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## Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice Symposium

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# Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice

*Hiro N. Aragaki\**

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## I. INTRODUCTION

In the wake of a recent three-part series by the New York Times,<sup>1</sup> arbitration is now back in the eye of the storm. The leading critique of arbitration, especially in the consumer and employment space, is that it is unjust both in the sense that it does not comport with basic notions of *procedural* fairness and/or because it cannot be expected to produce outcomes we would consider *substantively* just. For example, procedure in arbitration is dictated largely by contract rather than by mandatory rules that have been vetted by public bodies entrusted with safeguarding procedural values.<sup>2</sup> Arbitrators are not bound by the rules of evidence.<sup>3</sup> There is no substantive

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1. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System,"* N.Y. TIMES (Nov. 1, 2015), [http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?\\_r=0](http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0); Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

2. *E.g.*, Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005).

3. *E.g.*, *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 n.4 (1956) (rejecting the idea that arbitration is an adequate substitute for a judicial trial in part because arbitrators are not bound by the rules of evidence).

merits review.<sup>4</sup> These and other observations have led a growing chorus of critics to declare that arbitration is “an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law;”<sup>5</sup> a “deeply unfair end-run around the public courts and our civil justice system;”<sup>6</sup> little more than an instrument of corporate “self-deregulation”<sup>7</sup> that “subvert[s] our system of justice as we have come to know it.”<sup>8</sup>

Rather than meet this objection head-on, defenders of arbitration are typically quick to concede that arbitration is likely to be more unjust or unfair than our rule-bound, public system of justice.<sup>9</sup> The thrust of their response is therefore to focus on arbitration’s other virtues. For example, they claim that, as compared with litigation, arbitration makes many more choices available to disputants and gives them broad freedom to design a disputing process tailored to their particular needs.<sup>10</sup> They also argue that arbitration is generally faster, cheaper, and more efficient than its judicial counterpart.<sup>11</sup> In these ways, they help constitute arbitration’s identity primarily through values such as party autonomy and process efficiency rather than in terms of substantive or procedural justice.

I want to suggest that this almost reflexive embrace of autonomy and efficiency at the expense of justice substantially short-changes arbitration’s legacy as well as arbitration’s future potential to provide a robust alternative to adjudication in public

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4. Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 140 (2005) (noting in the securities arbitration context that “there is no meaningful judicial oversight to ensure that arbitrators are applying the law”); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 782–83 (2002) (“[A]rbitrators in most cases are not bound to follow the law, nor are their decisions appealable to a court of law for any but the most egregious of defects.”); Silver-Greenberg & Corkery, *In Arbitration, a “Privatization of the Justice System,”* *supra* note 1 (“[U]nlike the outcomes in civil court, arbitrators’ rulings are nearly impossible to appeal.”).

5. *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986).

6. John O’Donnell et al., *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, PUBLIC CITIZEN 5 (Sept. 2007), <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

7. Paul D. Carrington, *Self-Deregulation, the National Policy of the Supreme Court*, 3 NEV. L.J. 259, 281–86, 288 (2003).

8. *Casarotto v. Lombardi*, 886 P.2d 931, 941 (Mont. 1994) (Trieweiler, J., specially concurring), *vacated sub nom. Doctor’s Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995).

9. See, e.g., Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT’L ARB. 213, 258 (2005) (explaining the rise of arbitration in terms of a need for “workable dispute resolution” rather than “the integrity of legal principles and . . . the fairness and legitimacy borne of rigorous due process”).

10. Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 51 (2010); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 92 (2014).

11. See, e.g., Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in HOW ADR WORKS 915, 926 (Norman Brand ed., 2002) (“The greatest strength of arbitration is that the average person can afford it.”). A good example here is *Hall Street Associates v. Mattel* where the Court defended its conclusion that parties could not contract for substantive merits review under the FAA *not* because an added tier of review would open up more avenues for procedural wrangling and thus a greater risk that cases would be resolved without due regard for the merits, but rather because it would make arbitration more expensive, inefficient, and complex. *Hall St. Assocs. v. Mattel*, 552 U.S. 576 (2008). The Court reasoned that the FAA’s barebones vacatur provisions signified a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can “rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process. . . .”

*Id.* at 588.

courts. About the time the Federal Arbitration Act (FAA)<sup>12</sup> was passed in 1925, arbitration's virtues were not limited to affording more opportunities for choice or providing a faster and cheaper forum; they also included the idea that arbitral procedure was qualitatively superior to judicial procedure *circa* 1925, which in turn meant that the arbitral forum promised a more just resolution of disputes on their merits.<sup>13</sup> As the American Judicature Society put it in 1926, arbitration delivered “real justice, as against [the] mere theoretical justice” promised by courts.<sup>14</sup> In contemporary discourse about arbitration—particularly in the mandatory binding arbitration area—we have lost this justice-based conception of arbitration.

Reconstituting our conception of arbitration to include a commitment to justice will become increasingly important as arbitration continues to evolve into something of a *de facto* surrogate for litigation.<sup>15</sup> This is especially true in the case of disputes arising out of mass-contracting relationships, where the quality of consent to arbitration procedures is often placed in doubt. As the recent New York Times trilogy suggests, the debate over arbitration in these cases will increasingly require arbitration supporters to provide a more sophisticated and nuanced account of how a system of arbitration can address concerns about procedural fairness and legitimacy more so than freedom of choice or the bottom line.

## II. FORMALISM V. INFORMALISM

One important reason why arbitration is constructed in terms of autonomy and efficiency far more than justice has to do with arbitration's informalism.<sup>16</sup> Among critics of arbitration there is a common perception that informal systems are less capable than formal ones at guaranteeing justice,<sup>17</sup> especially for the party with fewer resources.<sup>18</sup>

There is certainly some truth to these criticisms. But it also bears noting that, to contemporary minds at least, it is much easier to associate informalism with lawlessness than with justice. Informalism evokes our worst fears of the Star Chamber, kangaroo courts, and unbridled discretion. It suggests a lack of consistency and equal treatment, results skewed by the unequal resources or sophistication of the parties,<sup>19</sup> and a questionable commitment to the rule of law.<sup>20</sup> By contrast, a formal system appears to us more effective at disciplining and constraining behavior.

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12. 9 U.S.C. §§ 1–16 (2012).

13. Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1973–86 (2014).

14. *Model Arbitration Statute Offered*, 10 J. AM. JUDICATURE SOC'Y 122, 123 (1926).

15. See Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 3 (1997).

16. Another reason is the perceived lack of true assent to boilerplate arbitration clauses in adhesive settings. See, e.g., MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 82–98 (2013); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637, 675–76 (1996).

17. E.g., JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 145 (1983).

18. E.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1394–96.

19. See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 113–26 (2011).

20. See David M. Trubek, *Turning Away from Law?* 82 MICH. L. REV. 824, 825 (1984) (book review).

As a result, to critics *and* supporters of arbitration alike, informality and justice come to be seen as part of a zero sum game: The more of one the less of the other.<sup>21</sup> This is suggested in remarks by the Court that when parties choose arbitration, they “*forgo* the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes”<sup>22</sup>—as if arbitration can either be a formal system focused on justice or an informal system focused on securing other benefits such as freedom of contract or efficiency, but not both.<sup>23</sup> It also underlies the claim by critics that informality and justice are fundamentally irreconcilable.<sup>24</sup> On this view, the best that can be said about a system that lacks formal evidentiary and procedural rules is that it is “speedy, inexpensive, and flexible.”<sup>25</sup> Rather than settling disputes on their proper merits based on reasoned arguments, in other words, informality inevitably allows things to devolve into a “wide-ranging, probing, ‘therapeutic’”—and therefore unprincipled—*inquiry*.<sup>26</sup> The idea that an informal system can be committed to justice as much as (or more than) it is committed to other private ordering values appears almost beyond contemplation.

As a result, arbitration’s selling points are constructed almost exclusively in terms of concepts such as autonomy or efficiency. For example, the Court has emphasized that “[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”<sup>27</sup> It has also described “arbitration’s essential virtue” in terms of “resolving disputes straightaway.”<sup>28</sup> Commentators on both sides of the aisle, too, focus on the twin virtues of autonomy and efficiency, framing arbitration’s chief advantages

21. See, e.g., Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 555 (2011) (declaring that contract procedure “reflect[s] market rather than constitutional imperatives,” without considering that it might reflect both).

22. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010) (emphasis added).

23. Other examples abound. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974) (“[I]t is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.”); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (reasoning that arbitration’s primary advantage of “secur[ing] prompt, economical and adequate” decisions made it correspondingly unsuited to decide weighty and complicated issues under the federal securities laws), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

24. Richard Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 267, 291–94 (Richard Abel, ed. 1982); Delgado et al., *supra* note 18, at 1391–97; Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1009–14, 1020 (1979).

25. Delgado et al., *supra* note 18, at 1374.

26. *Id.*

27. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). This rationale is cited in one form or another in many of the Court’s recent decisions. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 359 (2011); *Stolt-Nielsen*, 559 U.S. at 682; *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293–94 (2002).

28. *Concepcion*, 563 U.S. at 345 (describing the “encouragement of efficient and speedy dispute resolution” as one of the goals of the FAA); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 588 (2008); *accord* *Preston v. Ferrer*, 552 U.S. 346 (2008) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)) (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results.’”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (“Congress’ clear intent [in enacting the FAA was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”).

over litigation almost exclusively in terms of freedom of choice or cost and time savings.<sup>29</sup>

As a philosophical matter, however, there is no necessary connection between informalism and private ordering on the one hand, and formalism and justice on the other. Virtually everything that has been said about informalism can also be said about formalism. To law and economics scholars, for instance, formalism—not informalism—is the most reliable means of promoting efficiency. Clear and transparent rules better allocate baseline legal entitlements and better guide future behavior.<sup>30</sup> Formal rules can also help respect the rights of the individual and in this sense further the value of personal autonomy. This animates Amalia Kessler's explanation for why European conciliation courts never took hold on this side of the Atlantic: They were regarded as a vestige of an older feudal order that emphasized "deference to social superiors[] rather than individual autonomy."<sup>31</sup> American individualism lent itself more readily to an embrace of "formal, adversarial adjudication," which Kessler further argues was "integrally linked to the new nation's unique capacity to promote both freedom and free enterprise."<sup>32</sup>

By the same token, a formal system is not immune to injustice. As Morton Horwitz has argued, although the rule of law "undoubtedly restrains power . . . it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it *promotes* substantive inequality by creating a consciousness

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29. See, e.g., Theodore Eisenberg et al., *Arbitration Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 878 (2008) (reporting that companies express a preference for arbitration because it "takes less time and costs less than litigation" and "offers 'a quick, cheap, and easy dispute resolution mechanism' that is 'more efficient'") (footnotes omitted) (citation omitted); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 340 (2007) (observing that "the bulk of authority seems to agree that arbitration is a more efficient dispute resolution procedure than litigation"); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3070–71 (2015) (identifying "streamlined, efficient proceedings" and "freedom of contract" as the two principal values expressed in the Court's arbitration jurisprudence and arguing that after *American Express v. Italian Colors Restaurant*, the latter has completely eclipsed the former); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 432 (1986) (arguing that proponents of arbitration and ADR tend to emphasize efficiency gains, such as through docket clearing); Sternlight, *supra* note 16, at 677–78 (observing that supporters of arbitration tend to claim that it is faster and cheaper than litigation); Stipanowich, *supra* note 10, at 4 ("Conventional wisdom suggests that businesses choose binding arbitration mainly because it is perceived to be different from litigation. Parties look for some or all of the following: cost savings, shorter resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.") (footnote omitted).

30. Randall P. Bezanson, *The Myths of Formalism: An Essay on Our Faith That Formalism Yields Fairness and Effectiveness in Public Administration*, 69 IOWA L. REV. 957, 968 (1984) ("Efficiency and centralization are major byproducts of formalism."). See generally Larry Alexander, "With Me, It's All *Er Nuthin'*": Formalism in Law and Morality, 66 U. CHI. L. REV. 530 (1999) (arguing that, unlike morality, law's formalism promotes efficiency).

31. Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423, 428 (2009).

32. *Id.* at 430. Stephen Subrin makes a similar point when he argues that David Dudley Field's proposed procedural reforms in the mid-nineteenth century reflected Field's own twin commitment to formal law (as opposed to free-floating equity) and "[i]ndividual rights, state rights, limited government, and laissez faire economics . . ." Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 934 (1987).

that radically separates law from politics, means from ends, processes from outcomes.”<sup>33</sup> A rule-bound system can enable those who wish to avoid complying with the rule to hide behind a technical adherence to the letter of the rule—something that is considerably more difficult to accomplish in informal systems. As Cass Sunstein explains, “rules have clear edges, they allow people to ‘evade’ them by engaging in conduct that is technically exempted but that creates the same or analogous harms.”<sup>34</sup> Unlike standards, whose vagueness can have the opposite effect of chilling bad or questionable behavior, rules “allow the proverbial ‘bad man’ to ‘walk the line,’ that is, to take conscious advantage of underinclusion to perpetrate fraud with impunity.”<sup>35</sup>

The equity tradition developed in direct response to these perils of formalism.<sup>36</sup> As a system of *ex ante* rules, the common law tolerated injustices in particular cases for the sake of predictability and consistency. The classic example is that of the debtor who pays off a bond but neglects to have it cancelled. Because early English common law treated the seal as proof positive of a debt, the debtor in this case would have had no defense at law were an unscrupulous creditor later to sue on the same instrument.<sup>37</sup> By contrast, the debtor could obtain relief from the Chancellor sitting in equity, who—much like modern-day arbitrators—were not bound by the law and could use their discretion to effectuate substantive justice between the parties. Equity’s informalism, in other words, was precisely what enabled it to serve as an important “safety valve to deal with the problem of opportunism that arises where the simple *ex ante* structures of the common law invite efforts at manipulation by the sophisticated and unscrupulous.”<sup>38</sup> Rather than liberty or utility, therefore, the informal system of equity is better understood as focused on justice.<sup>39</sup> And not just “rustic justice,” either. Historian John Baker goes as far as to claim that “the chancellor’s justice was seen as something *superior* to the less flexible justice of the two benches.”<sup>40</sup> Something similar might be said about the unconscionability defense

33. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).

34. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 995 (1995).

35. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1696 (1976); see also Horwitz, *supra* note 33, at 566 (“By promoting procedural justice [the rules of law] enable[] the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage.”).

36. As Lord Ellesmere explained, “[t]he Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.” *The Earl of Oxford’s Case*, [1615] 21 Eng. Rep. 485 (Ch.) 486.

37. CHRISTOPHER SAINT GERMAIN, DOCTOR AND STUDENT 37–38 (William Muchall ed. 1874) (1518) (Dialogue I, chap. 12).

38. Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 903 (2012) (emphasis added); accord JOSEPH STORY, 1 COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 17 (1838) (observing that equity “qualifies, moderates, and reforms the rigor, hardness, and edge of the law . . . and defends the law from crafty evasions, delusions, and mere subtilties, invented and contrived to evade and elude the common law . . .”).

39. In Justice Story’s view, the “office of Equity [was] to protect and support the common law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it.” STORY, *supra* note 38, at § 17; see also Zechariah Chafee, *Foreword to SELECTED ESSAYS ON EQUITY*, at iii (Edward D. Re ed., 1955) (describing equity as “a way of looking at the administration of justice” and as a response to “the production of injustice by the very agencies which have been established to do justice”).

40. JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 90 (2d. ed., 1979) (emphasis added).

or even the Warren Court's equal protection jurisprudence.<sup>41</sup> The potential for abuses of discretion notwithstanding, both have come to be widely regarded as important bulwarks of justice—not just *despite* the fact that they make *ex post* judicial policing possible but *because* of it.

### III. ARBITRATION IN HISTORICAL PERSPECTIVE

My goal in Part II was to suggest that as theoretical matter, formalism has no greater purchase on justice than informalism. In this Part, I provide historical evidence to back this up. I show that, around the time that modern arbitration law reform (including the FAA) was being debated in legislatures, bar associations, and the popular press, arbitration's informalism was precisely what made it appear to be a forum committed to the just and fair adjudication of disputes on their merits.

#### A. *What if Less is More? Constructions of Arbitration and Litigation Circa 1925*

In the decades leading up to the enactment of the FAA, the courts were widely perceived as unable to deliver substantial justice. Crippling delays and mounting backlogs made it difficult for claims to be adjudicated on their merits in a timely fashion.<sup>42</sup> Even when they were, the resulting decision according to the law often did not reflect the layperson's sense of what was right.<sup>43</sup>

Leading voices of reform in this era such as Roscoe Pound argued that these problems were traceable more than anything else to the excessive formalism of the procedural law. In an era preceding the Rules Enabling Act,<sup>44</sup> judicial procedure was largely a creature of statute rather than court rule. Procedural codes of the day were notoriously complex and voluminous—some, like New York's infamous

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41. Cf. Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 613 (1999) (describing the Supreme Court's Equal Protection Clause jurisprudence as capable of authoritatively settling moral conflicts even though it is not based on determinate rules).

42. MOORFIELD STOREY, *THE REFORM OF LEGAL PROCEDURE* 108–9 (1912) (reporting that in 1909, 7,274 cases awaited trial in Pittsburg courts, which could try on average only 783 cases per year); Wesley A. Sturges, *Some Common Law Rules and Arbitration*, in DANIEL BLOOMFIELD, *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 158 (Daniel Bloomfield ed., 1927) (summarizing newspaper reports that during the ten month period ending April 30, 1925, some 114,000 cases were disposed of by the federal courts while 126,000 more were added); John Edson Brady, *The Arbitration of Commercial Disputes*, 6 BUS. L.J. 421, 421 (1925) (“[I]f no new cases were added to the calendar it would take about two years to dispose of the existing [backlog] . . .”); Moses H. Grossman, *The Need of Arbitration to Relieve the Congestion in the Courts*, 10 ACAD. POL. SCI. OF N.Y.C. 211, 211 (1923) (reporting increase of 18,000 cases pending in New York county courts from 1917–1923 and that trial courts could only process about 8,000–9,000 of them in a given year).

43. Henry W. Jessup, *The Simplification of the Machinery of Justice with a View to Its Greater Efficiency: Report to the Phi Delta Phi Club of New York City by Its Committee of Nine*, in *JUSTICE THROUGH SIMPLIFIED LEGAL PROCEDURE*, 73 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 16–17 (Carl Kelsey & Henry W. Jessup eds., 1917); William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L.Q. 261, 265 (1917); Thomas W. Shelton, *Greater Efficacy of the Trial of Civil Cases*, 33 COM. L. LEAGUE J. 661, 661 (1928).

44. Pub. L. No. 73–415, 48 Stat. 1064 (1934).

Throop Code, contained upwards of three thousand sections.<sup>45</sup> This elaborate system of statutory procedure both reflected and reinforced a deep distrust of judicial discretion to police fairness in particular cases. For example, if a judge sought to prevent a clear “miscarriage of justice occurring in his sight” by “depart[ing] in the least from the rigid, statutory regimen,” inevitably one party would appeal and the judgment would be reversed on technical grounds.<sup>46</sup> The net result was that lawyers and eventually even judges came to lose sight of the purpose of procedural rules, which was merely to facilitate the administration of justice rather than to eclipse it. This caused Pound to lament that, instead of stopping to ask what “substantive law and justice” require in a particular case, judges and lawyers became myopically focused on ensuring that the “the rules of the game been carried out strictly.”<sup>47</sup>

The rigidity of procedure also facilitated a game-like or “sporting” approach to litigation.<sup>48</sup> Lawyers bent on winning would justify results that had nothing to do with the merits of the case on the ground that they were simply standing on their rights. Shelton made this point in a way that recalls Horwitz’s and Sunstein’s warnings that formalism, far from constraining bad behavior, can actually facilitate it.<sup>49</sup> He argued that a system of statutory procedure enabled lawyers to

place[] insurmountable barriers in the path of the court in its journey to the goal established and set up by justice and the merits of the cause . . . [by arguing that] he is merely seeking the enforcement of the [procedural] statutes and asking that government be conducted in the manner that the legislative branch has seen fit to enact and to provide.<sup>50</sup>

In sharp contrast to how we might see it today, therefore, formalism in procedure was viewed as enabling the pursuit of individual self-interest (read: autonomy) as much as and perhaps even more so than of truth or justice.<sup>51</sup> This was consistent with the fact that—David Dudley Field’s earlier attempt at merging law and equity notwithstanding—most procedural codes of the day were still heavily inspired by common law procedure.<sup>52</sup> For as Pound explained, the common law has traditionally emphasized individual rights—that is, the “liberty of each limited only by the like liberties of all”—over the public good.<sup>53</sup> No wonder, therefore, that

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45. Subrin, *supra* note 32, at 940 (noting that the New York Code of Civil Procedure had “3441 provisions by 1897”). Compare this with the 86 Rules in today’s Federal Rules of Civil Procedure. See FED. R. CIV. P. 1–86 (2015).

46. THOMAS W. SHELTON, *SPIRIT OF THE COURTS* 93 (1918).

47. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 406 (1906).

48. Pound famously referred to this as the “sporting theory of justice.” Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 391 (1910).

49. See *supra* notes 33–35 and accompanying text.

50. SHELTON, *SPIRIT OF THE COURTS*, *supra* note 46, at xxvii.

51. Jessup, *supra* note 43, at 21 (quoting Elihu Root’s 1916 presidential address to the American Bar Association); Edward F. Sherman, *Dean Pound’s Dissatisfaction with the “Sporting Theory of Justice”: Where Are We a Hundred Years Later?*, 48 S. TEX. L. REV. 983, 984–85 (2007).

52. See Subrin, *supra* note 32, at 931–39 (providing an excellent discussion of how this was the case).

53. See, e.g., Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 345–47 (1905).

the common-law theory of litigation is that of a fair fist fight, according to the canons of the manly art, with a court to see fair play and prevent interference. Americans . . . strive in every way to restrain the trial judge and to insure the individual litigants a fair fight, unhampered by mere considerations of justice.<sup>54</sup>

The reform agenda that eventually led to the Federal Rules of Civil Procedure (and, much later, the Federal Rules of Evidence) was therefore organized around the principle that *fewer* rules of procedure would help produce *more* substantial justice. In other words, “Less is More.” As Charles Evans Hughes explained, “[i]t is manifest that the goal [of the Federal Rules] is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances.”<sup>55</sup>

It bears emphasizing that Hughes and others did not gesture toward informalism on the ground that it would create more opportunities for party autonomy or process efficiency. Instead, they did so because they believed it would help ensure that cases would be decided on their proper merits rather than get caught up in or disposed of by procedural formalities. To take another example, because the right of appeal was much broader than it is today, it was not uncommon for cases to be retried three, four, five or more times,<sup>56</sup> which all too often meant that litigants with limited resources were forced to compromise valid claims.<sup>57</sup> When reformers such as William Howard Taft argued for limiting the scope of judicial review to one (rather than the existing two) appeals as of right,<sup>58</sup> they did not do so on the basis that it would produce cost and time savings that would outweigh any loss in accuracy or fairness. Instead, they argued that one right of appeal actually produced *more* accurate, fair results:

In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must also be given to the other and wealthier party. It means generally two, three and four, and in some cases even five and six years of litigation. Could any greater opportunity be put in the hands of wealthy persons or corporations to fight off just claims and to defeat . . . the legal rights of poor litigants, than to delay them in securing their just due for several years? I think not. The fact is that procedure

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54. *Id.* at 347. This is consistent with Kessler’s explanation for why Americans rejected European conciliation courts for a more adversarial model of dispute resolution. *See supra* notes 31–32 and accompanying text.

55. *Address of Chief Justice Hughes*, 21 A.B.A. J. 340, 341 (1935).

56. *See* George W. Alger, *Treadmill Justice*, ATL. MONTHLY, Nov. 1909, at 696, 698–700.

57. *See* Arthur John Keeffe et al., *86 or 1100*, 32 CORNELL L.Q. 253, 258 (1946); H. H. Nordlinger, *Law and Arbitration*, 30 COM. L. LEAGUE J. 621, 622 (1925).

58. Prior to the current regime of *certiorari* review introduced by the Judiciary Act of 1925, Pub. L. No. 68–415, 43 Stat. 936, litigants in federal court had a right to appeal both to the circuit courts and to the U.S. Supreme Court. A similar situation prevailed at the time in state courts. *See generally* Edson R. Sunderland, *Problem of Appellate Review*, 5 TEX. L. REV. 126 (1926) (discussing system of double appeals in state courts).

which limits the right of appeal works in the end for the benefit of the poor litigant and puts him more on an equality with a wealthy opponent.<sup>59</sup>

Against this background, arbitration's informality was, ironically, precisely what made it seem a superior alternative to judicial procedure *circa* 1925.<sup>60</sup> Although some state arbitration statutes provided for review of arbitral awards for legal error,<sup>61</sup> arbitration was generally free of the complicated system of double appeals and interlocutory appeals, which sometimes led to wasteful retrials based on technical procedural defects that made little or no difference to the ultimate outcome.<sup>62</sup> Moreover, because the rules of evidence were relaxed, arbitrators could hear crucial testimony that would otherwise be excluded from a court of law based on the rules of hearsay or opinion testimony.<sup>63</sup> Less time would be taken up debating the proper method for introducing the evidence and more time would actually be spent considering it.<sup>64</sup> Witnesses could get to the heart of their grievances by telling their stories in a natural manner, "without continual interruption and badgering by counsel and striking out of testimony."<sup>65</sup>

This led judges and lawyers writing during this period to observe that as compared to litigation, arbitration "does away with . . . the technicalities of pleading, trifling exceptions relating to procedure, and rules of evidence . . . and gets down to the marrow of a controversy in a simple, speedy, and direct manner."<sup>66</sup> The U.S. Department of Commerce explained that, as compared with litigation, "[arbitration]

59. William H. Taft, *Delays and Defects in the Enforcement of Law in this Country*, 187 N. AM. REV. 851, 855 (1908); Edward J. McDermott, *Delays and Reversals on Technical Grounds in Civil and Criminal Trials*, 7 PROC. AM. POL. SCI. ASS'N 97, 102 (1910) (supporting proposals to restrict the right of appeal on the ground that doing so would "not prevent the attainment of substantial justice to the parties concerned and will not mar the standing of the profession").

60. Special Committee, Ass'n of the Bar of the City of N.Y., *Attitude of the Legal Profession Toward Arbitration*, in SELECTED ARTICLES ON COMMERCIAL ARBITRATION, *supra* note 42, at 201, 203 ("In large measure commercial arbitration is based upon procedural superiorities which that system has or is claimed to have over our established system for the administration of justice."). See Aragaki, *supra* note 13, at 1962–2007 (providing more background).

61. See, e.g., ILL. REV. ST., ch. 10, § 11 (1927) (repealed 1961); WASH. COMP. ST. ANN. § 424–25 (1922). Compare IOWA CODE § 12699 (1927) (providing that, subject to the agreement of the parties, "all the rules prescribed by law in case of referees are applicable to arbitrators") with *id.* § 11525 ("The trial by referee shall be conducted in the same manner as a trial by the court") with *id.* § 11550(6) (providing that a referee's report may be vacated if it is "not sustained by sufficient evidence, or is contrary to law").

62. See, e.g., Alger, *supra* note 56, at 698–99; Keeffe et al., *supra* note 57, at 258; Pound, *supra* note 47, at 413; Sunderland, *supra* note 58, at 135, 144–45.

63. See Charles A. Boston, *Some Observations Upon the Report of the Committee of the Phi Delta Phi with Special Reference to the Typical Judicial Article for a Constitution*, in JUSTICE THROUGH SIMPLIFIED LEGAL PROCEDURE, 73 ANNALS AM. ACAD. POL. & SOC. SCI., 104, 105 (Carl Kelsey & Henry W. Jessup eds., 1917) (arguing that evidence rules are "so administered as often to exclude the very best attainable evidence of a fact, which is accepted as such evidence everywhere outside of a court room by reasonable men"); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 620 (1908); W.F. Weiss, *Arbitration*, 36 J. ACCOUNTANCY 327, 329 (1923). In such cases, the arbitrators would give the evidence the weight they deemed appropriate—something that judges at the time were powerless to do. See John H. Wigmore, *Qualities of Current Judicial Decisions*, 9 ILL. L. REV. 529, 537–40 (1914).

64. Wesley A. Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing?*, 34 YALE L.J. 480, 486–89 (1925).

65. Nordlinger, *supra* note 57, at 625.

66. See Percy Werner, *Voluntary Tribunals: A Democratic Ideal for the Adjudication of Private Differences Which Give Rise To Civil Actions*, 3 J. AM. JUD. SOC. 101, 107 (1919–1920).

affords a means for decision upon the merits . . . with less chance for the result to turn upon some technicality or some rule of which neither party had knowledge.”<sup>67</sup> Even Charles E. Clark, one of the chief architects of the Federal Rules, sometimes looked to arbitration and other informal tribunals such as workmen’s compensation boards as a model for reform.<sup>68</sup>

To these and other commentators writing almost a century ago, arbitration’s informalism did not automatically signify what Paul Carrington calls “self-deregulation.”<sup>69</sup> To the contrary, it was perceived as *promoting* ethics and the rule of law in business because arbitrators, unencumbered by rigid substantive and procedural rules, were more effective at getting to the root of a dispute, thereby making it harder for businesses to shield unethical practices behind the letter of the law.<sup>70</sup> A similar sentiment about the justice-enhancing quality of informal adjudication is reflected in a little known survey of business leaders conducted by the Special Committee on Arbitration of the New York City Bar Association sometime in 1927 or 1928.<sup>71</sup> One survey question asked how desirable it was that arbitrators were not bound by rules of law. Of 65 respondents, 42 said this was positively desirable, only one said it was undesirable, and the remainder were indifferent.<sup>72</sup> What’s interesting is that those who thought it desirable did not defend informalism primarily on autonomy or efficiency grounds. Instead, they claimed it helped arbitration reach better decisions on the merits than litigation. Here are some examples of their comments:

“It would seem that this liberal provision regarding rules of law is a desirable feature. Often court decisions are upset not on the merit of the controversy itself but on failure to conform to technical provisions of law which do not bear directly upon the merits of the case.”<sup>73</sup>

“We are in favor of arbitration principally because of the fact that arbitrators are not bound or limited by rules of law but are supposed to base their opinion on the equity involved rather than on technical legal points . . . .”<sup>74</sup>

“The informality of hearings in commercial arbitration permits that sense of freedom to the contestants and witnesses that brings forth the true portrayal of the facts and circumstances regarding the matter in dispute. It is impossible to secure this atmosphere before those of the legal profession

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67. L. E. WARFORD ET AL., U.S. DEPT. OF COMM., TRADE ASSOCIATION ACTIVITIES 98 (1923).

68. See Charles E. Clark, *Procedural Fundamentals*, 1 CONN. B.J. 67, 71 (1927) (arguing that strict pleading rules might not be essential for ordinary litigation, considering that commercial arbitration tribunals and workmen’s compensation boards dispensed with them).

69. Carrington, *supra* note 7, at 279–283.

70. See, e.g., CLARENCE F. BIRDSEYE, ARBITRATION AND BUSINESS ETHICS: A STUDY OF THE HISTORY AND PHILOSOPHY OF THE VARIOUS TYPES OF ARBITRATION AND THEIR RELATIONS TO BUSINESS ETHICS 113, 171 (1926); Report of the Special Committee on Arbitration, in YEARBOOK OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 267, 273 (1925) [hereinafter *Special Committee Report (1925)*].

71. See Annual Report of the Special Committee on Arbitration, in YEARBOOK OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 294 (1928).

72. *Id.* at 312.

73. *Id.* at 312–13.

74. *Id.* at 312.

and where more often than not the witnesses or parties to the arbitration are confined to a ‘yes’ or ‘no.’”<sup>75</sup>

These and other observations from the period express the idea that law and justice are not coterminous; it is possible, in other words, to reach just outcomes without positive law.<sup>76</sup> As William Ransom, a former New York judge and later counsel to the New York Public Services Commission, explained, “[t]he administration of justice is, as we have seen, not necessarily justice according to law; unrivalled and perfect justice may conceivably be administered by a ruler governed only by his own discretion or by a tribunal which enforces only its own standards and views.”<sup>77</sup>

This praise for informality was not just limited to the commercial sphere, in which it is sometimes (erroneously) supposed that parties possess relatively equal bargaining power. Arbitration was also viewed in this period as a way to enhance access to justice for the poor.<sup>78</sup> For example, in his widely-circulated book on the subject, Reginald Heber Smith referred to arbitration and conciliation as the “first line of attack” against the “inequalities in the administration of justice” and described how arbitration was used by legal aid societies as a solution to the “problem of denial of justice.”<sup>79</sup> Tellingly, many leaders of the modern arbitration law reform movement such as Julius Henry Cohen and Frances Kellor were also actively involved in Progressive causes.<sup>80</sup>

### B. *Autonomy and Efficiency as a Means to Achieve Justice*

Here it could be retorted that my account of the FAA fails to consider the fact that the push for modern arbitration law reform in the early twentieth century was spearheaded largely by trade associations, chambers of commerce, and other mercantile interests for whom privatization and bottom lines were paramount. This emphasis in the historiography of the FAA on arbitration’s commercial roots, in turn, has helped solidify the association between arbitration’s informality and values such as autonomy and efficiency. For example, Jerold Auerbach describes the arbitration law reform movement that led to the FAA as having been spearheaded by “advocates of commercial autonomy” who saw arbitration as a way “to solve their own problems ‘in their own way—without resort to the clumsy and heavy hand

75. *Id.* at 309.

76. This idea had broad support about the time that the FAA was passed. *See, e.g.*, ELIHU ROOT, THE LAYMAN’S CRITICISM OF THE LAWYER 4 (1914) (“‘This may be law but it is not justice,’ sometimes heard, indicates a sense that the rules of law which profess to secure justice in general too often prevent justice in the particular case and themselves point out the way in which the adroit and unscrupulous may conform to the law and avoid being fair and honest.”).

77. William L. Ransom, *The Layman’s Demand for Improved Judicial Machinery*, in JUSTICE THROUGH SIMPLIFIED LEGAL PROCEDURE, 73 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 138 (Carl Kelsey & Henry W. Jessup eds., 1917).

78. Charles L. Bernheimer, *The Advantages of Arbitration Procedure*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99–100 (1926). *See also* “People’s Courts” of Arbitration, LITERARY DIGEST, Oct. 4, 1924, at 14 (describing arbitration tribunals as the “greatest step in twenty-five years to simplify legal procedure . . . and obtain for the poor ‘a degree of justice frankly impossible now’”).

79. REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES 70–72, 129–30, 243–44 (1919).

80. Aragaki, *supra* note 13, at 2003–04.

of Government.”<sup>81</sup> Likewise, Margaret Moses explains the motivation behind the FAA in terms of “[b]usinessmen need[ing] solutions that were simpler, faster, and cheaper.”<sup>82</sup> Thomas Stipanowich, too, views the early twentieth century arbitration reform movement as championing “a more efficient, less costly, and more final method for resolving disputes.”<sup>83</sup>

To be sure, there is truth to these claims. Cohen and other key proponents of the FAA sometimes justified the liberalization of arbitration law by reference to George Jessel’s famous paean to freedom of contract: “[I]f there is one thing which more than other public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting.”<sup>84</sup> Likewise, Cohen argued to Congress that the FAA was intended to correct three “evils” of litigation, two of which were “[t]he long delay usually incident to a proceeding at law” and “[t]he expense of litigation.”<sup>85</sup> Commentators during the period, too, frequently explained the increasing popularity of arbitration as a function of these inefficiencies.<sup>86</sup>

But the fact that proponents of the FAA valued autonomy and efficiency does not mean that they did not also value justice to the same degree or even more.<sup>87</sup> Consider that autonomy and efficiency values are important underpinnings of judicial procedure,<sup>88</sup> yet this in itself does not lead us to think that judicial procedure is agnostic about justice. Quite the contrary, autonomy and efficiency are important

81. AUERBACH, *supra* note 17, at 101.

82. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 103 (2006); *see also* Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47, 50 (2010) (declaring that in passing the FAA, “Congress intended efficiency to be the compelling interest”); Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 568–69 (2014) (“One reason that Congress passed the FAA was to provide a faster and cheaper alternative to litigation.”); Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 6, 14, 25–27 (explaining the passage of the FAA as motivated by “[b]usinesses want[ing] a simpler, cheaper, and internally administered justice system to resolve their common law claims”).

83. Stipanowich, *supra* note 10, at 8; *see also* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 399–401 (1998) (arguing that, at the time of the FAA’s enactment, arbitration was “believed to be more efficient than litigation, less costly and a better process for parties with continuing business relationships”).

84. JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 17 (1918) (quoting *Printing & Numerical Registering Co. v. Sampson*, [1875] 19 L.R.Eq. 462, 465).

85. *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 34–35 (1924) (brief of Julius Henry Cohen); *Comm. on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155–56 (1925).

86. *See, e.g.*, Grossman, *supra* note 42, at 214–15 (arguing that his proposed Court of Arbitration would help relieve court backlogs and delays); Wesley A. Sturges, *Modern Developments in the Practice and Law of Commercial Arbitration*, 5 B. BRIEFS 101, 104–5 (1928); Samuel Williston, *Fashions in Law with Illustrations from the Law of Contracts*, 21 TEX. L. REV. 119, 137 (1942); *Special Committee Report (1925)*, *supra* note 70, at 271 (describing the “congestion of the courts, the delays incident to trials, the inconvenience in meeting court engagements, [and] the expense” of litigation as contributing causes of the turn to arbitration).

87. As Justice Burger remarked during the Pound Conference, “[t]here is nothing incompatible between efficiency and justice.” Warren E. Burger, *An Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 23, 32 (A. Leo Levin & Russell R. Wheeler eds., 1979).

88. *See* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 324–30 (1997); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 252–64 (2004).

precisely because they can be an important *means* of furthering the overriding goal, which is to secure a fair adjudication of the merits.<sup>89</sup> In a system plagued by unnecessary delay and expense, witnesses die or forget details (or, worse, ‘remember’ events years after the fact with suspicious clarity).<sup>90</sup> Crucial evidence disappears.<sup>91</sup> Resource asymmetries between the litigants—which scholars such as Judith Resnik have identified as a central concern of due process<sup>92</sup>—force weaker parties to abdicate their rights.<sup>93</sup>

From this perspective, the crux of Cohen’s arguments to Congress about the “evils” of delay and expense was not so much that these things were problems in themselves, but that they amounted to an effective denial of justice.<sup>94</sup> Much the same can be said about autonomy. Proponents of the FAA advocated for freedom of contract in dispute resolution not so much because they sought to escape the rule of law<sup>95</sup> but because, consistent with the prevailing philosophy of “less is more,” they believed that parties and/or administering institutions with greater expertise in the subject matter of commercial disputes were likely to craft better procedural rules to govern arbitration than legislatures or courts.<sup>96</sup>

Moreover, there is no reason in principle why merchants should be less interested than non-merchants in the value of justice.<sup>97</sup> Around the time the FAA was passed, arbitration was sometimes portrayed as a way of clarifying the rights of the

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89. See, e.g., Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 507–10 (2003); Burger, *supra* note 87, at 32 (“Efficiency . . . is not an end in itself. It has as its objective the very purpose of the whole system—to do justice.”).

The procedural reforms that eventually led to the Federal Rules, too, were often billed as an antidote to the delay and expense of civil litigation, yet this has never led us to question the commitment of those reforms to justice. See, e.g., Adolph J. Rodenbeck, *The New Practice in New York*, 1 CORNELL L.Q. 63, 63 (1916); Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, 35 ABA REP. 614, 615 (1910) (advocating uniform federal procedure to “diminish the expense and delay of litigation”). Thus, one of the stated purposes of the so-called Cummins bill on uniform federal procedure was to encourage “speedier and more intelligent disposition of the issues presented . . . and . . . a reduction of the expense of litigation.” S. REP. NO. 69–1174, at 2 (1926).

90. See, e.g., A.C. Lappin, *The Case of Arbitration vs. Litigation*, 39 COM. L.J. 196, 198 (1934); Edward R. Finch, *Is Our Law Adequately Administered?*, 50 ANN. REP. A.B.A. 532, 535 (1927).

91. Joseph Wheless, *Arbitration As a Judicial Process of Law. A New Era in Legal Procedure Created by the New York and New Jersey Statutes. The Principles and the Practice Defined*, 30 W. VA. L. Q. 209, 210–11 (1924).

92. Resnik, *supra* note 19, at 82.

93. Lappin, *supra* note 90, at 198 (arguing that delay allowed “the stronger and richer litigant to force the weaker and poorer to surrender regardless of the merits” and recommending arbitration as a solution to this and other problems); see also Ransom, *The Organization of the Courts*, *supra* note 43, at 270–72; Elihu Root, *Reform of Procedure*, in PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION 87 (1911); Nordlinger, *supra* note 57, at 622 (“It has long been considered sound advice that . . . it is more advantageous to surrender your legal rights without litigation than to enforce them through litigation.”); Sturges, *supra* note 64, at 481.

94. *Where Jury Trial Fails*, 9 J. AM. JUD. SOC’Y 71, 72 (1925) (“Courts come to exist largely for the comfort and protection of debtors in a manner wholly contrary to our exalted principles of doing justice.”). Hence the common refrain during the period that “justice delayed is justice denied.” William Renwick Riddell, *The Administration of Justice*, 34 CAN. L. TIMES 885, 898 (1914) (emphasis added).

95. See *infra* notes 98–101 and accompanying text.

96. Aragaki, *supra* note 13, at 1982–86, 1991–93. Shortly after the passage of the FAA, the American Judicature Society observed that modern arbitration statutes “wisely refrain[ed] from laying down elaborate rules for arbitrators to follow[.]” *The Technique of Arbitration*, 9 J. AM. JUD. SOC’Y 79, 79 (1925). Rather than take this as an indication that such rules were unimportant, the Society concluded that such rules, while “needed,” were more “properly adopted by trade associations.” *Id.*

97. See Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 204–06 (2006).

parties so that future disputes could be avoided.<sup>98</sup> Many commercial disputes were adjudicated based on a strict evaluation of the rights and duties of the parties under the law.<sup>99</sup> This is perhaps what led Ransom to observe that “[i]t is not a desire to avoid the application of rules of law which drives business men out of the courts. . . . The aversion of the average man is rather to the procedural and administrative side of our legal machinery.”<sup>100</sup> As witnesses testifying in Congress and others writing during this period argued, businesses were flocking to arbitration precisely because procedural technicalities and wrangling by lawyers made it impossible for public courts to adjudicate cases on their proper merits.<sup>101</sup> It bears noting that business interests were also a key contingent behind the procedural reform movement that led to the Federal Rules,<sup>102</sup> which surely indicates that business interests were not necessarily opposed to the promotion of substantial justice.

#### IV. CAN ARBITRATION DELIVER JUSTICE TODAY?

My goal in Part III was not to make an empirical claim that, around the time of the FAA’s enactment, arbitration actually produced results that we could consider just. This would be an exceedingly difficult claim to vindicate, requiring a wealth of data about individual cases and a compelling normative framework for evaluating whether a particular result counts as “just.” Instead, my aim was to illustrate that it is not inconceivable that arbitration should be *constructed* as a forum committed to justice rather than (or in addition to) party autonomy and process efficiency. For in the decades leading up to the passage of the FAA, arbitration was widely understood in precisely this way.

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98. As Cohen and Dayton observed, businessmen of the period generally “draw their contracts in the light of ordinary rules of law” and that in arbitration, parties “ha[ve] the right to expect that [their] contract will be construed in accordance with such rules.” JULIUS HENRY COHEN & KENNETH DAYTON, *HANDBOOK AND GUIDE TO COMMERCIAL ARBITRATION UNDER THE NEW YORK AND UNITED STATES ARBITRATION STATUTES INCLUDING A SUMMARY OF THE PRACTICE OF ARBITRATION, AND FORMS 26–27* (Chamber of Commerce of the State of N.Y. 1932); see also *Special Committee Report (1925)*, *supra* note 70, at 273.

99. See, e.g., BIRDSEYE, *supra* note 70, at 92–93 (explaining that the New York Chamber of Commerce’s Court of Arbitration functioned “rather as a court of law in deciding many new and intricate points which arose in connection with commercial disputes”); Moses H. Grossman, *The Need of Arbitration to Relieve the Congestion in the Courts* 10 PROC. ACAD. POL. SCI. CITY N.Y. 211, 213 (1923) (arguing that arbitration is suitable even where “the controversy is intricate and the law applicable is doubtful” and stating that arbitrators can be selected from “jurists of the highest type, profoundly versed in law”).

100. Ransom, *The Layman’s Demand for Improved Judicial Machinery*, *supra* note 77, at 148; see also SMITH, *supra* note 79, at 69–70 (calling it a “fact . . . of the highest importance” that the expansion of arbitration does not imply dissatisfaction with the “rules of substantive law”).

101. *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the Comm. on the Judiciary*, 64th Cong., 1st Sess. 26–29, 48 (1915); Shelton, *Greater Efficacy of the Trial of Civil Cases*, *supra* note 43, at 664.

102. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 500–501 (1986) (noting the irony in the fact that that leading procedural reformers, often associated with interests of the “defense bar” proposed reforms that opened courthouse doors to “a new host of rights seekers,” by facilitating classwide relief and liberal discovery that “shone a beacon on corporate and government practices”); Subrin, *supra* note 32, at 948–49, 959–60, 969–73 (noting the irony of how conservative and liberal ideologies coalesced to help ensure the passage of the Rules Enabling Act and its eventual implementation in the form of the Federal Rules).

The question remains how helpful this excursion into the history of the FAA is for modern debates about arbitration, especially in the so-called “mandatory” binding arbitration area. Can arbitration supporters today (like their counterparts *circa* 1925) credibly portray an adjudicative system with no guarantee of discovery, no evidentiary rules, and no meaningful substantive review as harboring a commitment to justice that is as strong as or more so than its commitment to autonomy or efficiency?

My purpose in this Part is not to provide a definitive answer this question so much as to claim that the question itself deserves more serious consideration. I therefore interrogate some common misapprehensions about arbitration’s informality that help drive the perception that arbitration either is not, or cannot, be committed to justice in adjudication. Although I remain agnostic about the ultimate answer to the question, I suggest that confronting some of these misconceptions helps make the question itself more complex, and in this sense more compelling.

### A. Discovery

One bone of contention in contemporary debates about arbitration has to do with access to discovery. For instance, the Consumer Financial Protection Bureau’s recent study of mandatory binding arbitration notes that “limited discovery rights are the hallmark of arbitration” and that arbitration rules “generally envision less discovery than would be available in court.”<sup>103</sup> Proponents of arbitration sometimes fuel this impression by contending that limited discovery is an aspect of arbitration’s “fundamental nature.”<sup>104</sup>

As an empirical matter, however, it is difficult to know whether there is actually less discovery in arbitration than in litigation. To begin with, discovery is hardly a routine staple of civil litigation. Available empirical evidence suggests that it is not used at all in more than half of the civil cases pending in the federal courts.<sup>105</sup> On

103. *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FINANCIAL PROTECTION BUREAU § 4.6 (Mar. 2015) (quotation omitted), <http://perma.cc/5PLG-LLKY>.

104. David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMPL. & LAB. L. 1, 25 (2003); see also IAN R. MACNEIL ET AL., 3 FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT, § 34.1, at 34:2 (1999) (“Limitations on discovery . . . remain one of the hallmarks of American commercial arbitration, including arbitration under the FAA. Avoidance of the delay and expense associated with discovery is still one of the reasons parties choose to arbitrate.”).

The rationale is typically that “[u]nlimited discovery is incompatible with the goals of efficiency and economy.” 2007 *Non-Administered Arbitration Rules*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. at Rule 11 (2007), available at <http://www.cpradr.org/RulesCaseServices/CPRRules/2007CPRNon-AdministeredArbitrationRules.aspx>; REVISED UNIFORM ARBITRATION ACT § 17, cmt. 2 (2000) (“extensive discovery . . . eliminates the main advantages of arbitration in terms of cost, speed and efficiency”). Here, too, it rarely occurs to critics and supporters alike that arbitration eschews unbridled discovery for reasons that sound in justice—for instance, to reduce the negative impact on parties with fewer resources, who may be pressured to compromise valid claims before reaching a hearing on the merits. See generally Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) (noting the way that discovery rights can be used to obstruct the ascertainment of truth and the pursuit of justice).

105. See PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 28 (1978) (finding that approximately 52% of federal district court cases surveyed had no recorded discovery requests while 95.1% had 10 or fewer requests);

the other hand, commentators have long noted that discovery in arbitration is now fairly routine.<sup>106</sup> Some speculate that discovery in arbitration currently equals or rivals what is available in court,<sup>107</sup> both because there are fewer express discovery limits (such as the provisional limit of 10 depositions in federal court)<sup>108</sup> to constrain lawyers and because arbitrators hoping for repeat business may be sheepish about denying lawyer requests for additional discovery.<sup>109</sup> It is also not unknown for parties to provide in their agreement that the arbitration proceeding (including discovery) will be conducted according to the Federal Rules of Civil Procedure.<sup>110</sup>

Even if the absolute quantum of discovery in arbitration is less than it is in litigation, it is a further question what to make of this difference. Many judges and scholars have argued that discovery practice in the United States has spiraled out of control and that much of the discovery taken in litigation is either unnecessary or serves to hinder rather than promote the ascertainment of truth.<sup>111</sup> Reforms in the administration of justice have therefore largely sought to reduce—not expand—the scope of available discovery.<sup>112</sup> Some, like Second Circuit Judge Jon Newman, appear quite comfortable with even more drastic discovery limits:

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James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 621–23 (1998) (“[T]he majority of the civil cases have either no discovery or limited discovery . . .”); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89–90 (1983) (reporting no evidence of discovery in half of cases surveyed); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 540 (1998).

106. See, e.g., Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 277 (2007) (“In some contexts, such as securities and complex commercial cases, arbitration has become highly formalized, with routine discovery and motion practice, the application of substantive legal rules, and written and reasoned awards.”); Thomas Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COM. L.J. 383, 414 (2009) (“Legal counselors should be aware, however, that the old ‘no discovery in arbitration’ maxim is generally inaccurate and some amount of discovery usually takes place under standard arbitration rules.”).

107. Stipanowich, *supra* note 10, at 9, 12–15 (arguing that “arbitration procedures have become increasingly like the civil procedures they were designed to supplant, including prehearing discovery and motion practice”); Thomas Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT’L ARB. 297, 349 (2014) (“In the United States, commercial arbitration hearings are often preceded by weeks or months of prehearing discovery.”).

108. See Stipanowich, *supra* note 106, at 387 (noting the irony that the very same complaints about no-holds-barred discovery exist in arbitration, where there are fewer mandatory rules and parties have greater freedom to design a discovery process that makes sense for their dispute).

109. See, e.g., Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 717 (2004).

110. Stipanowich, *supra* note 10, at 12 n.62.

111. See INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 7–16 (2009); Brazil, *supra* note 104, at 1303–31; Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, in THE POUND CONFERENCE, *supra* note 87, at 51, 61 (“Many actions are instituted on the basis of a hope that discovery will reveal a claim.”); John D. Shugrue, *Identifying and Combating Discovery Abuse*, 23 LITIG., 10, 10 (1997); Willging et al., *supra* note 105, at 531, 547–53, 575, 584.

112. See, e.g., Court Rules, 192 F.R.D. 340, 388–90 (2000) (amending Rule 26 to limit discovery to matters “relevant to any party’s claim or defense” rather than to matters “relevant to the subject matter involved in the pending action,” unless prior court authorization is obtained); Federal Rules of Civil Procedure, 97 F.R.D. 165, 213–18 (1983) (amending Rule 26 to give the court authority to minimize redundant, repetitive, and disproportionate discovery); Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 526–27 (1980) (amending Rule 26 to provide for court intervention to assist counsel in curbing discovery abuse).

I doubt that discovery should be routinely permitted. Where discovery is needed, I doubt that depositions should be permitted beyond two or three, limited to one hour, that interrogatories should be permitted beyond five or ten, and that any but precisely identified documents need be searched for and produced.<sup>113</sup>

Limited discovery is typically thought to be important for arbitration in order to keep the proceedings fast and cheap—at least relative to taking the same case to court.<sup>114</sup> But if Newman and other critics of litigation-style discovery are correct, limited discovery may also help promote the cause of justice—that is, it may play an important role in ensuring that disputes get resolved on their substantive merits rather than get abandoned or compromised.

Here it is sometimes objected that, unlike in litigation, there is no *right* to discovery in arbitration;<sup>115</sup> thus, even if the overall extent of discovery in arbitration and litigation is comparable or if excessive discovery is problematic, at least litigants in court are guaranteed a certain discovery baseline. The objection is sound insofar as the nearly one hundred year-old FAA contains no discovery guarantees. But that need not imply that the FAA is opposed in principle to broad rights of discovery. For procedural codes in effect at the time the FAA was passed also did not provide for the type of liberal, lawyer-driven discovery that would later become a hallmark of the 1938 Federal Rules.<sup>116</sup>

In any event, the more recent Revised Uniform Arbitration Act (RUAA) and many current state arbitration statutes vest considerable discretion in the arbitrator to order discovery.<sup>117</sup> The California Arbitration Act, for instance, gives parties the

right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof . . . as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case . . . .<sup>118</sup>

The rules of leading private arbitration providers also typically give arbitrators broad powers to order discovery.<sup>119</sup>

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113. Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1650–51 (1985).

114. *E.g.*, Sherwyn, *supra* note 104, at 25–26.

115. *See, e.g.*, Carrington, *supra* note 7, at 283.

116. *See* Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691–701 (1998).

117. The RUAA has been enacted in 18 states and the District of Columbia. *Legislative Fact Sheet*, UNIFORM L. COMMISSION (2016) <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20%282000%29>. It provides: “An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.” REVISED UNIFORM ARBITRATION ACT, § 17(c) (2002).

118. CAL. CODE CIV. PROC. § 1283.05.

119. AMERICAN ARBITRATION ASSOCIATION, *EMPLOYMENT ARBITRATION RULES & MEDIATION PROCEDURES* 19 (2014) (Rule 9) (“The arbitrator shall have the authority to order such discovery, by

At the same time, it is questionable the extent to which litigation affords an absolute “right” to discovery. Beyond requiring parties to make certain initial disclosures,<sup>120</sup> discovery under the Federal Rules is largely a matter of judicial discretion.<sup>121</sup> For example, although Rule 30(a)(2)(A)(i) provides that each side may take up to 10 depositions without seeking leave of the court, there is nothing to stop the court from reducing that limit in less complex cases.<sup>122</sup> Any such decision would moreover be extremely difficult to overturn on appeal.<sup>123</sup> The upshot is that, rather than being rule-bound, discovery under the Federal Rules is in fact highly informal. It is ironic that in debates over civil procedure we have tended to regard this informalism as the cause of *too much* discovery,<sup>124</sup> yet in the arbitration context we are apt to interpret the absence of a Federal Rules discovery regime as the cause of just the opposite: *too little* discovery.<sup>125</sup>

### B. Evidence

Today, an arbitrator’s ability to disregard the rules of evidence is at best an argument for why arbitration promises greater party autonomy or process efficiency. Some critics write as if there are no rules about evidence in arbitration at all, which leaves the erroneous impression that arbitrators may ignore relevant and material facts with impunity.<sup>126</sup> More sophisticated critics suggest that the lack of clear rules makes the admission of evidence in arbitration relatively haphazard or

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way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.”); AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES 19–20 (2014) (Rule 22); JAMS, COMPREHENSIVE ARBITRATION RULES 21–22 (2014); JAMS, EMPLOYMENT ARBITRATION RULES 17–18 (2014); *Administered Arbitration Rules*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (July 1, 2013), <http://www.cpradr.org/RulesCaseServices/CPRRules/AdministeredArbitrationRules.aspx> (Rule 11); *Employment Arbitration Procedure*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (2009) (Art. 11).

120. FED. R. CIV. PROC. 26(a).

121. *Id.* 26(b)(1).

122. *Id.* 26(b)(2)(C). See *Myers v. Prudential Ins. Co. of Am.*, 581 F. Supp. 2d 904, 913 (E.D. Tenn. 2008) (“Much of discovery is a fishing expedition of sorts, but the Federal Rules of Civil Procedure allow the Courts to determine the pond, the type of lure, and how long the parties can leave their lines in the water.”).

123. *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 637–638 (8th Cir. 2007) (reviewing discovery orders for “gross abuse of discretion resulting in fundamental unfairness in the trial of the case”); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 471 (2007).

124. Francis Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 202 (1979) (“[W]hen discovery—totally unlimited because no issue is framed—mulls over millions of papers, translates them to microfilm and feeds them into computers to find out if they can be shuffled into any relevance . . . we should, I think, consider whether noble experiments [embodied in the Federal Rules] have gone awry.”); Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the ‘80s—Making the Rules Work*, 95 F.R.D. 245, 246 (1982) (observing that the Federal Rules’ permissive provisions on discovery tend toward “over discovery”).

125. See *supra* notes 103–104 and accompanying text.

126. E.g., Norman T. Braslow, *Contractual Stipulation for Judicial Review and Discovery in United States-Japan Arbitration Contracts*, 27 SEATTLE U. L. REV. 659, 663–64 (2004); Stacy A. Hickox, *Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes*, 16 WIDENER L. REV. 101, 133 (2010); cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (concluding that arbitration was “comparatively inferior to judicial processes” in protecting Title VII rights in part because “the factfinding process in arbitration usually is not equivalent to judicial factfinding. . . . [T]he usual rules of evidence do not apply.”).

simply less extensive than it would be in a court of law, such that crucial evidence might inadvertently be excluded.<sup>127</sup> The implication is that arbitration's informality with respect to evidence makes it a less fair or just process than litigation.

But to say that arbitrators have the discretion to disregard evidentiary rules is plainly not the same as saying that arbitrators are free to disregard the evidence itself.<sup>128</sup> The FAA, RUAA, and the Uniform Arbitration Act (UAA) all provide for vacatur of an award resulting from an arbitrator's "refus[al] to hear evidence pertinent and material to the controversy."<sup>129</sup> Nor is this a recent development, since substantially the same standard for vacatur applied to common law arbitrations well before the twentieth century.<sup>130</sup> This standard was also incorporated in many state arbitration statutes around the time the FAA was conceived and enacted.<sup>131</sup> As Cohen and Kenneth Dayton explained:

The law requires the arbitrators to give the parties every reasonable opportunity to secure and present their evidence and to hear all pertinent and material evidence which either party may offer. If they deny a hearing to a party, or hear only part of his case, or refuse to hear any pertinent and material evidence, the award will be invalid. The better practice is to listen to all evidence which a party wishes to present, unless it is clearly outside the case or repetitious.<sup>132</sup>

127. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 49–53.

128. *E.g.*, Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 704–06 (1952).

Consider that the rules of evidence are relaxed during bench trials, yet this in itself does not lead us to believe that bench trials are inherently more unfair or inaccurate than jury trials. See Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 203. Even in jury trials, the enforcement of evidentiary rules is not guaranteed and depends on the active vigilance of counsel. See Richard A. Posner, *Comment on Lempert on Posner*, 87 VA. L. REV. 1713, 1714 n.8 (2001) ("Most lawyers and judges have quite a relaxed sense of the rules of evidence, often ignoring them by tacit agreement and not only in bench trials.").

129. 9 U.S.C. § 10(a)(3) (2012); REVISED UNIFORM ARBITRATION ACT §§ 23(a)(3), 15(d) (2000) (providing an additional ground for vacatur where arbitrator conducted the hearing "contrary to section 15" which, *inter alia*, provides that parties have "the right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing"); UNIFORM ARBITRATION ACT § 12(a)(4) (1955).

130. Michael LeRoy traces the origins of the FAA's vacatur standards even further back to English common law which, among other things, treated "misbehaviour" of the arbitrators as a ground for setting aside awards. LeRoy, *supra* note 82, at 30–31. Although LeRoy does not specifically claim that the refusal to hear material and relevant evidence was considered to be an instance of such "misbehaviour," the FAA appears to do so. 9 U.S.C. § 10(a)(3) (providing for vacatur "where the arbitrators were guilty of *misconduct* in refusing to postpone the hearing, . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other *misbehavior* . . . . [emphasis added]"). Likewise, Corpus Juris identified the "refus[al] to hear competent and material evidence" as an aspect of arbitrator "misconduct" warranting vacatur. 5 CORPUS JURIS, § 484, at 191 & n.55 (1921) (collecting cases).

131. See, *e.g.*, CAL. CODE CIV. PROC. § 1288 (1927); 1929 Conn. Pub. Acts chap. 65, § 11; 1925 Haw. Rev. Laws § 2932; 1919 Idaho Comp. Stat. § 7434; IND. CODE § 941 (1926); 1928 La. Acts No. 262 § 10; MICH. COMP. LAWS § 13654 (1915); MINN. STAT. § 9517 (1927); MISS. CODE ANN. § 94 (1927); MO. REV. STAT. § 604 (1919); MONT. CODE ANN. § 9978 (1921); Nev. Laws chap. 7, § 16 (1925); 1923 N.J. Laws chap. 134, § 9; 1921 N.Y. Laws chap. 199, § 1457; N.C. Code § 898(p) (1927); 1927 Pa. Laws No. 248, § 10; 1929 R.I. Pub. Laws chap. 1408, § 10; 1927 Utah Laws chap. 62, § 16; WISC. STAT. § 298.10 (1927); 1927 Wyo. Sess. Laws chap. 96, § 16. The Uniform Arbitration Act of 1925 likewise provided for vacatur of arbitral awards where the arbitrators "refus[ed] to hear evidence, pertinent and material to the controversy" or were guilty of "any other misbehavior." UNIFORM ARBITRATION ACT § 16(c) (1925).

132. COHEN AND DAYTON, *supra* note 98, at 23–24; see also Julius Henry Cohen, *Hand Book for Arbitrators*, in COMMERCIAL ARBITRATION: A METHOD FOR THE ADJUSTMENT, WITHOUT LITIGATION, OF

Second, the fact that traditional evidence rules do not apply does not mean that less evidence is admitted in arbitration than in litigation. For example, Richard Delgado reasons that, because evidence rules “are intended to facilitate *introduction* of all relevant evidence,”<sup>133</sup> procedures such as arbitration that lack binding evidentiary rules tend to hinder the introduction of evidence. In fact it is just the opposite: The rules of evidence function primarily to exclude, rather than include, evidence.<sup>134</sup> Generally speaking, therefore, fewer evidence rules mean that *more* evidence is considered by the trier of fact.<sup>135</sup> This is consistent with the common perception that “arbitrators tend to let in most or all proffered evidence.”<sup>136</sup>

Arbitration handbooks and practice guides in circulation around the time the FAA was passed also uniformly encouraged arbitrators to err on the side of considering more, rather than less, evidence and to ignore technical rules of exclusion such as the hearsay rule and rules on opinion testimony. “Wherever there exists doubt as to whether certain testimony is admissible under one of the numerous exceptions [to the hearsay rule],” explained Kellor, one of the founding members of the American Arbitration Association (AAA), “it would seem to be the better practice for the arbitrators to admit such evidence . . . .”<sup>137</sup> The rationale for this bias was (and remains) quite simple: it reduces the risk that an award will be vacated because evidence was incorrectly excluded.<sup>138</sup>

Finally, even if judicial rules of evidence do not govern in arbitration proceedings, they are nonetheless part of a reservoir of shared practices and values that are persuasive on parties and arbitrators. Arbitration takes place against a background set of customs and values that make certain moves possible and others beyond the pale.<sup>139</sup> When disputes over evidence arise, parties and arbitrators are likely to turn to rules for the admission of evidence in court (and any relevant commentary and case law) for guidance.<sup>140</sup>

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DIFFERENCES ARISING BETWEEN INDIVIDUALS, FIRMS, OR CORPORATIONS 47, 51 (N.Y. Chamber of Comm. ed., 1911) [hereinafter *Hand Book for Arbitrators*] (“Arbitrators must before the proceeding is closed, take and consider all evidence that is material and pertinent to the controversy that is offered by either party.”).

133. Delgado et al., *supra* note 18, at 1373 (emphasis added).

134. Wigmore, *supra* note 63, at 539 (describing the rules of evidence as “mainly aimed at guarding the jury from the overweening effect of certain kinds of evidence”).

135. See FRANCES KELLOR, *ARBITRATION IN ACTION: A CODE FOR CIVIL, COMMERCIAL, AND INDUSTRIAL ARBITRATIONS* 99 (1941).

136. Schwartz, *supra* note 127, at 48 n. 42 (citation omitted); KELLOR, *supra* note 135, at 98 (“[A]s no penalty attaches to the admission of evidence that is neither pertinent nor relevant, arbitrators will not greatly curtail the admission of evidence, even though they may be satisfied that it has no bearing on the issue.”). One respondent to the New York City Bar Association’s survey remarked as follows: “It has been my experience in arbitrating cases that arbitrators usually listen to a great deal of pertinent evidence having a distinct bearing on the case which in the case of litigation might be objected to by an attorney and ruled out.” *Special Committee Report (1925)*, *supra* note 70, at 309.

137. KELLOR, *supra* note 135, at 101; see MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, *EVIDENCE IN ARBITRATION* 4, 15 (2d ed. 1987); MACNEIL ET AL., *supra* note 104, § 35.1.2.4, at 35:8–9.

138. See *supra* notes 129–132 and accompanying text.

139. Motion practice is an example. Even where provider rules fail to authorize motion practice, it has developed spontaneously based on what lawyers and arbitrators are accustomed to in litigation. See, e.g., Michael Hoellering, *Dispositive Motions in Arbitration*, 1 ADR CURRENTS 1, 8 (1996).

140. See, e.g., 2009 AAA Employment LEXIS 240 (James Greenwood, III, Arb.) (turning to state rule of evidence for guidance regarding when negligence may be inferred from circumstantial evidence); 2000 AAA Employment LEXIS 152 (William H. Ewing, Arb.) (stating that “legal rules of evidence . . . should apply in arbitration proceedings unless there is a very good reason for departing from them”); 1999 AAA Employment LEXIS 58 (Pamela J. White, Arb.) (noting that arbitrator was “guided by the

Consider what happens in arbitration when a party introduces hearsay testimony or a document that is alleged to bear the signature of a particular individual. Does the fact that there are no governing rules of evidence mean that the other side will be prevented from raising an objection or that the arbitrator will admit the evidence without batting an eyelid? Unlikely. Nor does it necessarily mean that the other side will fail to raise an objection, since it does not take legal training to appreciate the reliability problems inherent in hearsay testimony and unauthenticated documents. To be sure, there is no guarantee that the objection will actually be raised by a party or properly considered by the arbitrator in these circumstances. But the same is true in court, since evidentiary objections can be (and often are) waived.<sup>141</sup> And even when the objection is made, any error in admitting or rejecting the evidence is typically reviewable only if it had a demonstrable, non-harmless effect on the outcome.<sup>142</sup>

### C. Appeal

The relative lack of substantive merits review in arbitration is also taken as a telltale sign that arbitration's normative focus is not on justice or accuracy in outcomes but on other values such as autonomy or efficiency. For example, David Schwartz argues that "[a]rbitration is 'despotic decisionmaking' in the sense that the governing law makes arbitrator's decisions virtually unreviewable while accepting procedural and substantive results that would be considered unfair in a judicial setting."<sup>143</sup> Even commentators broadly supportive of arbitration sometimes proceed from this assumption. Thus, Paul Kirgis argues that the FAA's very limited grounds for vacatur or modification of arbitral awards—none of which provides relief for substantive legal errors<sup>144</sup>—evinces a "contractarian model" of arbitration, one that he believes was first put forward by merchants and commercial lawyers who pushed the FAA through Congress.<sup>145</sup> This, in turn, suggests to Kirgis that the FAA's purpose was to promote contractual autonomy rather than adjudicative justice.<sup>146</sup>

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Federal Rules of Evidence"); 1999 AAA Employment LEXIS 47 (Kevin B. Krauss, Arb.) (stating that the arbitrator used state rules of evidence and civil procedure "as a guide in processing this claim").

141. Richard A. Posner, *Comment on Lempert on Posner*, 87 VA. L. REV. 1713, 1714 n.8 (2001) ("Most lawyers and judges have quite a relaxed sense of the rules of evidence, often ignoring them by tacit agreement and not only in bench trials.").

142. FED. R. EVID. 103.

143. Schwartz, *supra* note 127, at 38.

144. 9 U.S.C. §§ 10, 11 (2012).

145. See Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN'S L. REV. 99, 99–103 (2006).

146. See *id.*; Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1, 5 (2006). In my view, what Kirgis overlooks is that the FAA's supposedly informal vacatur standards did not appear for the first time in the FAA; they were lifted *verbatim* from the premodern New York arbitration law in existence at least as of 1869, which in turn codified New York's common law vacatur rules. Aragaki, *supra* note 13, at 1951 & n. 57. The barebones vacatur provisions in the FAA are therefore more consistent with the earlier, "procedural model" of arbitration that Kirgis believes was replaced by modern arbitration law's contractarian emphasis. See Kirgis, *Judicial Review*, *supra* note 145, at 99.

Interestingly, Edward Brunet also points to the limited grounds for vacatur in FAA section 10 as evidence of the contract model, but largely for the *opposite* reason. Brunet believes that, in sharp contrast to an earlier paradigm of "folklore" arbitration, section 10 contemplates a much more modern, judicialized version of arbitration that actually provides too many grounds to challenge the award. Edward

But claims that substantive merits review either does not exist as a factual matter in arbitration or is normatively incompatible with the idea of arbitration are themselves matters of contention. At the time the FAA was passed, appellate boards were regularly used by chambers of commerce and trade associations.<sup>147</sup> There also appears to have been some willingness on the part of such groups to establish a system of precedent through published commercial arbitration reports that would become “generally recognized and accepted as sound business doctrine by those engaged in commerce.”<sup>148</sup> In more recent times, some arbitration supporters have urged the adoption of limited substantive merits review on the ground that it would improve the legitimacy and fairness of the process.<sup>149</sup> Major arbitration providers such as the AAA and JAMS have also promulgated appellate arbitration procedures.<sup>150</sup> Moreover, several states currently allow parties to contract for *de novo* judicial review of an arbitrators’ award.<sup>151</sup> Several federal circuits also followed

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Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 77–78 (1999). Unlike Kirgis, therefore, for Brunet it is the *formalism* of section 10 that makes it more consistent with autonomy.

147. The arbitration rules of several such groups provided for appellate arbitration. See, e.g., *Grain Dealers Nat’l Ass’n Arbitration Rules*, Art. IV (1923), in SELECTED ARTICLES ON COMMERCIAL ARBITRATION, *supra* note 42, at 105, 108–09; H. ARTHUR DUNN AND HENRY P. DIMOND, COMMERCIAL ARBITRATION, BEING A COMPILATION OF AWARDS OF ARBITRATION COMMITTEES OF VARIOUS TRADE ASSOCIATIONS AND CHAMBERS OF COMMERCE IN THE UNITED STATES 275–76, 279–80, 283–84, 286–90, 295, 304, 306 (1922) (setting forth rules of the Chicago and New Orleans Boards of Trade, among several others); Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 623 (1934) (“One is immediately struck in examining the trade association rules by the large number providing for an appeal after an arbitrator’s decision to another board of arbitration.”).

148. DUNN & DIMOND, *supra* note 147, at i (compiling and publishing redacted decisions provided for this purpose by trade associations and chambers of commerce “covering important trade customs and the interpretation of familiar contract terms, problems that arise daily in almost every active line of commerce”).

149. See, e.g., James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT’L ARB. 9, 97–102 (2004) (urging providers to adopt procedures allowing parties to obtain reconsideration of arbitral awards).

150. See, e.g., AM. ARBITRATION ASS’N, OPTIONAL ARBITRATION RULES (2013) available at [http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B9e172798-c60f-4de0-9ebc-438e54e78af8%7D\\_AAA\\_ICDR\\_Optional\\_Appellate\\_Arbitration\\_Rules.pdf](http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B9e172798-c60f-4de0-9ebc-438e54e78af8%7D_AAA_ICDR_Optional_Appellate_Arbitration_Rules.pdf); JAMS FOUNDATION, OPTIONAL ARBITRATION APPEAL PROCEDURE 2–5 (2003), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Optional\\_Appeal\\_Procedures-2003.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf); *Rules of Arbitration*, GREEN COFFEE ASS’N Art. XVII, [http://www.greencoffeeassociation.org/images/uploads/resources/PROFESSIONAL\\_RESOURCES-Arbitration\\_Rules.pdf](http://www.greencoffeeassociation.org/images/uploads/resources/PROFESSIONAL_RESOURCES-Arbitration_Rules.pdf) (last visited Mar. 21, 2016). The extent to which appellate arbitration procedures are currently used, however, remains an open question. See Brief for American Arbitration Association as Amicus Curiae Supporting Respondents at 23, *Hall St. Assocs v. Mattel*, 550 U.S. 968 (2007) (No. 06–989) (reporting that “less than one percent of arbitration agreements submitted to [the AAA] for administration contain provisions for appellate review”).

151. See N.J. STAT. ANN. § 2A:23B–4c (West Supp. 2013); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 97–98 (Tex. 2011); *Raymond James Fin. Servs., Inc. v. Honea*, 55 So. 3d 1161, 1169–70 (Ala. 2010); *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597–98 (Cal. 2008). Cf. *HH East Parcel LLC v. Handy & Harman, Inc.*, 947 A.2d 916, 926 n.16 (Conn. 2008) (stating two months after the Court’s decision in *Hall Street* that “[p]arties to agreements remain, however, free to contract for expanded judicial review of an arbitrator’s findings”) (*dictum*).

this practice until 2008,<sup>152</sup> when the Court put an end to it for agreements governed by the FAA.<sup>153</sup>

Second, as Harlan Dalton and others have argued, as a theoretical matter it is far from clear that a system with one automatic right of appeal promotes more just outcomes than a system without such a right.<sup>154</sup> Dalton asks us to consider a simple world (i) in which a trial court can be either correct or incorrect on the merits and (ii) in which an appellate court has only two options: affirm or reverse.<sup>155</sup> This gives rise to four possibilities:<sup>156</sup>

FIGURE 1

		Court of Appeal	
		<i>Judgment Affirmed</i>	<i>Judgment Reversed</i>
Trial Court	<i>Judgment Correct</i>	Uncertain case for appeal right	Weakest case for appeal right
	<i>Judgment Incorrect</i>	Uncertain case for appeal right	Strongest case for appeal right

The lower right-hand box—incorrect trial court judgment followed by a reversal on appeal—offers the strongest affirmative argument for appellate review. This is the scenario that critics of arbitration typically focus on when they argue that the lack of appellate review in arbitration is an undeniable hallmark of arbitration’s lawlessness.<sup>157</sup> But what Figure 1 makes clear is that there are three other possible alternatives. With respect to each of these alternatives, the right of appeal threatens to create (rather than correct) injustice. The upper right-hand box—correct trial court judgment followed by reversal on appeal—is arguably the worst possible outcome because it creates errors that would not have existed but for the appeal right. The upper and lower left-hand boxes both involve scenarios where the

152. P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 30–31 (1st Cir. 2005); Kyocera Corp. v. Prudential-Bache Trade Servs. Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 934–37 (9th Cir. 2001). Cf. UHC Mgmt Co. Inc. v. Computer Scis. Corp., 148 F.3d 992, 997–98 (8th Cir. 1998) (*dictum*).

153. Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008).

154. See, e.g., Robert M. Parker & Ron Chapman Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. REV. 573, 582 (1997); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 66 (1985); Irving Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417, 417–19 (1967). To be clear, these commentators do not argue for abolishing all appeals; instead, they advocate a system of discretionary review. See Dalton, *supra*, at 64.

155. See Dalton, *supra* note 154, at 76.

156. Figure 1 and the discussion that follows is substantially based on Dalton’s work. See *id.* at 76–81

157. See, e.g., Kenneth S. Abraham & J.W. Montgomery, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 362–63 (2003).

reviewing court simply reiterates the judgment below, in which case it is at least debatable the extent to which the right of appeal materially improves upon a system of no appellate review.<sup>158</sup> In fact, in such cases the right arguably results in less accurate outcomes because it imposes added transaction costs: The rightful winner or wrongful loser is “forced to subsidize the printing and lawyering industries just to wind up in the same place.”<sup>159</sup> To avoid these transaction costs, rightful winners will often agree to further compromise a correct trial court judgment in exchange for the losing party’s waiver of the appeal right.<sup>160</sup> Wrongful losers may agree to pay far more or receive far less than the actual value of the case for the same reason. The upshot is that if each of these four scenarios were equally likely, a concern for error correction—setting aside for a minute institutional goals and the appearance of legitimacy—does not unequivocally imply the need for an automatic right of appeal. This is perhaps one reason for the Court’s longstanding position that there is no due process right to substantive merits review.<sup>161</sup>

Extant empirical evidence about the relative probabilities of each scenario makes the case for such a right even more problematic. Appellate courts are known to affirm far more than they reverse,<sup>162</sup> meaning that the scenario that presents the strongest case for one appeal as of right (the lower right hand box in Figure 1) may be less common than one might imagine. Moreover, in the arbitration setting there may be an argument for leaving such legally incorrect awards alone rather than ‘correcting’ them. This is because arbitrators have the discretion to reach a legally incorrect result if they believe it necessary to avoid injustice. When they do, a reversal of that award on grounds of legal error may ensure fealty to the law but at the expense of substantial justice in particular cases. Barbara Black and Jill Gross’s study of securities arbitration cases points to this as a distinct possibility. Black and Gross found that for a number of reasons, including that securities law is complex, unclear, or favors brokerages, “arbitration panels, on more than an occasional basis, are reaching decisions favorable to investors even where the ‘law is clear’ that there is no basis for imposing liability on the broker.”<sup>163</sup> They predict that investors would fare worse in court given the difficulties of proof, the likelihood that a judge will apply strict pleading requirements, or simply because “customers’ complaints are frequently stronger on the equities . . . while the brokers’ defenses are stronger on the law.”<sup>164</sup>

158. There may, of course, be compelling institutional or party-centered reasons why a right of appeal is nonetheless justifiable in any of the remaining three scenarios. I set these other considerations aside, however, because the focus of this Symposium contribution is the conceptual link between the right of appeal and justice in outcomes.

159. Dalton, *supra* note 154, at 77.

160. *Id.*

161. Provided, of course, that due process rights were satisfied in the tribunal of first instance. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *State of Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cty.*, 281 U.S. 74, 80 (1930).

162. THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, *APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005* 4 (2006) (reporting state appellate court reversal rate of 32.7% for civil cases); Jon O. Newman, *A Study of Appellate Reversals*, 58 *BROOK L. REV.* 629, 633 (1992) (reporting that federal appellate courts reverse district court civil judgments only 27% of the time); Margaret P. Mason, Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 *YALE L.J.* 1191, 1198 n.30, 1199–1200 (1978) (studying decisions from 16 state supreme courts from 1870–1970 and finding that the aggregate reversal rate was 38.5%).

163. Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 *CARDOZO L. REV.* 991, 1040 (2002).

164. *Id.* at 1039.

At the same time, the other three scenarios, each of which provide reasons *against* a right of appellate review, may be more common than one would expect. For example, in their study of federal civil cases terminated between 1988–1997, Kevin Clermont and Ted Eisenberg found that losing defendants succeed on appeal at a rate of 33% while losing plaintiffs do so at a rate of less than half that—only 12%.<sup>165</sup> They argue that a “major source” of this defense-side bias is a perception by appellate courts that trial-level decisionmakers are generally pro-plaintiff, which they explain as inducing appellate judges to be “more favorably disposed to the defendant” than their trial court counterparts.<sup>166</sup> These findings suggest that in a not-so-insignificant percentage of cases, courts may be reversing correct trial court judgments (upper right-hand scenario).

Finally, the two left hand scenarios are also likely to be more common than one might expect, simply because appellate courts affirm for many reasons that have little to do with the actual merits. For example, depending on the applicable standard of review, certain factual and discretionary decisions by the trial judge may be allowed to stand even when they are actually erroneous. Cultural and institutional norms may also create an undue presumption in favor of affirmance. Examples include a desire for good relations with trial-level judicial colleagues, a fear that high reversal rates will drive up appellate filings, or “the strong identification, especially by former trial court judges, with those who labor under great pressure in the judicial trenches.”<sup>167</sup>

#### V. CONCLUSION: TOWARD A MORE SOPHISTICATED CONCEPTION OF ARBITRATION’S INFORMALISM

As arbitration clauses become increasingly common in mass contracts and mandatory binding arbitration comes under further scrutiny, I predict that the center of gravity of current debates will shift. Rather than whether adherents truly agreed to arbitration clauses or whether arbitration actually saves them time and money, the key question will become whether arbitration’s informalism currently provides—or can be adapted to provide—a fair process for end users, especially consumers and employees. But by constructing arbitration’s virtues exclusively in terms of autonomy and efficiency rather than justice, critics and supporters alike may have already predetermined the answer to this question.

My goal in this Symposium contribution has been to suggest that this construction of arbitration’s informalism deserves serious reconsideration. To begin with, it would have seemed odd to the judges, lawyers, and disputants who supported arbitration around the time the FAA was enacted. For they considered arbitration to be not just more economical and responsive to the needs and wishes of the parties, but for these reasons also a more just alternative than litigation in public courts *circa* 1925.<sup>168</sup> It is also curious as a theoretical matter. However much it may appear so to modern critics of arbitration, informalism is no more antithetical to justice than formalism. As the equity tradition itself attests, informalism has played and continues to play a vital role in the inevitable balance between *ex ante* rulemaking and

165. Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 952 (2002).

166. *Id.* at 971.

167. Dalton, *supra* note 154, at 79.

168. *See supra* notes 60–80 and accompanying text.

*ex post* judicial discretion. Although many speculate that informalism is nonetheless more likely in fact to produce injustice than formalism,<sup>169</sup> there is no persuasive body of empirical evidence to back this up. Indeed, to Pound and other early twentieth century architects of our current Federal Rules regime, it seemed just the opposite: *formalism* was more likely to cause injustice. This is why informalism came to be a key animating value of the procedural reform movement, as it was for the near-contemporaneous arbitration reform movement that helped produce the FAA.<sup>170</sup>

Is it possible to develop a more sophisticated conception of arbitration's informalism that would enable us to engage more meaningfully at the level of substantive or procedural justice in contemporary debates? Here I offer three suggestions.

First, we can no longer think of it as a choice between formalism and informalism. As a factual matter, informal systems such as Chancery were never completely devoid of rules—indeed they depended crucially on them.<sup>171</sup> The same is true of arbitration. Soia Mentschikoff made this point when she argued that

[t]he basic question is not whether rules of procedure or evidence are used in arbitration, for they clearly must be; the question is whether the ones used in arbitration are geared to the production of a better, in the sense of more just, result, than those used in the court process.<sup>172</sup>

By the same token, rule-bound systems never manage to purge all *ex post* balancing of the equities.<sup>173</sup> When they attempt to do so, as Duncan Kennedy argues, they typically generate “more uncertainty than would a frank avowal that the judge is allocating a loss by reference to an open textured notion of good faith and fair dealing.”<sup>174</sup> Pure formalism and pure informalism, in other words, are illusory.

Second, rather than the antithesis of rules, informalism may be better conceived as a particular *attitude* toward rules. If pure formalism takes rules as ends in themselves,<sup>175</sup> informalism can be reinterpreted as a flexibility to disregard the literal command of a rule in order to fulfill the policies or purposes behind it. The key is

169. See *supra* notes 24–26 and accompanying text.

170. Aragaki, *supra* note 13, at 1977–90.

171. Henry E. Smith, *An Economic Analysis of Law Versus Equity*, U. OF CHI. L. SCH. 4–5, 17–35 (Mar. 27, 2012), <http://www.law.uchicago.edu/files/files/Smith%20paper.pdf>. As Judge Posner explained, [m]odern equity has rules and standards, just like law. And although the ratio of rules to standards is lower in equity than in law, in cases where the plaintiff has an established entitlement to an equitable remedy the judge cannot refuse the remedy because it offends his personal sense of justice.

In the Matter of Grand Jury Proceedings Empaneled May 1988, 894 F.2d 881, 887 (7th Cir. 1989) (Posner, J.).

172. Mentschikoff, *supra* note 128, at 704.

173. For example, judges and juries sometimes manipulate legal rules in order to reach outcomes they believe are more fair. See, e.g., Drahozal, *supra* note 97, at 199–200 (citing contemporary studies showing that a significant percentage of judges and jurors admit to disregarding the substantive law in order to ensure justice and equity in particular cases).

174. Kennedy, *supra* note 35, at 1700.

175. Alexander, *supra* note 30, at 531 (“By formalism I mean adherence to a norm’s prescription without regard to the background reasons the norm is meant to serve (even when the norm’s prescription fails to serve those background reasons in a particular case.)”; Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. JL & PUB. POL’Y 645, 649 (1991) (describing rule-based decisionmaking as a determination to follow a rule even when doing so “produces the ‘wrong’ result . . . from the perspective of the justification undergirding the . . . rule”).

that informalism, on this view, does not deny the importance of following rules in the first instance. Cohen and Dayton captured this idea when they remarked that businessmen “generally draw their contracts in the light of ordinary rules of law” and that, when they go to arbitration, they “expect that their contract will be construed in accordance with [those] rules.”<sup>176</sup> But Cohen and Dayton added: “arbitrators will consider such rules and will not ignore them *if they think they are fair*,”<sup>177</sup> suggesting a view of informalism that does not reject rules outright—just rejects following them by rote. Much the same was true in equity, which was always required to follow the common law in the first instance.<sup>178</sup> From this standpoint, the fact that arbitration practice is becoming more rule bound or that parties are incorporating the Federal Rules of Civil Procedure or the Federal Rules of Evidence into their arbitration agreements<sup>179</sup> may not be a problem in and of itself—indeed it may help improve outcomes. The problem may instead arise when lawyers and arbitrators take an unnecessarily formalistic attitude toward those rules.

Third, rather than denoting a right or license to discard established rules and principles willy nilly, informalism can be regarded as coming with a responsibility to stand up to rules when they threaten to produce injustice. The formalist critique has traditionally taken informalism as a source of power rather than duty. From this standpoint, rule-boundedness is justice-enhancing insofar as it curbs the ability to abuse power. But what formalists overlook is that by doing so, rule-boundedness also minimizes any space to cultivate responsibility over and above the rote adherence to rules. Obeying rules thereby becomes not just necessary but also sufficient to ensure justice.<sup>180</sup>

For example, many critics take the FAA’s relative lack of detailed rules governing the procedure in arbitration, such as rules about discovery, as placing too much discretion in the hands of arbitrators or the party with greater bargaining leverage.<sup>181</sup> True enough if following the FAA’s barebones procedural rules is taken to be the extent of parties’ and arbitrators’ obligations. But the other way to understand this informalism is that it calls on us to be proactive about safeguarding justice despite what the FAA’s provisions expressly allow or forbid. Leading proponents of arbitration reform in the early twentieth century certainly saw it this way. They argued that, in order for arbitration to reach its full potential, it was not sufficient simply to have a federal arbitration statute. Private organizations such as the AAA had to step up to the plate to help ensure the quality and integrity of the process.<sup>182</sup>

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176. COHEN & DAYTON, *supra* note 98, at 26–27.

177. *Id.* (emphasis added); see also *Hand Book for Arbitrators*, *supra* note 132, at 52 (recommending that arbitrators should “disregard pure technicalities” but apply the substantive law so long as it was “based upon sound sense and the experience of mankind generally”).

178. Smith, *supra* note 171, at 19–21. As John Baker explained, medieval chancellors did not regard themselves as administering a system of law different from the common law of England. They were making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, rendered its attainment by due process unlikely. They came not to destroy the law, but to fulfil it.

BAKER, *supra* note 40, at 87.

179. See Stipanowich, *supra* note 10, at 12 n.62.

180. See *supra* notes 34–35 and accompanying text.

181. See, e.g., Carrington, *supra* note 7, at 282–83.

182. See COHEN & DAYTON, *supra* note 98, at 5, 12–13 (emphasizing the importance of close “supervision of [arbitral] procedure”—over and above what was provided in the FAA—by a chamber of commerce, trade association, or other organization which has special experience”); Aragaki, *supra* note 13, at 1982–84.

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A similar idea animates the Consumer and Employment Due Process Protocols, both of which were developed on the initiative of private organizations to improve the delivery of justice in arbitration.<sup>183</sup>

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183. NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE, CONSUMER DUE PROCESS PROTOCOL (1998); TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995).