Revolution in Law through Arbitration, The Eighty-Fourth Cleveland-Marshall Fund Visiting Scholar Lecture

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I. INTRODUCTION

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

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3The 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 AND MATERIALS].
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 Company⁴ (the “old time religion”) and Gilmer v. Interstate/Johnson Lane Corporation⁵ (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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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 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 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


annually—a significant boost from what had been its traditional workload. JAMS does business in the hundreds of millions of dollars annually.\textsuperscript{9} Law firms, like White & Case and Baker & McKenzie, have international commercial arbitration departments.\textsuperscript{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\textsuperscript{12} as the common currency of the


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


\textsuperscript{14}See, e.g., Nigel Blackaby et al., \textit{INTERNATIONAL ARBITRATION IN LATIN AMERICA} (2003); Jan Kleinheisterkamp, \textit{INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA} (2005); Focus on Arbitration in Latin America, \textit{INTERNATIONAL DISPUTES QUARTERLY}, (White & Case International Arbitration Group) Fall 2007.


and allows trade with China in the form of the CIETAC arbitral mechanism.\textsuperscript{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.\textsuperscript{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.\textsuperscript{19} In fact, the revolution has been conducted, and its story told, by the U.S. Supreme Court. At every stage of arbitration’s ascendance, 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.\textsuperscript{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


\textsuperscript{19} \textit{Carbonneau, The Law and Practice of Arbitration 2007, supra} note 1, at 77-189.

\textsuperscript{20} \textit{Id.}. 

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private process of adjudication with nearly unlimited jurisdictional reach.\textsuperscript{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.\textsuperscript{22} The general U.S. judicial stance, as a result, is that the recourse to arbitration must be sustained in nearly all circumstances.\textsuperscript{23} Even the principle of freedom of contract yields to the arbitration imperative: Party choice-of-law cannot defeat the reference to arbitration.\textsuperscript{24} There are periodic dissensions, especially in

\textsuperscript{21}Id.


\textsuperscript{23}Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178-79 (3d Cir. 1999). \textit{Harris} addresses the consumer arbitration issues in regard to the disparity in bargaining power between two parties. \textit{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. \textit{Id.} at 183.

\textsuperscript{24}Mastrobuono, 514 U.S. at 62-64.
employment and consumer cases, but arbitration agreements are enforceable in the vast majority of cases—even when they are unilateral and adhesionary in character. Manifest unfairness is not necessarily a defense to enforceability. Moreover, arbitrators and service providers are immune from suit. There is no arbitral malpractice, unless the arbitrator simply refuses to act. The watchwords of

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 in 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 “[t]he 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.


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\textsuperscript{30} and Exxon Shipping\textsuperscript{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—\textit{e.g.}, the use of the unconscionability defense,\textsuperscript{32}

\begin{thebibliography}{9}


\bibitem{Courts} Courts have previously found arbitral agreements to be unconscionable. \textit{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 \textit{Gilmer v. Interstate/Johnson Lane Corp.}, 500 U.S. 20 (1991), however, held that arbitration is neither inferior to judicial litigation nor unfair. \textit{Id.} at 34. Thus, it usually is not sufficient (except in a few California state law cases) to establish that an adhesiory arbitration agreement is procedurally unconscionable. Such an assertion states no more than that the adhesion contract is adhesiory. Ordinarily, establishing the oppressive quality of the material terms (or substantive unconscionability) is essential to a determination of unconscionability. \textsc{Carboneau, 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,\textsuperscript{33} actions to clarify awards,\textsuperscript{34} and opt-in provisions for enhanced judicial review\textsuperscript{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

4. The competency of neutrals is expected and is an obligation of the independent agencies that administer the arbitration.

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.

\textit{Id.} at 392-93 (parasing the actual language of the AAA’s Consumer Protocol).

\textsuperscript{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. \textsc{Carboneau, The Law and Practice of Arbitration} 2004, \textit{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; \textit{Exxon Shipping}, 11 F.3d at 1191; \textit{Brown}, 994 F.2d at 782-83.

\textsuperscript{34}Section 11 of the FAA does not authorize such an action, rather actions to clarify an award arose through judicial decisions. \textsc{Carboneau, Nutshell, supra} note 1, at 246. Actions seeking clarification undermine the efficiency of arbitration. \textit{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. \textit{See} Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126 (2d Cir. 2003).

\textsuperscript{35}The Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits oppose the enforceability of opt-in provisions. \textsc{Carboneau, The Law and Practice of Arbitration} 2004, \textit{supra} note 6, at 34. These courts reason that parties cannot create federal jurisdiction by contract. \textit{See, e.g., Bowen v. Amoco Pipeline Co.}, 254 F.3d 925 (10th Cir. 2001); \textit{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. \textsc{Carboneau, Nutshell, supra} note 1, at 243-46. The FAA makes no mention of opt-in provisions. \textit{Id.} at 245. Nonetheless, opt-in provisions find their strongest support in the principle of freedom of contract. \textit{Id.}
in state court rulings. The opposition to the federal concept of arbitration is evidenced in key California Supreme Court cases, like Engalla and Armendariz, 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. Having trained and


39Unless 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

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.


42The 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.


43Carbonneau, Cases and Materials on the Law and Practice of Arbitration, supra note 3, at 49.

44The 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, 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. 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. The New York Chamber of Commerce believed that a federal law on arbitration was necessary to complement the state legislation that favored arbitration. In the age of Swift v. Tyson, federal courts needed a federal statute on arbitration to enforce arbitration agreements when they ruled in litigation on the basis of diversity. The FAA, therefore, was not a sequel to the Magna Carta; it represented, in fact, a small


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.


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 acknowledgment 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. Like the Federal Sovereign Immunities Act and the New York Arbitration Convention, the FAA is a “marvel of compression.” It is a statute that achieves its regulatory purpose on the basis of an economical text. 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.


53Texas Trading, 647 F.2d at 306.

54The 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. 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, 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.” 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. 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.

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


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


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.
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, 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. 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. 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) and courts may have recourse to common law grounds for vacatur to assess arbitrator rulings.


62 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.


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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. Sometime after the enactment of the FAA, Erie 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. The Court began to realize that arbitration was no longer just a commercial

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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, and the Court felt that it was imperative that arbitration be validated as an adjudicatory method in all circumstances.

The holding in *Prima Paint* 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. 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 FAA represented more than the enactment of merely procedural regulations and that it actually created substantive federal rights.


Court's later pronouncements in the federalism trilogy\(^2\) and reaffirmed unequivocally in *Allied-Bruce Terminix Cos. v. Dobson*\(^3\) and *Doctor's Associates, Inc.*\(^4\)

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.\(^5\) The

\(^2\)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.


\(^5\)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. 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*:

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. The decisional content of the *Steelworker's Trilogy* became the model for the FAA's regulation of arbitration.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{83} Commercial arbitration,

\textit{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. \textit{Id.} at 42. The Court adapted, however, the public policy exception to the federal policy on arbitration. CARBONNEAU, \textit{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. \textit{Id.} Therefore, the judicial supervision of labor arbitration awards conforms to the federal policy favoring arbitration. \textit{Id.}


\textsuperscript{81} CARBONNEAU, NUTSHELL, supra note 1, at 171-72.


\textsuperscript{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, \textit{THE LAW AND
along with employment and consumer arbitration, were governed by the FAA. 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. 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, Scherk, Mitsubishi, and (and Vimar) cases represented a pure policy

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84Section 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.

85The 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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{93} Unlimited subject-matter arbitrability thereby became a basic principle of U.S. arbitration law.\textsuperscript{94} In fact, unless the arbitration agreement itself provided expressly otherwise, a broad arbitration agreement established, as a matter of law,

\begin{itemize}
\item \textsuperscript{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.” \textit{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.” \textit{Scherk}, 417 U.S. at 516-17. This clearly evidenced the Court’s intent to favor the enforcement of contracts for international commercial arbitration.
\item \textsuperscript{92}The Court quoted \textit{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.” \textit{Shearson/American Exp., Inc. v. McMahon}, 482 U.S. 220, 226 (1987) (citing \textit{Mitsubishi}, 473 U.S. at 626-27) (internal quotation marks omitted).
\item \textsuperscript{93}\textit{McMahon} held that claims under the Exchange Act and RICO (Racketeer Influenced and Corrupt Organizations Act) were arbitrable. \textit{McMahon}, 482 U.S. 220; \textit{Carbonneau, NUTSHELL}, supra note 1, at 149. The integration of international arbitral principles into U.S. law continued in \textit{Rodriguez de Quijas v. Shearson/Am. Express, Inc.}, 490 U.S. 477 (1989).
\item \textsuperscript{94}To differing degrees, \textit{Scherk} and \textit{Mitsubishi} held that international arbitrators could rule on statutory claims that arose in the context of international contracts. \textit{Scherk} focused more upon the enforcement of the arbitral clause. \textit{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. \textit{Id. See, e.g., McMahon}, 482 U.S. 220; \textit{Rodriguez de Quijas}, 490 U.S. 477.
\end{itemize}
that the parties had submitted both statutory and contractual claims to arbitration.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{99} The employment contract exception in FAA § 1 was narrowed to a small group of employees.\textsuperscript{100} The rule of statutory arbitrability even allowed civil rights claims that arose in the workplace to be decided by arbitration.\textsuperscript{101} Nonetheless, employment arbitration gave

\textsuperscript{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.\textsuperscript{CARBONNEAU, NUTSHELL, supra note 1, at 16.}

\textsuperscript{96}Steelworkers Trilogy, supra notes 77-79.

\textsuperscript{97}Id.

\textsuperscript{98}Arbitration has long been used to resolve disputes between brokers and stock exchanges.\textsuperscript{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.\textsuperscript{Id. See Wilko v. Swan, 346 U.S. 427 (1953); McMahon, 482 U.S. 220; Rodriguez de Quijas, 490 U.S. 477.}

\textsuperscript{99}See generally, THOMAS E. CARBONNEAU, EMPLOYMENT ARBITRATION 2d (JurisNet, LLC 2006) (hereinafter CARBONNEAU, EMPLOYMENT ARBITRATION).

\textsuperscript{100}See supra note 85.

\textsuperscript{101}Claims involving rights under the Civil Rights Act of 1964 are arbitrable.\textsuperscript{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


102The 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).


105The 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.

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

[which is] 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.


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


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.


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.\(^\text{113}\) 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.\(^\text{114}\) 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.\(^\text{115}\)


\(^{113}\) 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 undue means; evident partiality; procedural misconduct; or excess arbitral authority).


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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


\(^{117}\)In overruling Wilko, Justice Kennedy asserted that “arbitration is merely a form of trial to be used in lieu of a trial at law.” Rodríguez de Ouijas v. Shearson/Am. Express, 490 U.S. 477, 480 (1989) (citing Wilko v. Swan, 346 U.S. at 433 (1960)). Additionally, in Rodríguez, 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)).
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.\footnote{See CARBONNEAU, NUTSHELL, supra note 1, at 4 (citing Kaplan, 514 U.S. 938; Howsam, 537 U.S. 79; Bazzle, 539 U.S. 444).} 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 \textit{Plessy v. Ferguson}\footnote{Plessy v. Ferguson, 163 U.S. 537 (1896).} 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 \textit{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 \textit{Robert Lawrence}.\footnote{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).}

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
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


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.

of arbitration and its inferiority to judicial litigation.\footnote{123} The only real challenge to the current policy came in \textit{Volt Information Sciences}\footnote{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.\footnote{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

\begin{quote}
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.
\end{quote}


\footnote{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 \textit{Robert Lawrence} practically admitted was judicial legislation.” \textit{Id}. at 425 (emphasis added).


\footnote{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.


Justice Thomas dissented again in \textit{Mastrobuono} stating:
[\textit{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.]

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 voluntarily surrender the publicly known (the courts) for the


127Japan 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. 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. 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. 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. 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. 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.


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, 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. 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. 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. 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.

133 See supra notes 129-30 and accompanying text.
134 The Court in Gilmer disposed of these fears. Gilmer, 500 U.S. 20.
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. 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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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.