resisting arbitration bears the burden of proving that Congress intended to preclude arbitration of the statutory claims at issue. Thus, a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs.

Green Tree, 531 U.S. at 81 (citations omitted). *See also* Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002); *Bradford*, 238 F.3d 549; Kevin C. Clark, *The State of Arbitral Fees After* Green Tree Financial*: Uncertainty and Contradiction Demands Further Guidance from the Supreme Court*, 3 PEPP. DISP. RESOL. L.J. 133 (2003).

[107]*See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000); Engalla v. Permanente Med.

in the decisional law on consumer arbitration. Here, the issue of arbitrability centered upon the compromise of remedies, especially the consumer's ability to engage in class action relief.[108] Would a waiver of class action relief, impliedly or expressly, lead to the non-enforcement of arbitration agreements? Many courts did not think so.[109]

VIII. ARBITRATOR SOVEREIGNTY

The Court's first step in fostering the autonomy of arbitration was to federalize the applicable law—the exclusive reference to the FAA for the applicable law made for a uniform law and a single set of applicable principles. The second step in erecting the doctrine was to give arbitrators the greatest possible jurisdictional range and, consequently, to minimize the role of courts. The decisional sovereignty of the arbitrator was achieved in three landmark opinions. It was introduced in *First Options of Chicago, Inc. v. Kaplan*,[110] and firmly established in *Howsam v. Dean Witter Reynolds*,[111] and *Green Tree Financial Corp. v. Bazzle*.[112]

Group, Inc., 938 P.2d 903 (Cal. 1997); Kloss v. Edward D. Jones & Co., 54 P.3d 1 (Mont. 2002); Brower v. Gateway 2000, Inc., 676 N.Y.S. 2d 569 (N.Y. App. Div. 1998).

[108]The Court in *Bazzle* held that the decision whether an arbitration agreement permitted class action litigation resided with the arbitrator once the court determined that a valid contract of arbitration existed. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003). The ruling in *Strand* provided that arbitration agreements prohibiting class action lawsuits were enforceable as long as the consumers' substantive rights were not violated. Strand v. U.S. Bank Nat'l Assoc. ND, 693 N.W.2d 918 (N.D. 2005). Other federal courts have also upheld waivers of class actions in arbitral agreements. *See, e.g.*, Provencher v. Dell, Inc., 409 F. Supp. 2d 1196 (C.D. Cal. 2006); Discover Bank v. Superior Ct., 113 P.3d 1100 (Cal. 2005).

[109]*See supra* note 108.

[110]First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). *See, e.g.*, Adriana Dulic, First Options of Chicago, Inc., v. Kaplan *and The* Kompetenz-Kompetenz *Principle*, 2 PEPP. DISP. RESOL. L.J. 77 (2002); Kevin Michael Flowers, *Recent Developments:* First Options of Chicago, Inc. v. Kaplan, 12 OHIO ST. J. ON DISP. RESOL. 801 (1997); Natasha Wyss, First Options of Chicago, Inc. v. Kaplan*: A Perilous Approach to* Kompetenz-Kompetenz, 72 TUL. L. REV. 351 (1997).

[111]Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002). *See, e.g.*, Megan E. Byrnett, *Howsam v. Dean Witter Reynolds, Inc.*, 19 OHIO ST. J. ON DISPUTE RESOL. 739 (2004); Robert S. Clemente & Karen Kupersmith, *A Gateway – and Not a Dead End: The Six-Year Eligibility Rule and* Howsam, 1 SEC. ARB. 281 (2003); Michael A. Gross, *Pre-hearing Motions in the Post-*Howsam *Era*, 1 SEC. ARB. 203 (2003); James Hughes, *Applying the Eligibility Rule in Securities Arbitration: Resolving Circuit Court Conflict Regarding the Proper Role of Arbitrators and Courts*, 2003 J. DISP. RESOL. 565 (2003); Daniel Q. Posin, *Further Analysis of* Howsam v. Dean Witter *Pending Before the U.S. Supreme Court*, 13 WORLD ARB. & MEDIATION REP. 195 (2002); William Parker Sanders, Howsam v. Dean Witter Reynolds, Inc.*: The United States Supreme Court Decides that Arbitrators, Not the Courts, Determine Procedural Questions Under the NASD Code of Arbitration*, 2 J. AM. ARB. 199 (2003); Peter J. Smith, IV, *Investors Win:* Howsam v. Dean Witter Reynolds, Inc. *Makes Entering Arbitration Quicker, Easier, and Less Expensive*, 4 PEPP. DISP. RESOL. L.J. 127 (2003); Thomas J. Stipanowich, Howsam, Humana *and* Bazzle*: Recent Cases That May Affect Your Arbitration/ADR Practice*, 21 ALTERNATIVES TO HIGH COST LITIG. 51 (2003).

[112]Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003). See, *e.g.*, Dana T. Blackmore, *The Class Action Arbitration Dilemma–*Bazzle v. Green Tree Financial Corp.*: Does the FAA*

Although FAA § 3 provided for the judicial resolution of threshold jurisdictional questions, the *Kaplan* Court gave parties the contractual prerogative of delegating that authority to arbitrators.[113] Moreover, once a court discovered that a contract of arbitration was involved, all other matters pertaining to the arbitration (but for the enforcement of the award) were decided by the arbitrators.[114] The combined effect of *Kaplan, Howsam,* and *Bazzle*—assuming parties invoked their prerogative under *Kaplan*—was to relegate the judicial role in arbitration to the back-end of the process. Courts, moreover, could review arbitral awards only on a minimal basis.[115]

Preclude Class Action Arbitration When the Agreement is Silent?, 2 J. AM. ARB. 19 (2003); Kristen M. Blankley, *Arbitrability After* Green Tree v. Bazzle*: Is There Anything Left for the Courts?*, 65 OHIO ST. L.J. 697 (2004); Jonathan R. Bunch, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-wide Arbitration*, 2004 J. DISP. RESOL. 259 (2004); Erin Davies, Green Tree Financial Corp. v. Bazzle, 20 OHIO ST. J. ON DISP. RESOL. 597 (2005); Michael Oliver Eckard, *The United States Supreme Court's Indecision in* Green Tree Financial Corporation v. Bazzle*: A Class Act*, 55 S.C. L. REV. 489 (2004); Matthew Eisler, *Difficult, Duplicative and Wasteful?: The NASD's Prohibition of Class Action Arbitration in the Post-*Bazzle *Era*, 62 BUS. LAW. 1059 (2007); Samuel Estreicher & Michael J. Puma, *Arbitration and Class Actions After* Bazzle, 58 DISP. RESOL. J. 13 (2003); Robert Jason Herndon, *Mistaken Interpretation: The American Arbitration Association*, Green Tree Financial Corporation v. Bazzle*, and the Real State of Class-Action Arbitration in North Carolina*, 82 N.C. L. REV. 2128 (2004); Alan S. Kaplinsky & Mark J. Levin, *Arbitration Update:* Green Tree Financial Corp. v. Bazzle—*Dazzle for* Green Tree*, Fizzle for Practitioners*, 59 BUS. LAW. 1265 (2004); Kevin M. Kennedy & Bethany Appleby, Green Tree Financial Corp. v. Bazzle*: A New Day for Class Arbitrations?*, 23 FRANCHISE L.J. 84 (2003); Greg Kilby, *Leaving a Stone Unturned – The Unanswered Question from* Green Tree Financial Corp. v. Bazzle*: Does the Federal Arbitration Act Permit Classwide Arbitration?*, 59 U. MIAMI L. REV. 413 (2005); Alissa L. Klein, *The Battle Over the Gateway: The United States Supreme Court Holds that an Arbitrator is to Decide Class Action Issue in* Green Tree Financial v. Bazzle*,* 2 J. AM. ARB. 347 (2003); Scott L. Nelson, Bazzle, *Class Actions, and Arbitration: an Unfinished Story*, 2 SEC. ARB. 307 (2005); Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and* Green Tree Financial Corp. v. Bazzle, 41 CAL. W. L. REV. 1 (2004); Zack Zuroweste, *Like a Skunk at a Lawn Party: The* Bazzle *Decision Hits Corporate America*, 6 J. AM. ARB. 19 (2007).

[113]Without ever referring to the doctrine by name, the Court held that parties could contractually agree to delegate the authority to rule on jurisdictional challenges to the arbitrators. *Kaplan*, 514 U.S. at 942-43. *See* CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 2007, *supra* note 1, at 192.

[114]The Court explained its passive role stating that "[g]iven these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide." *Bazzle*, 539 U.S. at 453.

[115]The author previously noted that:

> Under the FAA, a court is required to confirm an award 'unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of the FAA.' Section 10 provides for the vacatur of awards on limited grounds (corruption, fraud, or undo means; evident partiality; procedural misconduct; or excess arbitral authority).

CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION, *supra* note 3, at 557-58 (*citing* Borop v. Toluca Pacific Secs. Corp., No. 97 C 4591, 1997 WL 790588 (N.D. Ill. Dec. 17, 1997)). *See also, e.g.*, Rodriguez v. Prudential-Bache Sec., 882 F. Supp. 1202 (1995); Remney v. PaineWebber, Inc., 32 F.3d 143 (4th Cir. 1994); Eljer Mfg. v. Kowin

Arbitrators, therefore, functioned with great freedom; they were essentially unfettered in reaching adjudicatory decisions. The courts became passive actors in their interaction with arbitration essentially deferring to the arbitrator's exercise of authority.

IX. THE LEGITIMACY OF THE FEDERAL POLICY ON ARBITRATION

The Court's elaboration of a "strong federal policy favoring arbitration"[116] raises at least two sets of contradistinctive questions. On the one hand: What impact does the policy have on the legitimacy of society and the Bill of Rights? Is resolving the so-called litigation crisis by denying access to courts equivalent to reducing the problems associated with criminal incarceration by increasing the use of the death penalty? How can the Court declare unfair, unilateral contracts to be mutual bargains? Is the policy on arbitration ultimately destructive of legality and the integrity of adjudication?

On the other hand: Is there a single version of public justice that must of necessity be fully implemented in every case? Are cumbersome, protracted, expensive, and fundamentally adversarial proceedings indispensable to the equation for justice? Is it imperative that society provide its members with public courts of law? Is functional and affordable adjudication not the only true justice? Does the implementation of law trump its mythology?

Even more pointedly: Is the federal policy on arbitration analogous in some respects to "separate but equal"? Does it reflect the use of legal doctrine to promote an unlawful circumstance—here, the elimination of the right to judicial recourse? At the time of its pronouncement, "separate but equal" had the trappings of an ordinary legal doctrine. It, however, concealed a pernicious objective. It was designed to give racism a palatable look, to make it appear lawful. Eventually, the Court and the rest of society understood that, in a racial context, separate was never equal and was never intended to be. In a like manner, the Court's endorsement and promotion of arbitration could be intended to mask an essential failing in society and to give a lawful appearance to an invidious design contrived by the Court and other powerful social actors.

Suspicions are raised because some parts of the Court's arbitration doctrine are based upon self-evident falsehoods—distortions accepted as truth only because the Court says they are true.[117] Although the Court may argue otherwise, in fact, arbitration does not guarantee parties the same rights they have in court. Arbitration

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Dev. Corp., 14 F.3d 1250 (7th Cir. 1994); Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775 (11th Cir. 1993); Fine v. Bear, Stearns, & Co., 765 F. Supp. 824 (S.D.N.Y. 1991).

[116] *See, e.g.*, E.E.O.C. v. Waffle House, Inc., 534 U.S. 279 (2002); J. Alexander Secs., Inc. v. Mendez, 511 U.S. 1150 (1994); Jacksonville Bulk Terminals, Inc. v. Int'l Longshoreman's Ass'n, 457 U.S. 702, 708 (1982); Gateway Coal. Co. v. United Mine Workers of Am., 414 U.S. 368, 382 (1974).

[117] In overruling *Wilko*, Justice Kennedy asserted that "arbitration is merely a form of trial to be used in lieu of a trial at law." Rodriquez de Ouijas v. Shearson/Am. Express, 490 U.S. 477, 480 (1989) (*citing* Wilko v. Swan, 346 U.S. at 433 (1960)). Additionally, in *Rodriguez*, the Court stated that: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 481 (*citing* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

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is designed to abbreviate judicial proceedings to reduce the cost of litigation and to make adjudication workable. Arbitration provides for reasonable adjudication and rights protection; they are not those supplied by courts. Despite the Court's contrary proclamation, arbitration is not a mere form of trial that has no impact upon substantive rights.[118] The handshake in arbitration differs from the one in court. The only means of providing equivalent rights is to judicialize arbitration which then robs arbitration of many of its procedural advantages. The circularity of the reasoning would then be complete.

The ruling in *Plessy v. Ferguson*[119] was designed to implement a hate principle. A hate principle, however, does not appear to be at work in the federal policy on arbitration. There seems to have been an ill-defined floating desperation within the Court over the years to find some sort of solution to the problem in American society of access to justice. In a haphazard manner, that objective, in various forms, circumstances, and intensities, was given expression in litigation on the FAA. These encounters (like the emergence of life itself on the planet) eventually gave rise to a complete and viably shaped legal doctrine, the momentum of which has yet to subside. A conspiracy among highly placed institutional actors for nearly half a century is not as convincing as the explanation that a set of piecemeal adjustments eventually acquired its own *raison d'etre* and a sufficient allegiance among the Court's shifting membership. This speculation, however, is belied by Judge Medina's prophetic insights in *Robert Lawrence*.[120]

At worse, the consequences of the federal policy on arbitration—whether deliberately or innocently—may affect weaker social actors disproportionately. Employees and consumers may lose rights only available in court or have them abridged or compromised. Do weaker citizens, however, really bear this cost alone? If so, is the unfairness warranted because everyone benefits from a more efficient and economical society? In the end, although the Court aspired only to influence the social role and standing of adjudication, the judicial doctrine on arbitration may represent a policy preference in favor of capitalism and economic prosperity over all other social values and objectives. Arbitration may have discounted litigation and put it on "sale." The economies would be an unintended, albeit necessary, benefit of the Court's program to make adjudication more accessible.

"Suborning" capitalism is hardly a crime. In fact, it is—in all likelihood—a social good that provides society-wide prosperity. Through statements of legal doctrine on arbitration, the U.S. Supreme Court was trying to make the Bill of Rights work and remain relevant in American society. The arbitral barrier to judicial adjudication applies equally to all contracting parties and does not discriminate between them or provide "other" processes for some of them. Reducing the cost of adjudication and providing better access to everyone, as well as quicker binding

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[118]*See* CARBONNEAU, NUTSHELL, *supra* note 1, at 4 (*citing Kaplan*, 514 U.S. 938; *Howsam*, 537 U.S. 79; *Bazzle*, 539 U.S. 444).

[119]Plessy v. Ferguson, 163 U.S. 537 (1896).

[120]Justice Medina wrote, "[w]e think it is reasonably clear that the Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements. . ." Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402, 406 (2d Cir. 1959).

finality, cannot be described as a social evil. A social necessity in civilized society would be a more apposite and accurate description.

X. EVALUATING THE FEDERAL POLICY

The U.S. Supreme Court's policy on arbitration has been elaborated through some forty opinions over forty years.[121] The policy is not overtly, or even impliedly, a configuration of judicial doctrine motivated by political ideology. It spans many different tilts to the Court's composition and its many different personalities. In recent times, Breyer and Ginsburg have authored as many opinions as Stevens, Kennedy, or the late Chief Justice. Justice Douglas appears to have been the most ardent High Court opponent to arbitration, but on the basis of preserving the integrity of law and institutional relationships.[122] There was no "penumbra" to his assessment

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[121]*See, e.g.*, Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. ____ (2008) (holding that the statutory grounds for the vacatur of awards are exclusive); Preston v. Ferrer, 128 S. Ct. 978 (2008) (affirming the Court's previous decision in Buckeye Check Cashing); Buckeye Check Cashing, Inc v. Cardegna, 546 U.S. 440 (2006); Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003); PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); E.E.O.C. v. Waffle House, Inc., 534 U.S. 279 (2002); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Green Tree Fin. Corp. – Ala. v. Randolph, 531 U.S. 79 (2000); Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998); Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681 (1996); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); United States v. Lopez, 514 U.S. 549 (1995); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995); U.S. Dept. of Treasury v. Fabe, 508 U.S. 491 (1993); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Asahi Metal Indus. Co., Ltd. v. Superior Court of Ca., 480 U.S. 102 (1987); United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Scherk v. Alberto-Culver CO., 417 U.S. 506 (1974); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Commonwealth Coatings Corp. v. Cont'l Casualty Co., 393 U.S. 145 (1968); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); Berndardt v. Polygraphic Co., 350 U.S. 198 (1956); and Wilko v. Swan, 346 U.S. 427 (1953).

[122]Justice Douglas explained his opposition to arbitration stating that:

> An arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply our law. We recognized in *Wilko* that there is no judicial review corresponding to review of court decisions. The extensive pretrial discovery provided by the Federal Rules of Civil Procedure for actions in district court would not be available. And the wide choice of venue provided by the 1934 Act, [] would be forfeited. The loss of the proper judicial forum carries with it the loss of substantial rights.

Scherk v. Alberto-Culver Co, 417 U.S. 506, 532 (1974) (Douglas, J., dissenting) (citations omitted).

of arbitration and its inferiority to judicial litigation.[123] The only real challenge to the current policy came in *Volt Information Sciences*[124] in which the views of would-be conservative Justices, antithetical to the enforcement of an arbitration agreement, prevailed over a would-be liberal dissent to maintain the favorable judicial policy intact. Finally, an admittedly conservative justice—Justice Thomas—has been the most vociferous critic of federal preemption and expanding the reach of the FAA to state courts.[125] Both are essential to the strong federal policy in favor arbitration.

Politics and ideology do not seem to inform the Court's decisional law on arbitration. Neither quiet moneyed interests nor vocal special interest groups have imposed an agenda on, or influenced, the Court. The policy favoring arbitration appears to be a purely judicial policy, instituted to achieve the ends of the legal system. Some of the most powerful lawyers in American society admitted that the judicial process had failed in some significant respects. In a politically contentious

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Justice Black noted:

> And I am fully satisfied that a reasonable and fair reading of that Act's language and history shows that both Congress and the framers of the Act were at great pains to emphasize that nonlawyers designated to adjust and arbitrate factual controversies arising out of valid contracts would not trespass upon the courts' prerogative to decide the legal question of whether any legal contract exists upon which to base an arbitration.

Prima Paint Corp. v. Food & Conklin Mfg. Co., 388 U.S. 395, 407-408 (1967) (Black, J., dissenting).

[123]*Prima Paint*, 388 U.S. 395. Justice Black, with whom Justice Douglas joined in dissent, stated: "[i]t seems to be what the Court thinks would promote the policy of arbitration. I am completely unable to agree to this new version of the Arbitration Act, a version which its own creator in *Robert Lawrence* practically admitted was judicial legislation." *Id*. at 425 (emphasis added).

[124]Volt Info. Sciences v. Bd. of Tr. Leland Stanford Jr. Univ., 489 U.S. 468 (1989). *See, e.g.*, Howard W. Ashcraft, Jr., Volt v. Board of Trustees*: Construction Arbitration and the Making of a Federal Case*, 8 CONSTRUCTION LAW 1 (1988); Arthur S. Feldman, Note, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*: Confusing Federalism with Federal Policy Under the FAA*, 69 TEX. L. REV. 691 (1991); *An Unnecessary Choice of Law:* Volt, Mastrobuono*, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250 (2002).

[125]Justice Thomas continued his opposition to arbitration stating that:

> In short, we have never actually held, as opposed to stating or implying in dicta, that the FAA requires a state court to stay lawsuits brought in violation of an arbitration agreement covered by § 2.
>
> Because I believe that the FAA imposes no such obligations on state courts, and indeed that the statute is wholly inapplicable in those courts, I would affirm the Alabama Supreme Court's judgment.

Allied-Bruce Terminex, Inc. v. Dobson, 513 U.S. 265, 297 (1995) (Thomas, J., dissenting).

Justice Thomas dissented again in *Mastrobuono* stating:

> [W]e concluded that the Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." As a result, we interpreted the choice-of-law clause "to make applicable state rules governing the conduct of arbitration" even if a specific rule itself hampers or delays arbitration.

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 65 (1995) (Thomas, J., dissenting) (citations omitted).

world in which resource allocation was very problematic, they set about finding a non-tax-supported solution to the provision of adjudicatory services in society. The Court found its solution in arbitration.

The Court appears to have been motivated exclusively by a desire to fulfill its responsibility to the rule of law—to the provision of effective legal and juridical services in American society. The judicial policy responded to a variety of needs in society. Functional adjudication evidently advances business interests. It is indisputable that business interests find aspects of the current legal process frustrating, unfair, and counterproductive—amounting to a type of invisible tax on commercial activity. These aspects include class action litigation, the attribution of punitive damages, jury determinations, and the use of the litigation process to force or "extract" settlements.[126] It is equally uncontestable that law is necessary to the proper operation of the marketplace. The order, predictability, and stability that result from a functional legal process make commercial transactions, profit, employment, and development possible. The rule of law is also instrumental to an individual's rights and personal allegiance to society. There is no other solution to irreconcilable conflict than even-handed justice. History makes it clear that the right to redress grievances is instrumental to social civilization.[127] The goal of contemporary democratic society is to preserve individual rights, achieve economic prosperity, and allow for orderly transitions in political power. This is the enterprise that the Court is attempting to sustain by replacing judicial litigation with arbitral adjudication in civil disputes and essentially relegating court proceedings to criminal prosecutions that directly affect individual civil liberties or to cases that involve highly divisive social issues.

The only real flaw in the decisional edifice is the issue of how the obligation to arbitrate is contracted. Coercive recourse by the weaker party contravenes traditional American notions of fairness. The weakness in the Court's policy is that few people would voluntary surrender the publicly known (the courts) for the

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[126]Corporate managers assess litigation in terms of its monetary costs and impact upon company time and resources. Generally, it is better to deal with would-be nuisance or potentially catastrophic litigation as economically as possible. Judicial litigation also exposes companies to potentially limitless liability. Juries, especially in the state of Mississippi, favor the "underdog" plaintiff against established interests. *See generally* Rand Institute For Civil Justice, Juries and Verdicts, http://www.rand.org/icj/pubs/juries.html. For complete books and articles on Juries, see http://www.questia.com/library/law/juries.jsp. The U.S. Supreme Court itself disfavors punitive damages, perceiving them as an insufficient instrument of regulation. *See Supreme Court Cases and Decisions*, Philip Morris v. Williams, N.Y. TIMES, http://www.nytimes.com/ref/washington/scctuscases_PUNITIVEDAMAGES.HTML; *Justices to Examine Punitive Damages in Exxon Oil Spill*, WASHINGTON POST, http://www.Washington post.com/up-dyn/content/article/2007/10/29/AR2007102900779.html; Bob Egelko, SAN FRANCISCO CHRONICLE, *In 5-4 ruling, Supreme Court curbs punitive damages* (Feb. 21, 2007), http://www.SFGate.com/cgi-bin/article. *See also* THOMAS J. COLLIN, PUNITIVE DAMAGES AND BUSINESS TORTS: A PRACTITIONER'S HANDBOOK (1998).

[127]Japan is something of an exception in that social hierarchy and political bureaucracy are the primary forces of society, but law remains at least relatively significant. Hitler, and now Chavez, are the only two recent examples of the perversion of the rule of law by manipulating the process of democracy to establish duly-elected dictatorships. Chavez, however, was unable to persuade the Venezuelan electorate. A few Roman emperors might also qualify for this dubious accolade.

privately unknown (arbitration). The problem is apparent in employment and consumer arbitration, fields that have generated the most strident anti-arbitration litigation.[128] In articulating its policy, the Court was faced with a dilemma of allowing for contract freedom in the recourse to arbitration or indirectly mandating arbitration. Full contract freedom meant most employees and consumers would choose to trust the courts (or, at least, take a long time to adjust to the new remedy), thereby defeating the policy imperative of providing society-wide access to workable justice. Fostering arbitration, therefore, meant abridging individual contract rights and coercing participation in the process. The economically superior actor would impose the agreement to arbitrate in an industry-wide fashion. Therefore, freedom of contract alone could not bring about the revolution; abridgement of individual rights became an administrative imperative to establishing the policy on arbitration.

The Court enforced adhesion contracts as if they were bilateral contracts.[129] Undemocratic and possibly overreaching, the strong federal policy favoring arbitration was made acceptable by proclaiming that the contract of arbitration, even though the product of a single party, was—as a matter of law—equally in each party's best interest.[130] Institutional actors avoided the negative aspects of judicial adjudication, especially its disruptive effect upon transactions and commercial policy. Individual parties gained access to a viable form of adjudication that provided workable remedies and basic fairness. Arbitral adjudication also had an extensive track record of adaptability to new circumstances.[131] It, therefore, could be adjusted to repair identified deficiencies and address new eventualities. Arbitration was for both parties, fair, flexible, and final—in addition to being effective, efficient, and expert.

XI. CONCLUSIONS

Arbitrators can provide legal, equitable, professional, and customary answers to conflicts. Adaptability, expertise, and eventual finality are the principal characteristics of arbitration. Lawyers provide the hands-on supervision as counsel and advocates, while courts peer remotely into the process from a respectful distance. Disadvantages exist but have not persuaded the policy-makers from their endorsement of arbitration. Law—in the sense of decisional law or *stare decisis*—suffers because legal norms are no longer elaborated on a public record.[132] Awards are private rulings not always accompanied by decisional reasoning. The decisional sovereignty of the arbitrator is sometimes close to a divine right. Arbitrators decide procedure, the merits, and damages almost without constraint. They can rule on contract and regulatory law claims. There is little, if any, protection from the

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[128] *See generally* CARBONNEAU, EMPLOYMENT ARBITRATION, *supra* note 99.

[129] *See* Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3d Cir. 1999).

[130] Carbonneau, *Crossroads of Legitimacy*, *supra* note 64.

[131] *Id.*

[132] One of the standard criticisms of arbitration is that there is no public discussion of the legal norms it creates. It is true that arbitral proceedings are private; however, the publication of awards is beginning and is quite strong. In any event, the U.S. Supreme Court ruled these concerns insufficient to invalidate an arbitration agreement. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

ignorance, incompetence, or mistakes of arbitrators. The protection of rights succumbs to expediency and functionality and the risks of an unaccountable process.

These disadvantages can either be remedied or tolerated. A less malleable problem is that arbitral justice was never the promise of the American Constitution. Judicial justice was or, at least, became the general expectation. Despite this reverence, having law arrive at bad or no results is difficult to defend. It amounts to creating a bundle of abstract legal guarantees with no consequence upon the reality of society. It is an empty sociological mythology. An elevated and sacrosanct promise of due process is meaningless if it cannot be implemented. In these circumstances, the purity of due process guarantees should yield to arbitration's flexibility, fairness, and finality because the latter, unlike the former, has a measurable positive bearing upon the lives of individuals. In this sense, arbitration and privatized justice save the promise of the law from itself and its failure of implementation. Arbitration is truncated adjudication, but—despite, or perhaps because of, an absence of discovery, cross-examination, and appeal—it produces real and sustainable adjudicatory results.

There remains a gnawing reluctance to accept fully and unquestioningly the Court's transformation of justice through arbitration. As noted earlier,[133] the hesitancy arises in part from the adhesionary character of some arbitration agreements. Doubts also arise from the ability of arbitrators to decide public law issues in private proceedings.[134] Arbitrators can rule upon the great issues of the day—racial discrimination, gender equality, the integrity of financial markets, and monopolistic commercial conduct—and, yet, have no public mandate or allegiance to the public interest. The very development of statutory law is stunted by such a process.

Modifications in the arbitral mechanism could protect the integrity of law. For example, recent rulings on labor arbitration teach that consent to the arbitrability of statutory rights must be individually affirmed.[135] The same rule could be applied to adhesion contracts to engage in employment arbitration. Employees would need to sign a special notice that explains the significance of arbitration and its impact upon statutory rights. This requirement would need to proceed from federal law—as an amendment to, interpretation of, or revision of the FAA—because if it were imposed by state contract law it could be subject to federal preemption as a rule that discriminates against contracts of arbitration.[136] A similar practice could be implemented for consumer contracts that contain arbitral clauses. These new forms of arbitration might warrant special rules of validity under the FAA. It should be underscored that the affirmance regime would not allow employees or consumers to reject the unilateral agreement to arbitration disputes. It simply provides for the conveyance of greater information and knowledge. The weaker party at least enters the imposed process with an enhanced sense of what it involves. Parties should know what arbitration means, the importance of arbitrator selection, and the process's potential impact on procedural and substantive rights.

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[133] *See supra* notes 129-30 and accompanying text.

[134] The Court in *Gilmer* disposed of these fears. *Gilmer*, 500 U.S. 20.

[135] *See* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).

[136] *See* Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681 (1996).

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When employment and consumer transactions involve the application of statutory rights, courts should be authorized to review the arbitrator's disposition of regulatory law matters. The review that is contemplated would lead to the increased use of the common law grounds under FAA § 10, perhaps their express incorporation into statutory language. As labor arbitrators cannot exceed the terms of the CBA, employment and consumer arbitrators should stay within the four corners of the applicable statute, as defined by flexible judicial standards. The FAA might also require arbitrators to render reasons explaining their statutory determinations. Otherwise, the power to review would be meaningless. Review could only be used to correct flagrant errors that denature the statute, that, in effect, eliminate the enacted rights. Each of the new areas of arbitration should develop self-sustaining processes that conform to standards of fundamental fairness. The danger is exposing the FAA to possibly a virulent virus of differing opinions. In any event, the contemplated review might best be accomplished by an internal form of arbitral appeal to a second arbitral tribunal.

Regulation could also take place in terms of mandating educational requirements for arbitrators and having them satisfy certifying obligations. This would involve: instructional courses; a national examination, training, and experience; development of arbitrator dossiers; and the rule of impartial arbitrators. Regulation must, however, be modest and contained. It should apply only to necessary and abusive circumstances. The act of regulating can easily get out of hand. It should not transform or swallow up the process being regulated. Intelligence and good judgment should accompany the elaboration of any public restrictions on the individual freedom to contract. None of these modifications, however, are free of risks and dangers. They may do more to compromise the arbitral process than to strengthen and embellish it.

The most perceptive and reassuring recent development in the decisional law on arbitration came in the form of the Eleventh Circuit's decision in *B.L. Harbert*.[137] Rather than muddy the waters with more doctrinal sophistry, the court stated—eloquently, forcefully, and persuasively—that *pro forma* litigious challenges to the enforceability of arbitral awards were antithetical to the process and society's interest in workable adjudication. In the court's assessment, the claim that the arbitrator "manifestly disregarded the law" in reaching his determination was transparently false. Like many other motions in a trial, the argument was pleaded by counsel in order to create delay and to obfuscate in the hope of reducing or with the more far-fetched aspiration of eliminating the established liability. According to the court, the arbitrator was a distinguished professional, had conducted a serious arbitration, and rendered a considered outcome. The words and the instinct, however, were there. On a lucky day, they might speak to the court. In adversarial litigation, as in "shout" journalism, advocates never leave any stone unturned; when all else fails, as the truism goes, they hurl insults. In these fields of endeavor, there is no accountability for disfiguring the truth. As long as pain is inflicted, the cause is advanced.

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[137] B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006). *See* Curtis Brown, *Resolving Disputes Outside of Court, The Year in ADR Case Law*, 17 EXPERIENCE 19 (2007); Carbonneau, *Crossroads of Legitimacy*, *supra* note 64; Helm, *supra* note 64; Christopher McKinney, *Too Many Motions for Vacatur of Commercial Arbitration Awards? The Eleventh Circuit Sanctions Unwary Litigants*, 2007 J. DISP. RESOL. 283 (2007).

The Eleventh Circuit heard the words, but only recognized them for what they were. Gaming arbitration like other matters in litigation, said the court, would destroy the beneficial impact of arbitration upon the adjudication of disputes. Adding adversarial tactics to the legal system's regulation of arbitration would divest the alternative remedy of its efficiency and effectiveness. Its principal effect would be to deprive society of a functional system of adjudication. In the instant case, there was no factual justification whatsoever for the challenge to the arbitral award. It was brought forward as a token, empty defense. In the court's view, the vacatur action was frivolous. In a similar subsequent case, it would warrant the imposition of sanctions. Involvement in legal proceedings does not justify an abuse of right.

While a new statutory text reflecting case law additions would represent a measurable advance in the field of arbitration, the Eleventh Circuit's ruling in *B.L. Harbert* is no less important. In fact, such rulings may be the only antidote to the consequences of the political inability to enact a more contemporary statute. The clever ruse of the advocate or formalistic procedural maneuvering should not prevent the courts from reaching the right results. Although the legal process exists to protect rights, that mission cannot be pursued at the price of obliterating the process itself. Like freedom of speech, legal representation is both a right and responsibility. There is no license to exploit it without regard to its actual consequences upon individuals and society. Analytically unsound positions and spurious allegations should not be allowed to pollute the process in the name of a vacuous concept of fairness. Being fair does not mandate constitutional insanity.

In many respects, arbitration represents a second chance for the legal system. It amounts to a bypass that gives the legal system another opportunity at a healthy and productive social role. The hope generated by arbitration and the judicial doctrine that protects it should not be muted by the antics of blind advocacy and reactive rights protection. *B.L. Harbert* states a correct and essential position. May it have a long and ample progeny.

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