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Thomas E. Carbonneau

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Arbitral Justice: The Demise of Due Process in American Law

Thomas E. Carbonneau

I. THE ARBITRAL PROCESS: AN INTRODUCTORY DEFINITION

Arbitration consists of a process for resolving disputes in a final and binding manner outside the traditional court system. The rules that govern arbitrations provide for flexible proceedings and do not require the strict application of legal rules. A standard contract provision mandating the submission of disputes to arbitration ordinarily is the gateway to the process.¹

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† Professor of Law and Director of the Eason-Weinmann Institute of Comparative Law, Tulane University. Copyright © 1996 Thomas E. Carbonneau.

¹ There are two types of arbitration agreements: the submission to arbitration under which contracting parties submit an existing dispute to arbitration and the arbitral clause under which contracting parties submit future disputes to arbitration. Ordinarily, parties agree to an arbitral clause and, once a dispute materializes, enter into a submission to refer the dispute to arbitration. At the time of the demand for arbitration and agreement thereto, the parties also draft the arbitral tribunal’s terms of reference, a document of central importance to the arbitration because it defines the tribunal’s scope of adjudicatory authority.
The agreement to arbitrate constitutes a waiver of other possible remedies for resolving disputes, including a formal judicial trial. The parties to the arbitration agreement name the arbitrators who act as the adjudicators of the matters submitted to arbitration. Arbitrators function as private judges and are usually experts in the matter submitted to arbitration. The arbitral tribunal’s determinations, known as awards, are usually simpler and less costly than their judicial counterpart and are more quickly rendered. Appeal against an award is generally either unavailable or unavailing.

II. HISTORICAL AND CONTEMPORARY STANDING OF THE ARBITRAL REMEDY

The idea of nonjudicial dispute resolution, and the recourse to arbitral adjudication in particular, has gained substantial standing in the U.S. legal system in the last ten to fifteen years. Owing largely to the holdings of the U.S. Supreme Court, arbitration law and procedure have emerged from the obscurity of specialized practice and entered the adjudicatory mainstream.

The institution of arbitration, however, was not always so blessed. Indeed, several decades ago the process of arbitration was neither an institution nor a commonplace means of resolving disputes.

2. The parties may, however, rescind their agreement to arbitrate by common agreement, or mutual rescission. Such an agreement would terminate the provision for arbitration and allow the parties to pursue litigation before the courts or enter into another dispute resolution contract.

3. It is important to note that arbitration, like a court proceeding, is a form of adjudication (i.e., a third party hears the arbitrating parties and has the authority to render a final and binding disposition of the case). Although the parties may settle their claim in arbitration, arbitral proceedings are not meant to induce settlement or provide circumstances for negotiation. Arbitration, therefore, is a modified form of the judicial proceeding. Other remedies for dispute resolution, such as mediation, negotiation, and the mini-trial, are nonadjudicatory devices. In these settings, the third party’s function is to assist the parties in attempting to reach a settlement. If the parties fail to agree, they must either invoke adjudication or leave their dispute unresolved.

4. Section 10 of the U.S. Arbitration Act, for example, provides very limited grounds for challenging the enforcement of an arbitral award. 9 U.S.C. § 10 (1994). The basis for challenge is limited to gross procedural deficiencies (e.g., arbitrator corruption or partiality, excessive exercise of arbitral authority, or glaring procedural unfairness) and does not include either the inarbitrability defense or the public policy exception to enforcement.

5. For a discussion of the Court’s decisional law, see Thomas E. Carbonneau, Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform, 5 Ohio St. J. on Disp. Resol. 231 (1990).
The history of arbitration is long-standing—dating back, for example, to biblical times and to the romanist period. The segment of its evolution that is germane to the present considerations can be confined to the nineteenth and early twentieth centuries—the formative period of modern legal systems.

In effect, the movement to establish functional national legal institutions precipitated a reaction against informal, nonlegal, and nonjudicial forms of adjudication. If courts were to function as the national oracles of normative law and procedural justice, there was little room for makeshift, party-confected modes of dispute resolution. The courts were a central organ of the state and an instrument for implementing the dictates of society's juridical creed. The mission of achieving justice required public investiture and accountability. Judicial responsibilities, therefore, were too august and serious to be exercised by just anyone.

Despite its historical antecedents, arbitration—in nineteenth-century Europe and later in the United States—was, therefore, viewed as a process that functioned in derogation of legality. It was a bastard remedy, incapable of being integrated into the self-respecting family of adjudication. It had the right blood, but lacked official status and proper standing. Arbitrators were caricatures of their judicial siblings—“pie-splitters,” who lacked requisite pedigree and cultivation. As a result, they were unable to perform professional adjudicatory tasks: conduct a trial and apply the law. Arbitrators could only pretend to be what they were not and never could be: real judges. Finally, ordinary citizens could not simply make their own law and disregard the judicial process by the vehicle of a contract arrangement. Society, as the collective entity, had the dominant voice in establishing justice and determining public policy.

The stigma of illegitimacy that marked the institution of arbitration during this period was variously expressed in different legal systems. These regulatory regimes, however, were unified by their common objective of dissuading or preventing parties from having recourse to arbitration. In most nineteenth-century civil-law systems, for example, the civil codes could not directly repudiate arbitration; it had a presence that was too substantial in legal history and in romanist

practices. The redactors of the codes quietly undermined the reference to arbitration, however, by eliminating features of the law that made it a functional remedy.\footnote{7}

Of the two types of arbitration agreements, the codes only recognized the submission to arbitration as a valid contract for dispute resolution. The submission is an agreement by which existing disputes are submitted to arbitration. The arbitral clause, the other type of arbitration agreement, is an agreement by which future disputes are submitted to arbitration. By outlawing the arbitral clause (presumably to protect parties from too hastily waiving their rights to a judicial forum and legal remedy), the legislation severely limited the access to arbitration. When in discord, parties would be much less likely than at the outset of their transaction to agree to anything, let alone arbitration.

Anglo-Saxon common-law jurisdictions also participated in the portrayal of arbitration as an untrustworthy and unacceptable alternative to judicial adjudication. Under English law,\footnote{8} the "stated case" procedure allowed courts to reform or to revise completely an arbitrator's ruling on the legal questions that arose during the arbitration. The case or the legal question that arose would be submitted to a court of law for final determination. According to English concepts, therefore, arbitrators were neither able nor qualified to render legal rulings. Intolerant of what it considered to be "justice under a tree," English law converted arbitral tribunals into factfinding bodies that were unable to provide final answers to the questions of litigation. From a practical perspective, parties would be extremely

\footnote{7} The practice referred to is still in evidence in a number of Latin American civil codes and codes of civil procedure. Although Latin American countries, Mexico in particular, are revising their view of arbitration in order to participate in international commerce, there is still a lingering view that arbitration is a vehicle for Northern imperialism.


reluctant to engage in arbitration if they were likely to receive a judicial disposition of their case in any event.\textsuperscript{9}

The U.S. legal system emulated the English example, espousing a generally inhospitable attitude toward arbitration.\textsuperscript{10} Although U.S. courts never altered or revamped the adjudicatory determinations of arbitrators, they refused to give binding effect to arbitration agreements until the arbitral tribunal had rendered an award. This judicial practice allowed parties who anticipated an unfavorable ruling from the arbitral tribunal to repudiate the agreement to arbitrate by lodging an action before a court of law prior to the conclusion of the proceeding.\textsuperscript{11}

Such systemic hostility toward arbitration illustrated that legislatures and courts were jealous of their jurisdiction, their authority, and their roles in society. They did not want their identities usurped or their work depreciated by arbitration. There was also a sense (perhaps a prejudice) that the public mission of the law and adjudication could not be accomplished in an ad-hoc fashion by private judges. The "untrained" could not do justice or discover how legal rules should intermediate between the public interest and individual rights. The normative function of law, as a guide through society's conflictual relationships, and its role in the political order—its ability to take elitist, unpopular, minoritarian positions in a democratic state—needed to be preserved and protected from vagaries of contractual justice.

However assessed, this rationale for the legal antipathy toward arbitration would soon wane and eventually expire in the mid- to late-twentieth century. Arbitration was about to be rehabilitated. Although European jurisdictions participated in this reappraisal of arbitration,\textsuperscript{12} the strength of the development has been most visible and elaborate in the U.S. legal system. Continental civil-law systems may have been

\begin{enumerate}
\item[9.] See Lionel Kennedy, Note, Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention, 23 VA. J. INT'L L. 75, 83 n.30 (1982).
\item[10.] On the U.S. law of arbitration, see Thomas E. Carboneau, American and Other National Variations on the Theme of International Commercial Arbitration, 18 GA. J. INT'L & COMP. L. 143 (1988).
\item[11.] Some argue that the practice actually indicated support for arbitration because it could result in enforcement. That view is as distortive as it is generous.
\item[12.] This is especially true of France. French courts and legislation were the primary leaders in the arbitration area until recently when the U.S. Supreme Court became very active in the area. See Thomas E. Carboneau, Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability, 2 TUL. INT'L & COMP. L. 193 (1994) (with François Janson).
\end{enumerate}
attuned to the role arbitration could play in international commerce, but it would be the U.S. Supreme Court that would envision arbitral adjudication as a means of refashioning the social role and function of judicial justice.

III. THE U.S. ARBITRATION ACT

In 1925, with the enactment of the U.S. Arbitration Act,\textsuperscript{13} the U.S. Congress declared the rehabilitation of arbitral justice and dispute resolution. Renouncing the precedent of English law, the legislation expressly terminated the U.S. judicial hostility to arbitration. It proclaimed that arbitration agreements were valid contracts constituting a lawful exercise by parties of their contractual rights. The courts were instructed to view arbitration agreements as "valid, irrevocable, and enforceable" contracts\textsuperscript{14}—in effect, to desist from their practice of frustrating the enforcement of arbitration agreements. As significant as the support for arbitration agreements was the Act's provision for limited judicial supervision of arbitral awards.\textsuperscript{15} This feature of the legislation guaranteed that the outcome of arbitration would be as binding and as unassailable as the promise to participate in the process.

These provisions anticipated, in effect, the modern, world-wide legislative legitimization of arbitration. Primarily because of the needs of an emerging international business community, arbitration would shed its suspect status and gain standing as a recognized adjudicatory remedy. The legislation would also spawn in U.S. law a progressive reconsideration of the value and of the very character of adjudication through arbitration. In the end, minimalist procedural and substantive guarantees under the law would be altered and arbitration's fundamental role and identity would be recast once again.

These radical developments could not be anticipated at the time of the enactment of the legislation. Indeed, the immediate consequences of the promulgation of the Act were consistent with its underlying goals. The federal courts sustained the contractual recourse to arbitration, and engaged only in the limited, legislatively authorized review of arbitral awards. Pursuant to the intent of the statute,

\textsuperscript{13} Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (current version at 9 U.S.C. §§ 1-16 (1994)).


\textsuperscript{15} See id. § 10 (1994).
Arbitration became accepted as a viable and binding remedy in commercial and maritime transactions. There, seasoned business people dealt with one another through standard practices and did not want their relationships disrupted by protracted legal proceedings.

In effect, arbitration provided a means by which merchants could resolve their disputes "in-house." It allowed them to appoint knowledgeable adjudicators aware of trade customs, to present their case in a reasonable and informal setting, and to have the matter decided quickly in a final fashion. Arbitration had established itself as a premier mechanism for achieving commercial justice.

IV. FEDERALISM AND LARGER JUDICIAL DESIGN FOR ARBITRATION

The impetus for the judicial articulation of a more ambitious vision of arbitration came initially from the conflict of federal and state law. Despite the rehabilitation of arbitration in federal law, many states continued to have statutes that were antagonistic to the alternative process. These statutes generally disallowed the recourse to pre-dispute arbitration agreements on the basis of public policy. Even willing, sophisticated parties were not allowed to relinquish their right to have their day in court prior to the emergence of a dispute. The paternalism of the approach was transparent, but it also reflected understandable concern about the integrity of law and the protection of rights.

Notwithstanding the misgivings in state laws, federal courts continued to apply the mandate of the U.S. Arbitration Act wherever substantive federal jurisdiction could reach. As a "substitute for industrial strife," for example, arbitration became, through the pronouncements of the U.S. Supreme Court, the remedy of choice in labor matters. There, as well, expertise, procedural flexibility, and nonlegalistic determinations best suited the character of disputes and the needs of parties.

The coexistence of countervailing state and federal laws on arbitration eventually became untenable, especially in litigation in which the federal courts were obligated to apply state law. In these cases, which reached the federal judiciary solely on the nonsubstantive

ground of diversity of the litigants' citizenship, federal courts—under the celebrated *Erie* doctrine\(^7\)—could be required to apply a state law hostile to arbitration. This resulted in a direct conflict between the federal court's duty to enforce arbitration agreements under section 2 of the U.S. Arbitration Act and its obligation under *Erie* to apply the provisions of state statutes. Necessary constitutional regard for the state authority to legislate and the balance between state and federal power, however, mandated that the federal courts live with and adapt to the conflict.

A. *Enter the U.S. Supreme Court*

It is at this juncture that the U.S. Supreme Court embarked upon its campaign to insulate arbitration from all possible legal challenges. Its early opinions contained doctrine that remained roughly within the circumference of the enacted legislation. The holdings addressed specific legal issues and, by comparison to later rulings, were timid and hesitating pronouncements. Nevertheless, they announced a much longer journey: the march toward a wide and boundary-less concept of arbitration, founded purely upon self-proclaimed judicial policy.

As to the conflict between the federal regime on arbitration and state laws, the Court's disposition was elliptical on the surface, but nevertheless clear in its direction. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court held that Congress had the authority to command that the federal courts rule in a particular way on certain issues.\(^8\) The federal legislation on arbitration represented such a directive and the federal courts were obligated to acquiesce to this congressional command even when their jurisdiction was based solely on diversity of citizenship. Moreover, the federal legislation, according to the Court, governed a purely procedural matter; because substantive rights were not involved, there could be no constitutional conflict between state and federal authority to legislate. Despite the evasive, somewhat tortuous reasoning, the Court's message was clear: The federal courts were to apply the federal law on arbitration whenever they entertained an arbitration question, regardless of *Erie* and claims for safeguarding states' authority to legislate in the area.

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The slight-of-hand in the reasoning was obvious. For example, asserting that arbitration law was merely a matter of procedure was hardly believable in light of the federal legislation's consecration of the contractual right to arbitrate. Moreover, the position that there was no conflict between federal and state law barely masked the naked assertion of federal power. The Court's decision in *Prima Paint* made clear that uniformity of approach, at least among the federal courts, was paramount on the Court's decisional agenda. A revolution in legal rights and protections had not yet been instigated or achieved, but it had been adumbrated.

A subsequent case, *Wilko v. Swan*, attested to the Court's moderation of design in interpreting the federal law on arbitration at this time.\(^{19}\) *Wilko* involved claims of securities fraud under the Securities Act of 1933. The 1933 Act was designed to bring stability to the financial marketplace after the 1929 stock market crash and instituted special remedies for protecting individual investors. In its ruling, the Court denied effect to a pre-dispute arbitration clause contained in a contract for brokerage services, reasoning that the public policy underlying the securities legislation exceptionally outweighed the competing public policy in the U.S. Arbitration Act.\(^{20}\)

*Wilko*, therefore, established a measured demarcation between the province of the public interest and the remedial domain of arbitration. Adjudication through arbitration could not be countenanced everywhere—especially not in the face of congressional declarations of exclusive judicial jurisdiction (as in the 1933 Act) and where weaker parties could be abused and were in need of protection. Arbitration was a dispute resolution alternative in specialty fields where self-regulation was the order of the day and parties were equally positioned. Such a restriction of the scope of application of arbitration was born of the nature of the remedy and of the disputes it was intended to address. It did not compromise arbitration's adjudicatory standing, but simply gave it appropriate definition.

**B. The March Begins**

Ensuing events robbed the federal judicial doctrine on arbitration of its balance and moderation. First, the Court embarked upon an

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20. *Id.* at 434-38.
ever-expanding endorsement of international commercial arbitration, viewing it as critical to the U.S. interest in international trade and commerce. Following the U.S. ratification of the New York Arbitration Convention (the principal treaty on international arbitration), the Court held, in effect, that international arbitrators could rule upon at least some disputes that arose not from the contractual relationship as such but under federal statutory law, despite the reference in these statutes to exclusive judicial jurisdiction. The exclusive jurisdiction of domestic U.S. courts was inapplicable, according to the Court, because of the international character of the transactions and the special adjudicatory needs of the international business community. Arbitration provided neutrality, expertise, and enforceability in transborder commercial relations, while litigation before municipal courts yielded primarily the uncertainty that proceeded from the conflict of jurisdiction, law, and judgments.

Second, the Court revisited the question of state and federal authority to regulate arbitration, emboldened to some degree by its position on international arbitration. It now proclaimed the federal law on arbitration to have a considerably enhanced scope. Reaffirming its prior disposition that federal courts were obligated to apply the federal law on arbitration even in diversity cases, the Court then extended that obligation to state courts. The Court held that state courts sitting in state-law cases must apply the provisions of the federal legislation whenever some basis, no matter how minimal, existed for applying federal law. This was accompanied by declarations that, where federal law could apply, state laws that

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23. See supra note 21 (cases cited therein).
24. See supra note 21 (cases cited therein).
contravened the Federal Arbitration Act were unconstitutional. The basis for the application and supremacy of federal law was the rather elastic notion of interstate commerce.

In seeking absolute national uniformity on arbitration, the Court rendered state laws that were antagonistic to arbitration inapplicable in litigation that otherwise was governed by state law and held before state courts. In effect, the right to arbitrate had become a substantive federal right protected by the Supremacy Clause of the federal Constitution. The protection of that right would extend wherever the concept of interstate commerce could be made to reach. Indeed, one might speculate that the exercise of the right itself created substantive, federal question jurisdiction.

The Court also, suddenly and inexplicably, merged its domestic and international doctrines on arbitration into a unitary arbitration law. The decisions on international arbitration lost their transborder and, to some extent, their commercial specificity. In a number of securities cases and later in a civil rights case involving age discrimination in an employment context, the Court advanced the view that even claims that arose under statutes with public policy implications could be heard by arbitrators in either the international or domestic setting.

The jurisdiction of arbitral tribunals had considerably widened. Arbitrators were not limited to ruling on maritime, commercial, contractual, and labor matters, but were also entitled, as a matter of law, to rule upon securities, RICO, civil rights, and any other type of claim, no matter what the import to the public interest, provided the arbitration agreement did not specifically exclude the arbitrators' right to adjudicate such matters.

These decisions, in effect, spawned the securities arbitration industry. They also established, for the first time, that arbitration was an acceptable remedy in the area of consumer disputes—even when the agreement to arbitrate was basically a unilateral and probably an adhesionary contract. The Court's articulation of an "emphatic
federal policy" on arbitration amounted to a revolution in the constitutional guarantees afforded to U.S. citizens. For all practical purposes, however, the Court’s stance on the question was buttressed by the U.S. Congress in subsequent legislation that implicitly affirmed the Court’s doctrine.

As a result of these “advances” in the federal law on arbitration, it is now possible for a major bank, a car manufacturer or dealership, a financial broker, or any other economic actor to insert a provision for final and binding arbitration in a purchase agreement or service contract and make it indispensable to the transaction. The consumer, if at all aware of the provision and its meaning, must either accept it as stated or forego doing business with the actor in question or the entire industry.

Federal law no longer protects the right to engage voluntarily in arbitration, but rather safeguards the right of some parties to force other parties into the process. Arbitration is not a matter of contract; it is a matter of law and, worse yet, a matter of judicial policy. Paradoxically, individual rights are abridged to enforce the private contractual right to engage in arbitration.

Recent cases indicate continued exuberance for arbitration on the part of the Court. Last term, the Court decided no less than four submission agreement is the only lawful contract for arbitration in these circumstances. In other words, a consumer may only agree to arbitration once a dispute has arisen.


32. In 1988, the U.S. Congress amended the Federal Arbitration Act so as to sustain the reference to arbitration and, in keeping with the U.S. Supreme Court’s position, to favor arbitration by restricting or basically eliminating possible challenges to the process. For example, new section 16 of the Federal Arbitration Act provides for immediate recourse against any federal court ruling that is unfavorable to arbitration and denies the same relief against rulings that favor arbitration. The Congressional intent is clear and is entirely in agreement with the Court’s decisional law. See 9 U.S.C. §§ 15, 16 (1994).

33. Bank of America in San Francisco recently placed arbitration agreements in all of its service contracts with its customers who had bank accounts.

34. Several car manufacturers and car dealerships insert arbitration clauses into sales contracts for the purchase of cars by customers.

35. Most, if not all, financial brokerage firms have arbitration provisions in their agreements with their customers. It is basically an industry-wide practice that is perfectly lawful. The agreement to arbitration is a prerequisite for clients seeking to do business with the firms. Soon after the ruling in the McMahon case, a Massachusetts law declared the practice of unilateral predispute arbitration clauses in brokerage services contracts to be unlawful. The U.S. Supreme Court affirmed the determination that that law was preempted by the Federal Arbitration Act. See Securities Indus. Ass’n v. Connolly, 883 F.2d 1114, 1114-15 (1st Cir. 1989), cert. denied, 495 U.S. 956 (1990).
arbitration cases. The number of cases reflects the importance the Court attaches to the law in this area. The decisions affirm the supremacy of federal law over state law and the position that the recourse to arbitration should be immunized from any legal challenge. The Court also affirms the position that arbitrators have a warrant to exercise the full range of judicial and remedial powers by authorizing them in effect to award exemplary relief. Finally, some content is added to the Court's evolving and curious contractualist concept of arbitration—a notion by which contracting parties can divest completely the legal system of any supervisory or regulatory authority over arbitration.

C. A Critique

The Supreme Court's brief for arbitration spans a number of Courts and Chief Justices and generally has unified the various ideological strains in the Court's membership. The Court views alternative remedies, arbitration in particular, as a means of alleviating the congestion in the federal court docket. Rather than argue for new courts and for the expenditure of additional public resources upon the judiciary, the Court prefers to push cases in the direction of arbitration. The perfect cover for this managerial objective is the assertion of the need to purify the judiciary of any residue of judicial hostility toward arbitration and to fulfil the expressed legislative goals of the federal law on arbitration.

Through its appearance of devotion to arbitration and to systemic considerations of separation of powers, the Court can more effectively ride herd upon the federal judicial bureaucracy. It seems to matter little what the ultimate implications are for individual rights or the

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36. Many writs are filed each year, requesting that the U.S. Supreme Court review inferior court rulings on constitutional grounds. The Court accepts for review only a very small percentage of the thousands of cases submitted—as few as one or two percent. To have the Court review and rule upon four arbitration cases, then, is literally a landmark event. See Sheldon R. Shapiro, Current Awareness Commentary, 132 L. Ed. 2d C-1 to C-2 (Aug. 1995).


38. See Mastrobuono, 115 S. Ct. at 1216-19.

institution of arbitration. In effect, the Court's response to the problem of access to federal courts is to make them even less accessible. Despite the burdens that are imposed upon the federal system for the prosecution of drug offenders and other criminal defendants, is it wise to push so much civil litigation outside the purview of the courts, when issues of significant public moment and basic fairness are implicated?

Arbitration was not conceived of as a judicial trial. It is privatized justice, funded exclusively by the arbitrating parties and controlled by them, the arbitrators, and private arbitral institutions, like the American Arbitration Association or the International Chamber of Commerce. The arbitral proceeding is not a public hearing, and—depending upon the language of the arbitration agreement—is not governed by the rules of judicial procedure or, in many instances, by the substantive rules of law. Arbitrators rarely (in domestic practice at least) issue reasons with their awards and the prospect of judicial scrutiny of the determination is virtually nonexistent. In the proverbial language, you get only one bite at the apple in arbitration, and the result is only as good as your arbitrator. Moreover, the determination is not intended to serve the public interest, but only that of the parties who have paid for the arbitration.

The Court's unbridled support for arbitration is at once surprising and unnecessary. The Court's willingness to curtail major constitutional and political interests—such as states' rights and federalism, civil rights, federal regulatory authority over the marketplace, and generally, due process guarantees—to bolster arbitration benefits neither the legal culture nor, in the long run, the institution of arbitration itself. In addition, the quality of the Court's reasoning in these cases detracts from the credibility of the announced doctrine. To have the highest court in a legal system dominated by the technicalities of legal procedure state that arbitration is a "mere form of trial"\textsuperscript{40} that does not affect the content of the statutory rights submitted to arbitration, is incredible and preposterous. Foreign and even domestic arbitrators will view legal claims arising under U.S. statutes differently than federal judges and will conduct hearings in a different fashion.

\textsuperscript{40} See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).
Unless the structure of arbitration is radically altered, it is not a suitable adjudicatory mechanism for every type of claim. One of the presumably lasting lessons of the alternative dispute resolution (ADR) movement is precisely that there is no universal device for dispute resolution. Furthermore, effective remedies must be customized to the individual characteristics of different disputes. In a word, arbitration is no more of a panacea than the adversarial trial. Surely, there must be some limit as to what arbitration can achieve and some remaining public function for the courts and the law to perform.

Finally, and this is the most disconcerting feature of the decisional law, the Court does not communicate in its opinions any sense of having a fundamental understanding of the institution of arbitration—either of its history, ideology, or actual operation. Standard notions in the area have no presence in the reasoning and a cohesive architecture of law is lacking. Logical difficulties and intellectual problems are dismissed by invoking slogans, misrepresenting prior opinions, and incanting ritualistic confidence in arbitration. Nowhere does the Court attempt to provide a serious definition of the role and function of arbitration and alternative remedies in the American legal process. The meaning of this "new age" and everything else is left up to the individual contract as a surrogate for regulatory authority and normative law.41

This saga of "legal revolution through arbitration" has yet other nefarious consequences. Converting arbitration into a privately funded second court system has had an impact upon the institution of arbitration as well. As the jurisdiction of arbitration grew, so did lawyer participation in the process and the adversarial tenor of arbitral proceedings. Lawyering practices—extensive, party-conducted pre-trial discovery, depositions, direct and cross-examination—are redefining the character of arbitral procedure and justice.

As a result, there is growing dissatisfaction with arbitral adjudication in both specialized and nonspecialized fields.42 Arbitral
proceedings are becoming protracted, more expensive, and more destructive of the litigants' relationship. Ironically, the Court's steadfast support of arbitration may result, in the end, in a depreciation of the institution. Specialized groups may lose a functional remedy and access to justice would remain difficult for the general population.

V. ARBITRATION AND ADR

The development of arbitration law has been allied generally to the recognition and endorsement of ADR, the movement toward alternative dispute resolution to achieve greater efficiency and humanity in adjudicatory practices. In fact, the federal court support for arbitration uplifted the standing and importance of ADR. The goal of ADR mechanisms (such as negotiation, mediation, and the mini-trial) is to provide structured frameworks by which third parties can assist disputing parties to reach their own resolution of their conflict. These mechanisms do not provide for adjudication, but rather attempt to foster agreement and settlement between the parties. In the age of limited resources and cost reduction, the touting of ADR has become quite popular. According to the consecrated expression, it allows the parties to "self-empower"—to exercise creativity and responsibility in the fashioning of solutions to their disputes.

The central difficulty, here again, is exemplified by the proselytizing tactics associated with these remedies. There is a denial of established hierarchy and methodology, no recognition of overarching interests—in street parlance, "just let the parties do it if they want to and perhaps let's force them to do it because it's better for them." ADR redefines the role of law in society and the public mission of the lawyer, but advocates never put content to that redefinition nor do they address the larger implications of the change they espouse. "Just try the new elixir," they seem to say, "and it will make you feel better." Although "lawyer-bashing" is a popular and invigorating sport, how valuable and necessary are lawyer services in our social and political community? Will the abandonment of traditional lawyer functions advance the interests of society? Will the

15. The principal complaints center upon the adversarialization of the proceedings that proceeds from growing lawyer participation in the process.

surrogate services help us to discover and sustain our communitarian values and ethics?

ADR and arbitration appear to beckon in a better direction and toward a new day. There is the prospect of transcending the limitations of human nature and of discovering finally the plenitude of fulfilled religion. Do mediation and arbitration or conciliation and negotiation truly open a path to higher-minded dispute resolution or are they illusions by which to avoid for a time, at least, the unpleasant aspects of social life in a human community? Can these devices assist us in better confronting abortion, capital punishment, racial discrimination or racial backlash, and each other? Advocates of ADR appear to mistake style and structure for content. We cannot place the Constitution or lawmaking institutions in abeyance for ADR experiments without paying a substantial price in terms of our social and political existence.

ADR offers a scattered and entangling methodology. If arbitration isn’t what you want throughout your “conflict,” you can always put in a rider for mediation at some stage of the dispute process. Then, your remedy becomes, by your very wish, “med-arb.” If arbitrators, mediators, and conciliators cannot get you to “agree,” then you should rent the services of a retired or out-of-office judge—“rent-a-judge.” Or, you may want particular devices for certain phases of your evolution through crisis and toward a remedy. You should then use one technique for factfinding, another to discuss how you “feel” about all of this dispute resolution experience, and yet another to guide you back through the maze of menus to your original problem.

In addition, there are now both public and private forms of ADR.\textsuperscript{44} Government agencies and selected federal courts employ ADR techniques to fulfill their public mandates. An agency does not regulate, but provides a framework for adjusting conflicts and disagreement between itself and the people over whom it has legal jurisdiction. Federal judges are authorized by Congress to experiment with mediation. The judges cease to hear cases and to apply the law; rather, they attempt to guide the parties to their “own” solutions. How many litigants are willing to tell the judge who is to hear their case if

\textsuperscript{44} For a discussion of this distinction, see \textit{Alternative Dispute Resolution} (Thomas E. Carbonneau ed., forthcoming 1997). \textit{See also} E. WENDY TRACHT-HUBER & STEPHEN HUBER, \textit{Alternative Dispute Resolution: Strategies for Law and Business} chs. 14-16 (1996).
they do not reach a mediated agreement that he or she has failed as a mediator of disputes? There is now in the public sector a rash of attempts, in the name of economy and cost reduction, to integrate ADR techniques into all facets of local, state, and federal government. This layer of ADR is added to the existing process in the private sector where ADR is now used to resolve all types of disputes. And that layer of ADR has been added to the traditional use of arbitration in specialty areas.

All of these disparate forms of ADR explode forth, and there is little in the way of public regulation (but for the concept of freedom of contract), and of definition of roles, ethics, and jurisdiction. Everyone, however, appears to be convinced that they are doing the right thing, "making a difference," and acting for the greater or greatest good and benefit of human kind.

The fallacy of the thinking lies in its facility. ADR, with its multiple choices, in the final analysis, may not depart so dramatically from the traditional judicial remedies. It may, in fact, only delay, confound, and complicate that eventual recourse. It may create more and different work for legal and other professionals. More importantly, the application of ADR techniques may not alter at all the reality of conflict or of dispute resolution in most settings. Finally, rather than dispose of our need for law and adjudication, ADR may only postpone and confuse our attempt to grapple with the significance of law in American society.

There is little doubt that the American form of adversarial litigation is problematic. There is reason to complain mightily about the length, cost, and debilitation of litigants and American society through the current legal process. Legal reform is necessary and so is a more realistic understanding of the limits and possibilities of litigation and of the legal method. The compromise of the fundamental guarantee of due process of law and equal protection, however, is clearly an excessive price to pay to achieve the necessary modifications.

Privately funded, nonpublic, nonnormative alternatives are simply not an adequate substitute for the public mission of the law. Arbitration fares well in highly defined, largely self-regulated communities, the activities of which are governed by established customary practice. Mediation is a viable mechanism in circumstances in which there is a substantial motivation for agreement
between the parties and in which there will be a continuing relationship. The specific area of child custody disputes following divorce is an illustration.

Neither alternative remedy can replace the social, historical, and cultural investment a community makes in a national legal system. The painstaking quest to determine what is right and to achieve what is fair cannot be eliminated from the existence or responsibilities of the community. Changes in trial procedures and in forms of liability can be attempted, but the need for a rule of law simply cannot be abstracted from our collective mind simply because it has become problematic. Part of an answer may reside in a redefinition of the training and function of lawyers. Different segments of the profession could perform different professional tasks. A special group of lawyers could function as dispute counselors. They would offer neutral advice to clients about available remedies and procedures.

VI. CONCLUSIONS

The late twentieth century is beset by revolutions. Past practices are under serious challenge. Most of these upheavals somehow implicate arbitration and commerce.

The quest for global economic advantage, for example, has generated regional economic alliances that seek to replace the nation-state. To varying degrees, the European Union and NAFTA are, of course, the best illustration of the attempt to erect regional economies and political institutions.

The ideological and economic collapse of the Soviet Union and its satellite states represents another revolution in the world geopolitical order. After the downfall of Communism, these countries are attempting to rebuild their societies, infrastructures, and marketplaces by attracting foreign investment. A necessary part of the undertaking involves espousing Western legal and commercial practices, which, in turn, means endorsing the process of international commercial arbitration.

These radical restructurings converge in a number of ways with the redefinition of American justice through arbitration. Each development involves the delegation or subordination of political, ideological, and cultural authority to the dynamics of commerce and the dictates of commercial practices. In each set of circumstances, the
hope is that commerce and the incentive for profit will fill the void and provide solutions to the complex problems that were left in the aftermath of the revolution. The creative energies of politics, ideology, and culture appear immobilized by the enormity of the tasks that lie ahead. Privatization and adopting the approach of the commercial bottom-line perhaps can stabilize problems, provide a functional lucidity, and point to a pathway out of a morass of difficulties.

In NAFrA, for example, when trade policy disputes between the participating national governments become irreconcilable, provision is made for delegating at least part of the resolution to private arbitrators. The goal, in effect, is to facilitate decisionmaking by transferring the conflict to a nonpolitical, nonpublic, and nonsovereign framework. Because procedural factors can influence the decisionmaking process, however, there is little agreement as to the composition of the projected arbitral tribunals. In other words, privatizing trade policy conflicts becomes merely another avenue for temporizing and allowing time to adjust countervailing positions.

Despite its considerable success in some dispute resolution areas, simply invoking the process of arbitration does not magically provide a solution or lessen the perplexities of establishing acceptable trade policy positions between sovereign governments that, in spite of their partnership, are in different stages of economic development. Private dispute resolution and the commercial approach have distinct advantages, but cannot be vehicles for resolving conflicts or problems that require other, less expedient solutions. Commercial practices cannot simply lend their efficiency and penchant for reasonable settlement to political problems that trigger national self-interest and divide cultures, nations, and national economies.

Rebuilding the former Communist states creates even more massive problems—the least of which at times appears to be the building of a legal system. There is, here as well, a great reliance upon the commercial ethos and the expression at least of rhetorical confidence in arbitration to resolve commercial conflicts. The real, rather than symbolic, passage of these countries from Communism to European-styled social democracy is a harrowing endeavor; even rudimentary achievements are likely to take decades. The trappings of democratization and Westernization are present, but, in the face of the upheaval and anarchy, prior practices appear more reassuring than the promises of the future. These states need and want the codification of
law to take place overnight. Founding legal institutions, however, cannot be simply imported or transplanted—at least not without generations of gradual adaptation.

How much is really changed in the new Russian Federation? In order to attract foreign investment with the image of a relatively stable business climate, the Russian Federation enacted an arbitration statute. The impression that was communicated by the legislation was that Russian parties could now enter into standard arbitration agreements, would participate in ordinary arbitration litigation, and make good on arbitral awards. Actual practice, however, is quite different from the projections.

The Russian view of arbitration has not been altered by the statute. Russians still think of arbitration as litigation under local law before Russian commercial courts. Moreover, would-be arbitral awards face little likelihood of successful enforcement if rendered against a Russian party. Doing business in Russia, for this and other reasons, is still perilous. The hold of the past remains strong.

Like a new adjudicatory day, the image of a new world order awash in harmony and rationality continues to be aspirational. The dilemma of living in human society is more, not less complex; exorbitant demands are being placed upon dwindling resources. Commerce and its predilection for arbitration cannot possibly function as vehicles for giving content to national culture and national political values. There are no facile, blanket solutions to the problems that confront either the world order or individual national societies. To move toward light rather than darkness, the new societies must begin the painful task of building real foundations and making choices that are difficult to the point of cruelty.

The temptation in the U.S. legal process to undertake law reform and curtail legal rights by heralding arbitration or other ADR mechanisms should not be indulged without great caution. Sloganeering wins elections, but does little to alter the real course of events in society. The problems with legal adjudication and lawyering practices are enormous, but these problems will not be resolved by embracing superficial solutions.

Some time ago, the residents of a particularly bad public housing development in Chicago declared that they were willing to waive their right against illegal search and seizure to allow police to address the project's problem with drug dealers.\textsuperscript{46} This was an act of desperation in the face of equally desperate circumstances. The media coverage emphasized the enormity of the drug problem rather than the profound unlawfulness of the solution. Only a few years ago, such a proposal would have been unthinkable and, if advanced, would have been roundly and rightly denounced. The core political culture of a society cannot be altered fundamentally without producing irretrievable modifications in the character of that society. No amount of despair or even human suffering is worth the denial of individual freedom or of democratic political heritage.

The Chicago example speaks eloquently to many different concerns; it curiously parallels the U.S. Supreme Court's decisional approach to arbitration by placing the protection of rights in an ancillary position among protected values. The primary dissenter against the evolution of the Court's case law on arbitration have all anchored their opposition in a protection of rights argument. Each dissenter proceeded from an intimate acquaintance with the rights that were being compromised to arbitration. The dissenter knew from past practice and professional experience that the rights involved were important to American law and society. Former Justice Douglas, a commercial lawyer of some repute, inveighed against the arbitration of securities claims in a prophetic dissent in \textit{Scherk v. Alberto-Culver, Inc.}\textsuperscript{47} Justice Stevens, a highly regarded scholar in antitrust law and a seasoned jurist, advanced a poignant critique of the arbitrability of antitrust claims in \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}\textsuperscript{48} He renewed, with vigor and force, his objections to the Court's misguided arbitration doctrine in the recent \textit{Vimar} case.\textsuperscript{49} Finally, Justice Thomas, long an advocate of states' rights, undertook

\begin{thebibliography}{9}
\bibitem{46} See Report on the Cabrini Green Housing Project (CNN television broadcast, Mar. 1993).
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in the *Terminix* and *Mastrobuono* cases\(^5^0\) a rigorous and trenchant analysis of the Court’s inconsistency on the state-law question.

These voices remind us of the gravity of the interests that are involved in this judicial reorchestration of the Bill of Rights. If we are unable to afford some of the social institutions we have, we should at least be allowed to vote upon which ones we are willing to expunge from our social life. The institution of arbitration is not simply being adapted to embrace a larger dispute resolution destiny. It is being exploited as a tool by which to achieve a surreptitious reduction of justice services in our society. American society is no longer characterized by a transcending rule of law, but rather by an expiring legal culture. Commercial expediency and privatized justice through arbitration may produce the desired efficiency in the short run, but what manner of political society will the United States be in the twenty-first century if, in desperation and despair, we rid it of the normative function of law and basic procedural justice?

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