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# An Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure

*Imre S. Szalai\**

## I. INTRODUCTION

When two parties agree to arbitrate a dispute between them, they generally agree that a neutral third party will resolve the dispute instead of a court. The parties in effect forego the rules of civil procedure available in court and substitute their own rules of procedure for resolving the dispute.<sup>1</sup> Our government sanctions this private system of dispute resolution, mainly through the Federal Arbitration Act (FAA).<sup>2</sup>

Arbitration agreements exist today in connection with a wide variety of transactions. Employers,<sup>3</sup> insurance companies,<sup>4</sup> merchants,<sup>5</sup> credit card companies,<sup>6</sup> cell phone companies,<sup>7</sup> banks,<sup>8</sup> and fast food companies<sup>9</sup> have all used arbitration agreements. When my first child was born, I was asked to sign an arbitration agreement during the registration process at the hospital before the delivery of my child. My wife was in labor, and I remember thinking, how can such an agreement be enforceable under these circumstances, and how did we get to this point where arbitration agreements are found throughout our society?<sup>10</sup>

The FAA, which was enacted in 1925, is the main federal statute regulating arbitration agreements.<sup>11</sup> The FAA generally declares that an agreement to arbi-

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1. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (by agreeing to arbitrate, a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration,” and the party does not forgo substantive rights).

2. 9 U.S.C. § 1-16 (2006).

3. *See, e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

4. *See, e.g.*, *Prescott Architects, Inc. v. Lexington Ins. Co.*, 638 F. Supp. 2d 1317 (N.D. Fla. 2009).

5. *See, e.g.*, *Adler v. Dell Inc.*, No. 08-cv-13170, 2009 WL 4580739 (E.D. Mich. Dec. 3, 2009).

6. *See, e.g.*, *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009).

7. *See, e.g.*, *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010).

8. *See, e.g.*, *Bailey v. Suntrust Bank*, No. 09-7776, 2010 WL 2010009 (E.D. La. May 18, 2010).

9. *See, e.g.*, Deepak Gupta, *Would You Like Fries with Your Mandatory Binding Arbitration Clause?*, Consumer L. & Pol’y Blog (Jan. 31, 2008), <http://pubcit.typepad.com/clpblog/2008/01/would-you-like.html>; McDonald’s Shrek All Family Event Reward Program Terms and Conditions, <http://shrek.mcdonalds.com/shrekterms.aspx> (last visited Oct. 4, 2010).

10. To be fair to the hospital, it did not appear to be the general practice of the hospital to have patients sign the paperwork at the time of delivery. Instead, the hospital had provided us with the paperwork a few weeks in advance, and we were supposed to turn in the paperwork earlier than the due date of our child. However, our first child arrived earlier than expected, and therefore, I filled out the paperwork when we were checking in at the hospital.

11. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (“[The FAA] creates a body of federal substantive law establishing and regulating the duty to honor an agree-

trate is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>12</sup> The FAA was a groundbreaking statute when it was enacted because prior to its enactment, “agreements to arbitrate future disputes were almost always unenforceable in the United States.”<sup>13</sup> Today, pursuant to the FAA, if parties agree to resolve a dispute through arbitration, and one party subsequently refuses to honor the arbitration agreement, the other party may petition a court to enforce the agreement.<sup>14</sup> If a valid arbitration agreement exists, the court will order the recalcitrant party to submit the dispute to arbitration.<sup>15</sup>

The FAA has not been significantly amended since its enactment in 1925. Over time, the uses of the FAA and the Supreme Court’s interpretation of the FAA have expanded beyond the original intent of the drafters. For example, the FAA was not intended to apply to arbitration agreements in the employment context, but the Supreme Court has expanded the application of the FAA to employment agreements.<sup>16</sup> Also, the FAA was never intended to apply in state courts.<sup>17</sup> However, the Supreme Court, in what has been called a “worse mistake” than the infamous constitutional error in *Swift v. Tyson*,<sup>18</sup> has held that the FAA is applicable in state courts.<sup>19</sup>

Due in part to the expansion of the FAA and the use of arbitration agreements in a wide variety of transactions throughout our society, there has been a backlash against the FAA over the last few years,<sup>20</sup> and there have been several recent proposals and attempts to amend the statute. For example, Congress attempted to enact the Arbitration Fairness Act of 2009, which would have broadly banned pre-dispute arbitration agreements in connection with disputes arising under civil rights laws and disputes in the employment, consumer, and franchise contexts.<sup>21</sup>

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ment to arbitrate.”) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983)).

12. 9 U.S.C. § 2 (2006).

13. 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 4.1.2 (Supp. 1999).

14. 9 U.S.C. § 4.

15. *Id.* The FAA also contains other provisions to facilitate arbitration, such as provisions regarding the appointment of arbitrators, and confirming, vacating, or modifying arbitration awards. See, e.g., *id.* §§ 5, 9-11.

16. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-41 (1991) (Stevens, J., dissenting) (analyzing the FAA’s legislative history to show that the FAA was never intended to apply to employment-related disputes between an employer and employee); see generally 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 (2006).

17. See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, AND INTERNATIONALIZATION* (1992); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541 (2004).

18. David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L. & CONTEMP. PROBS. 5, 7 (2004).

19. *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984).

20. For example, see the website for the Fair Arbitration NOW Coalition, an organization that is against the use of pre-dispute arbitration agreements in transactions with consumers, employees, homeowners, and the elderly. Fair Arbitration NOW Coalition, End Forced Arbitration, Home Page, <http://www.fairarbitrationnow.org/about> (last visited Oct. 4, 2010).

21. H.R. 1020, 111th Cong. § 4 (2009) & S. 931, 111th Cong. § 3 (2009).

In July 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>22</sup> which chipped away at the FAA by prohibiting arbitration in certain contexts and by authorizing government agencies to restrict the use of arbitration. The Dodd-Frank Act generally banned the use of pre-dispute arbitration agreements in connection with residential mortgages and home-equity loans.<sup>23</sup> Also, the Dodd-Frank Act authorized federal government agencies to prohibit or impose conditions or limits on the use of arbitration agreements in the securities and financial services industries.<sup>24</sup> Congress has, in effect, delegated authority to government agencies to amend the FAA through rules and regulations.<sup>25</sup> When these government agencies in the near future consider adopting regulations restricting the use of arbitration agreements, there will likely be much debate and lobbying about whether the use of arbitration agreements should be limited.

The ongoing debate about amending the FAA has encouraged me to explore the history of the FAA and its original purpose. I have often wondered why the FAA was enacted in 1925, at that particular moment in time. In my research, I have been surprised by the strong passions expressed by reformers who helped enact the FAA,<sup>26</sup> and I have often wondered what factors motivated them and led to the FAA's enactment. I have discovered that the history behind the FAA's enactment is rich, and multiple factors, and several different people and organizations, helped contribute to its passage in 1925.<sup>27</sup>

This article's primary focus is on a completely unexplored aspect regarding the development of our modern arbitration laws; the enactment of our modern arbitration laws has a significant relationship to landmark developments in modern civil procedure, particularly,

- (1) the enactment of the Judiciary Act of 1925, which gave the United States Supreme Court broad discretion to decide what cases it would hear

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22. Dodd-Frank Wall Street Reform Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (amending 15 U.S.C. § 780).

23. *Id.* § 1414(e)(1).

24. The Dodd-Frank Act created a Bureau of Consumer Financial Protection, which will regulate the offering and provision of consumer financial products and services. *Id.* § 1011(a). This new Bureau is required to conduct a study and produce a report of the use of arbitration agreements in connection with the offering or provision of consumer financial products or services. *Id.* § 1028(a). In line with its findings in the report, the Bureau is granted authority to issue regulations "prohibit[ing] or impos[ing] conditions or limitations on the use" of such arbitration agreements. *Id.* § 1028(b). Similarly, the Dodd-Frank Act authorizes the Securities and Exchange Commission to prohibit or impose conditions on the use of pre-dispute arbitration agreements in the securities industry. *Id.* § 921(a).

25. The Dodd-Frank Act also contains some other arbitration-related restrictions in connection with whistleblower protection provisions. *See, e.g., id.* § 922.

26. Others have had a similar reaction when studying the reformers who pushed for modern arbitration statutes during the 1920s. *See* MACNEIL, *supra* note 17, at x ("As a legal scholar digging primarily into the dry legal details of the story, I could nonetheless sense the deep passions, commitments, and prejudices stirring the participants. This lent an excitement to my task I had surely never expected.").

27. Imre S. Szalai, *Modern Arbitration Values and the First World War*, 49 AM. J. LEGAL HIST. 355, 360-62, 391 & n.20 (2007) (describing how the First World War influenced the movement for modern arbitration statutes and how organizations like the American Bar Association and members of the Chamber of Commerce of the State of New York played a prominent role in lobbying for the FAA).

through writs of certiorari,<sup>28</sup> and which has been described as causing “the most sweeping alteration of the Supreme Court’s role ever passed in American history” and as giving birth to the modern Supreme Court;<sup>29</sup>

(2) the enactment in 1934 of the Rules Enabling Act, which transferred to the federal judiciary the power to create procedure,<sup>30</sup> and the related adoption in 1938 of the Federal Rules of Civil Procedure, which in amended form still govern federal civil litigation today and heavily influenced the development of procedure in state court systems,<sup>31</sup> and

(3) the Supreme Court’s expansion of personal jurisdiction in 1945 in *International Shoe Co. v. Washington*, which developed the modern framework to analyze the fundamental question of the limits of a court’s power over a defendant.<sup>32</sup>

In sum, the FAA was part of a broader, contemporaneous movement for procedural reform, and this article discusses this remarkable and unexplored relationship between the FAA and modern civil procedure.

This article attempts to fill two salient gaps in prior scholarship. First, it has been observed that the relationship between civil procedure and alternative dispute resolution has not received substantial attention, and the two fields have remained segregated in legal academia.<sup>33</sup> This article, through its examination of the inter-related development of our modern arbitration laws and civil procedure, is an attempt to help merge the study of these two fields. Second, there has been criticism that the study of civil procedure often gives insufficient attention to history, and that the study of historical foundations of procedure should be the starting point for understanding modern procedure.<sup>34</sup> This article examines the historical development of our modern arbitration laws and their overlooked relationship to other important developments in civil procedure, and this study can help inform our current understanding of these procedural developments and inform future debate about reforms.

As mentioned above, the backlash against the FAA and seeing how the FAA is used and arguably abused in current practice generally encouraged me to ex-

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28. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 § 237(b) (1925) (codified as amended at 28 U.S.C. §§ 1254, 1257, 1259 (2006)).

29. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1644 (2000); Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 14 (2008).

30. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as 28 U.S.C. § 2072 (2006)).

31. The original version of the Federal Rules of Civil Procedure can be found at 38 U.S. 649, 649-788 (1938).

32. 326 U.S. 310 (1945).

33. Jean R. Sternlight and Judith Resnik, *Competing and Complementary Rule Systems: Civil Procedure and ADR, Forward*, 80 NOTRE DAME L. REV. 481, 487 (2005); see also Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 681-89 (2005).

34. Tobias Barrington Wolff, *Geoffrey C. Hazard, Jr., and the Lessons of History*, 158 U. PA. L. REV. 1323, 1323-24 (2010); *id.* at 1323 (“In the field of civil procedure, it is sometimes a struggle to get practitioners, judges, and scholars to give history the attention it deserves.”).

amine the history of the FAA. However, the idea for this article arose more directly from two sources.

First and foremost, the groundbreaking work of the late Professor Ian Macneil most directly inspired this article. Professor Macneil wrote the leading book about how American arbitration law developed.<sup>35</sup> However, Professor Macneil explained that the focus of his book was narrow, and he emphasized that his study “necessarily omits a great deal, particularly related to context and causation.”<sup>36</sup> At the end of his book, he encouraged others to engage in “causative investigation” and examine what other forces may have shaped the development of American arbitration law.<sup>37</sup> More specifically, Professor Macneil recommended that for a proper, thorough understanding of American arbitration law, one should examine the following question: “What was the connection between the arbitration reform movement and the more general movement for professional procedural reform that occurred during the same decades.”<sup>38</sup> He explained that he avoided answering this question in his book,<sup>39</sup> and Professor Macneil’s question most directly encouraged me to examine the relationship between the enactment of the FAA and the contemporaneous, broader movement for procedural reform.<sup>40</sup>

Second, some news organizations have a practice of preparing obituaries for famous people far in advance of their deaths,<sup>41</sup> and I thought it would be an interesting exercise to apply this practice to the FAA. The FAA, as used today, has its faults and is in need of some amendments. Congress has already begun to chip away at the FAA by restricting the use of arbitration agreements, and I expect that perhaps sometime in the future, Congress may significantly amend the FAA. If and when the FAA is significantly amended, what will be remembered about this 1925 statute? What would a hypothetical obituary for the FAA look like? With all the recent backlash against the FAA, it is easy to lose sight of how the enactment of the FAA was a significant achievement in procedural reform. Examining the FAA within its historical context as part of a broader, contemporaneous movement of procedural reform helped me appreciate some strengths or values of the FAA as it relates to modern civil procedure. I wanted this article and hypothetical obituary to capture some of these overlooked values of the FAA, and I hope these values can inform future debates about amending the FAA.

In order to explore the different ways in which the FAA is related to the development of modern civil procedure, this article is divided into four main parts. First, this article discusses how the FAA is related to the Judiciary Act of 1925.<sup>42</sup>

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35. MACNEIL, *supra* note 17.

36. *Id.* at 174.

37. *Id.*

38. *Id.* Professor Macneil mentions Professor Edward Purcell as the source of this question in his book.

39. *Id.*

40. I would like to stress again that there are many different factors that influenced and helped shape the enactment of the FAA in 1925. This article regarding the relationship between arbitration and civil procedure focuses on only one particular aspect of how and why our modern arbitration laws developed.

41. David F. Gallagher, *Compressed Data; Don't Mourn, Yet. These Obits Were Only Designs*, N.Y. TIMES, Apr. 21, 2003, at C4 (describing how CNN's draft obituaries were accidentally published online).

42. I discussed the relationship between the FAA and the Judiciary Act of 1925 in a short section in a prior article dealing with the FAA and subject matter jurisdiction. See Imre S. Szalai, *The Federal*

Second, this article focuses on the FAA's relationship to the enactment of the Rules Enabling Act and the related adoption of the Federal Rules of Civil Procedure. Third, this article discusses how the Supreme Court's transformation of the doctrine of personal jurisdiction in *International Shoe* is related to the enactment of the FAA. Fourth, this article discusses how the FAA's relationship to important procedural developments helps emphasize that there is an interconnectivity between arbitration and litigation, and through this examination, one also sees how the FAA can serve our legal system and modern society in different ways.

#### A. *The FAA's Relationship with the Judiciary Act of 1925*

William Howard Taft, who served as President of the United States and subsequently Chief Justice of the United States Supreme Court, was an advocate for procedural reform during the early decades of the 1900s.<sup>43</sup> He was instrumental in the passage of the Judiciary Act of 1925, which expanded the discretionary power of the United States Supreme Court to hear cases and in effect gave birth to our modern Supreme Court.<sup>44</sup>

In August 1908, Taft delivered a speech titled "The Delays of the Law" to the Virginia Bar Association,<sup>45</sup> and this speech called for procedural reforms to improve the administration of justice.<sup>46</sup> This speech, which occurred near the beginning of the movement for procedural reform, foreshadowed some future successes of this movement. Taft spoke about the technicality, delay, and expense of litigation.<sup>47</sup> He explained that existing court procedures were too "elaborate," and he desired to reform procedure and make it "simple and effective."<sup>48</sup> Taft also suggested that such reforms could be implemented by the legislature enacting a practice act containing a few general principles, and the legislature would then delegate to the judiciary the function to create rules of court. As explained in the next section of the article, these suggestions eventually came to fruition when Congress enacted the Rules Enabling Act in 1934.

In his 1908 speech, Taft also explained that there was so much frustration with existing court procedure that such frustration had "induced merchants and commercial men to avoid courts altogether and to settle their controversies by

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*Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 369-72 (2007). The discussion of the relationship in this current article borrows from, and builds upon, the short section from the prior article. The prior article focused on a jurisdictional issue involving the FAA, and not the development of different procedural reforms as this article does.

43. Robert Post, *Taft & The Administration Of Justice*, 2 GREEN BAG 2d 311, 312 (1999).

44. Hartnett, *supra* note 29.

45. The Yale Law Journal published this speech. See generally William H. Taft, *The Delays of the Law*, Address Delivered Before the Virginia Bar Association (Aug. 6, 1908), 18 YALE L. J. 28 (1908).

46. See generally Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906). Taft's 1908 speech about the need for procedural reform echoed similar themes from a famous 1906 speech given by Roscoe Pound, future dean of the Harvard Law School, at the annual meeting of the American Bar Association (ABA). Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006); see also John Henry Wigmore, *The Spark that Kindled the White Flame of Progress: Pound's St. Paul Address of 1906*, 46 J. AM. JUDICATURE SOC'Y 50 (1962). Pound's 1906 speech, which will be explored in more detail in the next section of the article, has been credited as the "spark" that started a procedural revolution.

47. Taft, *supra* note 45, at 30-31.

48. *Id.* at 31.

arbitration, and to this extent the courts have been relieved.”<sup>49</sup> However, he recognized that this use of arbitration was mainly possible only between business associates or members of the same commercial body, and he lamented that others could not easily take advantage of the benefits of arbitration.<sup>50</sup> It should be remembered that at the time of Taft’s speech, which was before the enactment of the FAA in 1925, courts generally would not force parties to honor an arbitration agreement.<sup>51</sup> However, the use of arbitration was possible within the context of a trade association or closely-knit business community most likely because pressures from the organization or community, such as the threat of expulsion, could have the effect of encouraging parties to honor an agreement to arbitrate.<sup>52</sup> Although Taft’s 1908 speech did not call for the enactment of a law broadly supporting arbitration like the FAA does, he did recognize the benefits of arbitration,<sup>53</sup> and Taft suggested the enactment of a limited arbitration law to support an arbitration tribunal for particular disputes.<sup>54</sup>

Also, in his 1908 speech, Taft foreshadowed the enactment of the Judiciary Act of 1925. Taft did so when he explained that litigants who reach a supreme court typically have already had one appellate review of their case in an intermediate appellate court, and he did not believe that the purpose of a supreme court should be to give a second appellate review to the litigants because they already had a first appellate review.<sup>55</sup> Instead, Taft’s 1908 speech explained that the purpose of a supreme court should be to “lay down general principles of law for the benefit and guidance of the community at large,” and thus, “the appellate jurisdiction of the court of last resort should be limited to those cases which are typical and which give to it in its judgment an opportunity to cover the whole field of the law.”<sup>56</sup> As explained below, Taft’s suggested reforms regarding appellate jurisdiction came into being with the enactment of the Judiciary Act of 1925, which Taft heavily lobbied for and which redefined the appellate jurisdiction of the United States Supreme Court.

In 1922, while Taft was serving as Chief Justice of the United States Supreme Court, Taft gave a speech entitled “Possible and Needed Reforms in the Administration of Justice in the Federal Courts” at the ABA’s annual meeting.<sup>57</sup> Taft began this speech by expressing concerns that the judicial business of the federal

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49. *Id.* at 30-31. The next section of the article will explore in more detail the frustration with existing court procedures during the early 1900s.

50. *Id.* at 31.

51. Prior to the enactment of the FAA, “agreements to arbitrate future disputes were almost always unenforceable in the United States.” MACNEIL ET AL., *supra* note 13, § 4.1.2.

52. *Cf.* MACNEIL, *supra* note 17, at 36-37.

53. Taft, *supra* note 45, at 36-37 (“The hearing is prompt and the payment of the award equally prompt, and in this way a large mass of litigation that now blocks our courts would be taken out of our judicial tribunals, and be settled with dispatch.”).

54. *Id.* at 36-37. Later, near the end of World War I, Taft served on such an arbitration tribunal for specialized disputes. Taft was the co-chair for the National War Labor Board, which helped administer arbitration to resolve labor disputes that would impact mobilization for the war. See Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOT. L. REV. 399, 420-29 (2008).

55. Taft, *supra* note 45, at 34.

56. *Id.*

57. William Howard Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, 45 ANN. REP. A.B.A. 250, 250 (1922).



courts had significantly increased and caused delays in hearing cases, and he detailed several causes of the overcrowded federal dockets, including how federal regulations had multiplied and how the business of the country had increased and led to more disputes.<sup>58</sup> Other scholars have similarly recognized how concerns regarding the overcrowded federal dockets encouraged reforms:

The growing national economy was accompanied by an increase in regulation, at both the national and state levels, and the industries subject to regulation were not shy about challenging these new laws. Expanding caseloads also resulted from prosecutions of actors engaging in activities recently criminalized by Congress: narcotics trafficking, white slavery, income tax violations, auto theft, and perhaps most dramatically, Prohibition-related crime. In addition, federal courts faced a wave of civil litigation stemming from war-related contract and bankruptcy disputes. These factors combined to produce increasingly clogged dockets that spurred reformers to seek solutions.<sup>59</sup>

Procedural reforms like the Judiciary Act of 1925, the FAA, the Rules Enabling Act, and the Federal Rules of Civil Procedure took place against this backdrop, and these reforms were viewed, at least in part, as helping to alleviate concerns about an overburdened judiciary.

In Taft's 1922 speech, after discussing concerns about the overcrowded federal dockets, Taft discussed some needed reforms which would help deal with these concerns, including the need for simplified, uniform federal procedure and a proposal to reform the appellate system. In his speech, Taft continued to stress the importance of simplifying federal court procedure by arguing that law and equity should be merged and Congress should delegate to the judiciary the power to create simplified rules.<sup>60</sup> Taft mentioned the ABA's campaign for Congress to

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58. Taft explained some of the causes of the overcrowded dockets as follows:

[The] business [of the federal courts] has grown because of the tendency of Congress toward wider legislative regulation of matters plainly within the federal power which it had not been thought wise theretofore, to subject to federal control. More than that, the general business of the country, and the consequent litigation growing out of it has increased, so that even in fields always occupied by the federal courts, the judicial force has proved inadequate. In this situation, the war came on, statutes were multiplied, and gave a special stimulus to federal business. Since the war, there has been a great increase of crimes of all kinds throughout the country. This within the federal jurisdiction has included depredations on interstate commerce, and schemes to defraud in which are used facilities furnished by the general government. Then under the inspiration of the war, traffic in intoxicating liquors was forbidden, and under the same inspiration the 18th Amendment was passed and the Volstead Law was put upon the statute book. Prosecutions under this law alone have added to the business in the federal courts certainly 10 per cent.; while cases growing out of the income and other war taxation, out of war contracts and claims against the government, have made discouraging arrears in many congested centers. The criminal business has usually been first attacked, and the effort to dispose of it has in some jurisdictions nearly stopped the work on the civil side.

*Id.* at 250-51.

59. Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 1 (2003).

60. Taft, *supra* note 57, at 259-60.

delegate such rule-making power to the judiciary,<sup>61</sup> and he recognized that this reform, which would lead to simplicity and efficiency in the administration of justice, would help alleviate concerns about the overcrowded dockets.<sup>62</sup>

Taft's 1922 speech also focused on the need for reforming the appellate jurisdiction of the Supreme Court. He explained that with the docket problems in the lower federal courts, the number of appeals to the Supreme Court had increased so much that there was significant delay in hearing a case,<sup>63</sup> and he was concerned that the Supreme Court would "fall further and further behind" in hearing cases due to the increased business of the lower federal courts.<sup>64</sup> Taft explained that to help deal with such concerns regarding an overburdened federal judiciary, there was a need to modify the jurisdiction of the Supreme Court by increasing its discretionary power to hear cases, and Taft discussed proposed legislation to this effect, which Congress eventually enacted as the Judiciary Act of 1925.<sup>65</sup>

To help alleviate concerns regarding an overburdened federal judiciary, the Judiciary Act of 1925 limited access to the Supreme Court and permitted an appeal to the Supreme Court as a matter of right only in limited circumstances.<sup>66</sup> Other than those limited appeals as a matter of right, "[v]irtually all other cases came to the United States Supreme Court by certiorari, where the Court had discretion whether to grant review."<sup>67</sup>

This restructuring of the Supreme Court's jurisdiction has been described as "the most sweeping alteration of the Supreme Court's role ever passed in American history"<sup>68</sup> and as helping give birth to the modern Supreme Court, which has the power to set its own agenda by choosing which cases to hear.<sup>69</sup> Former Justice

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61. This campaign regarding federal court procedure will be explored in more detail in the next section of the article.

62. Taft, *supra* note 57, at 265-67.

63. *Id.* at 250-58.

64. *Id.* at 258.

65. *Id.* at 254-58. Others have similarly described how the Judiciary Act of 1925 was intended to deal with overcrowded dockets:

The Court's caseload increased by leaps and bounds as the nation's judicial business exploded in the period following the First World War . . . . By the 1920s, another docket crisis was in full swing. Justice was again marred by delays in disposing of the Court's caseload - a caseload still heavily weighted with mandatory-type cases . . . . Under the leadership of Chief Justice Taft, a committee of Supreme Court Justices suggested to Congress that the docket crisis be addressed by reducing the mandatory docket and expanding the discretionary docket. The primary object of this proposal, as Justice Van Devanter explained to the Senate, "is to relieve the congestion resulting from the present over-crowded docket of the Supreme Court, and thus enable a more expeditious disposition of the cases which that court is called upon to decide, by restricting the obligatory appellate jurisdiction of the court to cases and proceedings of a character and importance which render a review of right in the Supreme Court desirable from the public point of view."

Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 85-86 (1988) (quoting *Procedure in Federal Courts: Hearings on S. 2060 and S. 2061 Before the Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong. 6-7 (1924) (statement of Justice Van Devanter)).

66. See generally FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 255-94 (1928) (exploring the different ways in which the Judiciary Act of 1925 changed the jurisdiction of the Supreme Court and gave the Supreme Court power to determine whether a case involved a sufficient national interest justifying the exercise of jurisdiction).

67. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 1.4 (4th ed. 2003).

68. Sternberg, *supra* note 29, at 14.

69. Hartnett, *supra* note 29, at 1644-45.

Sandra Day O'Connor praised Taft and his leadership in the passage of the Judiciary Act of 1925 as helping to transform the Supreme Court from a court that at first served a small, newborn country into a court that could accommodate the needs of a much larger, modern society.<sup>70</sup>

As mentioned above, the Judiciary Act of 1925 helped respond to concerns about an overcrowded federal judiciary. However, then Professors Felix Frankfurter and James M. Landis of Harvard Law School criticized Congress for ignoring the lower district courts when it enacted the Judiciary Act of 1925. They argued that the Judiciary Act, although relieving the Supreme Court of overcrowded dockets, left "unchecked" the "major" problem of increasing caseloads in the lower district courts.<sup>71</sup> They criticized Congress for not exploring "ways and means of shutting off at its source litigation that eventually finds its way to the Supreme Court."<sup>72</sup>

Although they were correct that the Judiciary Act of 1925, by itself, failed to address the problem of congested dockets of the lower federal courts, Professors Frankfurter and Landis appear to have overlooked an important relationship between the Judiciary Act of 1925 and the FAA: the same Congress that passed the Judiciary Act of 1925 simultaneously enacted the FAA, which would help relieve this problem of overcrowded dockets in the lower federal courts. The bills that would become the FAA and the Judiciary Act of 1925 were referred to the respective Committees on the Judiciary.<sup>73</sup> The Speaker of the House signed these enrolled bills on February 5, 1925, and the Senate President pro tempore signed them on February 6, 1925.<sup>74</sup> On the following day, the bills were presented to President Calvin Coolidge for his approval.<sup>75</sup>

President Coolidge signed the FAA into law on February 12, 1925, and he signed the Judiciary Act of 1925 into law the following day.<sup>76</sup> The "major" problem of the "growing volume of business" before the lower federal courts, as de-

70. Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 8 (1990) (quoting Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 898 (1953)). For more background regarding the enactment of the Judiciary Act of 1925, see generally FRANKFURTER & LANDIS, *supra* note 66.

71. FRANKFURTER & LANDIS, *supra* note 66, at 272, 294 ("The growing volume of business coming before the district courts, with its inevitable reflex upon the burdens of the circuit courts of appeals and the Supreme Court, was also left unchecked, with a single minor exception [regarding corporations chartered by Congress].").

72. *Id.* at 292.

73. In January 1924, subcommittees of the Committees on the Judiciary from the Senate and House of Representatives held joint hearings on the bills which would become the FAA. See *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong., 1st Sess. (1924) [hereinafter 1924 Hearings]. Shortly thereafter, in early February 1924, the Subcommittee of the Senate Committee on the Judiciary held hearings on the bill that would become the Judiciary Act of 1925, and later in December 1924, the House Committee on the Judiciary held hearings on the bill that would become the Judiciary Act of 1925. See *Procedure in Federal Courts: Hearings on S. 2060 and S. 2061 Before the Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong. 47 (1924); *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States, Hearings on H.R. 8206 Before the House Comm. on the Judiciary*, 68th Cong. 25 (1924).

74. 66 CONG. REC. 3060 (1925); *id.* at 3091.

75. *Id.* at 3276.

76. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (1925) & Act of Feb. 13, 1925, ch. 229, 43 Stat. 936; 66 CONG. REC. 3747-48 (1925).

scribed by Professors Frankfurter and Landis,<sup>77</sup> was specifically mentioned by supporters of the FAA as a reason for the FAA's passage. During Congressional hearings regarding the FAA, there were repeated references to how the FAA would help alleviate the problems of overcrowded dockets.<sup>78</sup> In conclusion, contrary to the observation of Professors Frankfurter and Landis, Congress did not ignore the overburdened lower courts when it enacted the Judiciary Act of 1925.<sup>79</sup> The FAA and Judiciary Act of 1925 are two important procedural reforms that were considered and enacted simultaneously, and with the simultaneous enactment, Congress approved a two-pronged approach to help relieve an overburdened federal judiciary.

## II. THE FAA'S RELATIONSHIP WITH THE RULES ENABLING ACT AND THE FEDERAL RULES OF CIVIL PROCEDURE

During the early 1900s, there was a reform movement that led to the enactment of the Rules Enabling Act in 1934 and the related adoption of the Federal Rules of Civil Procedure in 1938, both of which were landmark developments for modern civil procedure. As explored in more detail below, the enactment of the FAA is related to these developments. First, this section of the article will provide an overview of the procedural system that predated and helped instigate the reforms. Second, this section of the article will discuss the path to the enactment of the Rules Enabling Act and the adoption of the Federal Rules of Civil Procedure. Finally, this section will conclude by discussing how the FAA fits within this larger procedural landscape.

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77. FRANKFURTER & LANDIS, *supra* note 66, at 294.

78. During the 1924 hearings regarding the bills that would become the FAA, Herbert Hoover, then Secretary of Commerce, submitted two letters to the Chairman of the Senate Judiciary Committee. 1924 Hearings, *supra* note 73, at 20-21. In these letters, Hoover explained there was an "urgent need" for the FAA, and he encouraged Congress to enact the FAA without delay. *Id.* He described the judicial system as being in the state of an "emergency" requiring "prompt action" because the "clogging of the courts is such that the delays amount to a virtual denial of justice." *Id.* In the legislative history of the FAA, there are numerous concerns raised about the "congestion of the court calendars" and the costs and delays of litigation, and the FAA's supporters repeatedly stressed that arbitration would serve as an inexpensive, quick, efficient solution. *Id.* at 34-35; *id.* at 18 (testimony of Julius H. Cohen) (FAA would alleviate congestion in the courts); *id.* at 22 (letter from National Wholesale Grocers' Association of United States) (arbitration would help eliminate expensive litigation); *id.* at 26 (testimony of Alexander Rose on behalf of Arbitration Society of America) (overcrowded court dockets); *id.* at 31 (resolution of American Bankers Association) (arbitration offers "the best means yet devised for an efficient, expeditious, and inexpensive adjustment" of disputes); *see also* 65 CONG. REC. 11081 (1924) ("The result of such a bill will be to do away with a lot of expensive litigation") (remarks of Representative Leonidas C. Dyer); 66 CONG. REC. 984, (1924) ("The business interests of the country find so much delay attending the trial of lawsuits in courts that there is a very general demand for a revision of the law in this regard.") (remarks of Senator Thomas J. Walsh). The next section of the article will provide some more background regarding the enactment of the FAA.

79. As mentioned above, even today there is still an unfortunate tendency for legal scholarship to segregate civil procedure from other means of dispute resolution. *See supra* note 33 and accompanying text.

*A. Federal Court Procedure Prior to the Adoption of the Federal Rules of Civil Procedure*<sup>80</sup>

To understand the reform movement of the early 1900s that led to the enactment of the Rules Enabling Act and the related adoption of the Federal Rules of Civil Procedure, it is helpful to understand the preexisting system that prompted the reforms.<sup>81</sup>

*Static Conformity*

The first Congress enacted the Process Act of 1789, which provided that the procedure in actions at law in the federal courts should be the same in each state “as are now used or allowed in the supreme courts of the same.”<sup>82</sup> This statute has been described as requiring static conformity because federal courts in actions at law had to adhere to local state practice as it existed in 1789, regardless of whether the state subsequently changed the governing procedure in the state court system.<sup>83</sup>

The Process Act of 1789 did not apply to states admitted to the union after 1789.<sup>84</sup> For such states, the federal courts generally could follow whatever procedure they chose.<sup>85</sup> In 1828, Congress enacted a new Conformity Act which provided that federal courts in states that were admitted to the union after 1789 had to conform to 1828 state procedure, while federal courts in the original states were still required to conform to 1789 state procedure.<sup>86</sup> However, pursuant to the new Conformity Act, all federal courts generally had to follow 1828 state procedure regarding “writs of execution and other final process issued on judgments.”<sup>87</sup> In 1842, Congress enacted a similar statute to cover states admitted to the union between 1828 and 1842,<sup>88</sup> and for states admitted after 1842, a similar result occurred through judicial construction of the acts admitting the states to the union.<sup>89</sup>

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80. This subsection of the article, which provides an overview of federal court procedure prior to 1938, and the following subsection, which discusses the enactment of the Rules Enabling Act and adoption of the Federal Rules of Civil Procedure, rely heavily on the excellent, leading account of the history of the Rules Enabling Act by Professor Stephen B. Burbank. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). For these subsections of the article, I am heavily indebted to Professor Burbank’s work.

81. Burbank, *supra* note 80, at 1035 (explaining that the movement for procedural reform in the 1900s had its origins in the prior century).

82. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1002 (3rd ed. 1998) (citing Act of September 29, 1789, ch. 21, § 2, 1 Stat. 93 (1789)). On the equity side of the federal courts, it was necessary in all states for lawyers practicing in federal court to learn a separate federal equity procedure because conformity to state procedure was not used in connection with equity. *Id.* The conformity principle did not apply with respect to equity because many states had not developed significant equity jurisprudence. *Id.* Procedure in equity was generally governed by court rules adopted by the Supreme Court since 1822. *Id.*; see also Burbank, *supra* note 80, at 1037, 1039.

83. WRIGHT & MILLER, *supra* note 82, § 1002; Burbank, *supra* note 80, at 1037.

84. WRIGHT & MILLER, *supra* note 82, § 1002.

85. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 61 (2003).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

This pattern of static conformity generally continued in the federal system until 1872.<sup>90</sup>

### *The Field Code*

While the federal courts were caught in a system of static conformity, important procedural developments were occurring in state court systems.<sup>91</sup> At the state level, a significant procedural reform occurred in New York state courts in 1848 with the adoption of the Field Code.<sup>92</sup> The two most important features of the Field Code involved abolishing the different forms of action of common-law pleading and abolishing the distinctions between law and equity as separate systems of justice.<sup>93</sup> These reforms helped create a merged system of law and equity with only a single form of action, and pleading practice was simplified so that pleadings were supposed to state the facts in simple and concise form instead of the technical formulas used in connection with common-law pleading.<sup>94</sup> One scholar has described the changes brought about by the Field Code as follows:

[The Field Code] was a death sentence for common-law pleading. It was meant to end all special pleading, forms of actions and writs, and to close the chasm between equity and law. It was meant, in other words, to revolutionize the most recondite, most crabbed, most lawyerly area of law.<sup>95</sup>

Several states used the Field Code as a model for reforming their own procedures.<sup>96</sup> Eventually, New York's Field Code, through numerous amendments, grew from 392 provisions to over 3,000 provisions, and criticism grew that the code had become too long, overly complicated, and hyper-technical.<sup>97</sup>

Due to the static conformity required in the federal court system at the time, these new codes adopted in many states were generally not available in federal courts until the federal courts switched to a system of dynamic conformity in 1872.<sup>98</sup>

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90. *Id.*

91. Burbank, *supra* note 80, at 1038-39.

92. *Id.*

93. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE DESKBOOK § 71 (2010). There were many different forms of action at law in the common-law system, each with its technical formula, and a plaintiff had to choose the correct form of action suited for his or her case. CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND §§ 45-49 (1897) (explaining features of common law pleading). For some more information regarding common law pleading and code pleading, see generally STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 45-50 (2006); CHARLES E. CLARK, HANDBOOK ON THE LAW OF CODE PLEADING 10-12, 17-19 (1928).

94. CLARK, *supra* note 93, at 17-19. For more information about how various states adopted code pleading based on the Field Code, while some states retained certain aspects of the common-law system, see *id.* at 19-22.

95. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 294 (3rd ed. 2005).

96. WRIGHT & KANE, *supra* note 85, § 61.

97. FRIEDMAN, *supra* note 95, at 295 (amended version of Field Code became "monstrously inflated," "a figure of Falstaffian proportions among the other codes," "smothered in details," and "a long way from Field's dream of simplicity") (citation omitted); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 56-57 (1952); SUBRIN & WOO, *supra* note 93, at 51; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 940 (1987).

98. WRIGHT & KANE, *supra* note 85, § 61. The federal requirement to conform to state procedure was made "subject . . . to such alterations and additions as the said courts . . . deem expedient," and

*Dynamic Conformity*

In 1872, Congress substituted dynamic conformity for the static conformity previously required in the federal court system.<sup>99</sup> Pursuant to the Conformity Act of 1872,

practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held. . . .<sup>100</sup>

The Conformity Act of 1872 continued in effect until the adoption of the Federal Rules of Civil Procedure in 1938.<sup>101</sup>

This dynamic conformity system did not significantly simplify practice or lead to uniformity for actions at law,<sup>102</sup> and the procedure in the federal courts generally varied from state to state:

Some states adhered to common-law pleading with or without statutory modifications. Others used code systems of procedure. The inevitable result [of dynamic conformity] was to produce as many different federal procedures as there were state jurisdictions.<sup>103</sup>

At first glance, it appears in theory that the dynamic conformity created by the Conformity Act of 1872 would allow a lawyer practicing in one state to learn only one system of procedure because generally speaking, federal courts would follow current state procedure.<sup>104</sup> However, in practice, the procedure used in federal court was complicated under the Conformity Act of 1872 because of several exceptions. To the extent there was a federal statute on point, state practice would not be used.<sup>105</sup> Also, state practice would not control for various matters, such as questions of jurisdiction, validity of service of process, a federal judge's conduct in the administration of trial, and appellate procedure.<sup>106</sup> Furthermore, a federal judge had discretion not to follow state practice:

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although the Field Code and similar codes in other states may have been eligible for importation into federal court using this discretion, most federal courts were apparently hesitant to do so. Burbank, *supra* note 80, at 1038-39 & n.90 (citation omitted).

99. Burbank, *supra* note 80, at 1039; WRIGHT & KANE, *supra* note 85, § 61; WRIGHT & MILLER, *supra* note 82, § 1002.

100. WRIGHT & MILLER, *supra* note 82, § 1002 (citing Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197 (1872)).

101. *Id.*

102. *Id.*

103. *Id.*; see also Burbank, *supra* note 80, at 1040-41.

104. WRIGHT & KANE, *supra* note 85, § 61.

105. *Id.*

106. *Id.*

[E]ven where there was conformity, it was to be “as near as may be,” and this was understood by the Court to make the Conformity Act “to some extent only directory and advisory” and to permit the federal judge to disregard a state practice that would, in the judge’s view, “unwisely encumber the administration of the law, or tend to defeat the ends of justice.” With all these exceptions to conformity, and with the judge left somewhat at large to decide when to conform, it is hardly surprising that the result was, in the view of a distinguished commentator, “a mixture of conflicting decisions, which have served to cloud the whole subject in hideous confusion and shifting uncertainty.”<sup>107</sup>

This confusing procedural landscape created by the Conformity Act of 1872 bred dissatisfaction with the system of federal court procedure.<sup>108</sup> In 1896, an ABA committee gave the following description of the confusion:

With the mixed condition of affairs where practice is regulated by Federal statute, by rules of the Federal court, by the statute and rules of the court where the venue is laid, or possibly by the Chancery practice, modified by statute and rules, a lawyer practicing in the Federal courts, even in his own state, feels no more certainty as to the proper procedure than if he were before a tribunal of a foreign country.<sup>109</sup>

Several commentators similarly viewed federal practice during the late 1800s and early 1900s as involving uncertainty and confusion.<sup>110</sup> Dissatisfaction with

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107. *Id.* (citations omitted).

108. Burbank, *supra* note 80, at 1040-41; SUBRIN & WOO, *supra* note 93, at 51; WRIGHT & MILLER, *supra* note 82, § 1002 (“[Federal] procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be ‘as near as may be.’”).

109. Am. Bar Ass’n, *Report of Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 420 (1896).

110. WRIGHT & MILLER, *supra* note 82, § 1002 (stating that “the procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be ‘as near as may be.’”); E.W. Hinton, *Court Rules for the Regulation of Procedure in the Federal Courts*, A.B.A. J., Mar. 1927, 8, 8 (showing that there should be a uniform system of rules for federal practice at law, just like for federal practice in equity, because under the Conformity Act of 1872, there is “much confusion” and “needless perplexing questions” regarding incorporating state practice); Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 546, 564 (1930) (recognizing that the Conformity Act of 1872 has “resulted in considerable confusion in Federal practice, owing to the exceptions and limitations, which decisions of the Supreme Court have read into the Act.”). One ABA committee characterized the confusion as follows:

[The practice in federal courts is] in a still more confused and unsatisfactory condition, since it depends upon, first, the positive enactments of Congress relating to matters of procedure; second, upon the practice in the state in which the action is being carried on; third, and perhaps mainly, upon the individual views of the Federal judge or the personal preferences of the clerk of the court in which the action is pending.

Am. Arbitration Ass’n, *Report of the Committee on Uniformity of Procedure*, 21 ANN. REP. A.B.A. 454, 462 (1898); see also Burbank, *supra* note 80, at 1042 (“[A] common view of federal practice under the Conformity Act was, ‘To the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; to the author of text books on federal practice it is a golden harvest.’”) (citation omitted).



this complex procedural landscape helped give birth to a movement for procedural reform that led to the enactment of the Rules Enabling Act and the related adoption of the Federal Rules of Civil Procedure, as well as the enactment of the FAA.

*B. The Enactment of the Rules Enabling Act and Adoption of the Federal Rules of Civil Procedure*

In 1906, Roscoe Pound, future dean of Harvard Law School, delivered a famous speech called “The Causes of Popular Dissatisfaction With the Administration of Justice” at the ABA’s annual meeting in St. Paul, Minnesota.<sup>111</sup> Pound’s speech has often been viewed as helping to inspire the procedural reform movement that led to the enactment of the Rules Enabling Act and the adoption of the Federal Rules of Civil Procedure,<sup>112</sup> and as explained in more detail below, Pound’s speech also likely influenced the campaign for the FAA and several state arbitration statutes.

Pound’s speech heavily criticized the “sporting theory of justice” present in our system of court procedure.<sup>113</sup> Pound characterized lawyers as using the rules of procedure like the rules of a “football” game.<sup>114</sup> Instead of trying to “dispose of the controversy finally and on the merits,” Pound explained that the sporting theory of justice “leads to exertion to get error into the record.”<sup>115</sup> Similar to how “football rules put back the offending team five, ten or fifteen yards,” Pound characterized the procedural system at the time as one that “awards new trials, or reverses judgments, or sustains demurrers” on a mere technicality.<sup>116</sup> Pound believed that this sporting theory of justice had negative effects on society and our courts:

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses, and jurors in particular cases, but to give to the whole

111. Pound, *supra* note 46.

112. As explained by Professor Robert G. Bone,

The adoption of the Federal Rules of Civil Procedure in 1938 marked the culmination of a more than thirty-year campaign for procedural reform. The beginning of this campaign is usually traced to Roscoe Pound’s famous 1906 address . . . . In his speech, Pound criticized, among other things, the excessive technicality and formality of the common law and code systems. His critique inspired a multi-decade lobbying effort in Congress spearheaded by the ABA, as well as numerous reform campaigns at the state level. The federal efforts eventually produced the Rules Enabling Act in 1934 and the Federal Rules of Civil Procedure in 1938.

Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 290 (2010). Professor Jay Tidmarsh explained Pound’s role as follows:

On August 29, 1906, a little known Nebraska lawyer [named Roscoe Pound] climbed to the podium at the twenty-ninth American Bar Association convention in St. Paul, Minnesota, and commenced the most thoroughly successful revolution in American law. The success of the revolution has been so complete that it swept clean lawyers’ collective memory of what it had replaced, obliterated a system that had taken centuries to construct, killed off an entire vocabulary, and inverted the way in which every lawyer—every person, really—thinks about the law.

Tidmarsh, *supra* note 46, at 513; Wigmore, *supra* note 46, at 50-53 (giving eyewitness account of Pound’s stirring speech); Burbank, *supra* note 80, at 1045.

113. Pound, *supra* note 46, at 404.

114. *Id.* at 405.

115. *Id.*

116. *Id.* at 406.

community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.<sup>117</sup>

Pound also portrayed our procedural system in the courts as “archaic” and the procedural rules as “behind the times:”

Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.<sup>118</sup>

This speech caused a “furor” when it was delivered,<sup>119</sup> and the speech helped prompt the ABA to examine and push for procedural reform.

Pound’s speech was referred to the ABA’s Committee on Judicial Administration and Remedial Procedure,<sup>120</sup> which issued a report finding that many of Pound’s criticisms were valid and recommended the appointment of a special committee to address Pound’s criticisms.<sup>121</sup> The ABA then appointed a special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation, and this committee of fifteen included Pound.<sup>122</sup> This special committee produced several reports suggesting reforms, including a practice act that would concisely set forth general principles for courts, while leaving the regulation of details to the judiciary through the creation of court rules.<sup>123</sup> Pound characterized this particular suggestion, a practice act with rules of court, as the “first and most fundamental” reform for the courts.<sup>124</sup>

In 1912, the ABA’s Committee on Judicial Administration and Remedial Procedure recommended that another special committee be created to present proposals to Congress regarding a uniform system of procedure to be prepared by

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117. *Id.*

118. *Id.* at 408-09.

119. Burbank, *supra* note 80, at 1045; Tidmarsh, *supra* note 46; Wigmore, *supra* note 46.

120. Wigmore, *supra* note 46, at 52-53.

121. Burbank, *supra* note 80, at 1045.

122. *Id.* at 1045-46.

123. *Id.* at 1046-47.

124. *Id.* at 1047-48 (citation omitted).

the Supreme Court for use by the lower federal courts.<sup>125</sup> This new ABA committee was known as the Committee for Uniform Judicial Procedure, which campaigned for procedural reform for more than twenty years.<sup>126</sup>

Over the course of two decades, the ABA's Committee for Uniform Judicial Procedure helped lobby for different versions of bills, and these bills generally authorized a delegation of power to the Supreme Court to make rules of procedure.<sup>127</sup> The committee also prepared reports for the ABA regarding its work,<sup>128</sup> and during this time, there were several Congressional hearings, debates, and reports regarding the bills.<sup>129</sup>

When the need for these bills regarding uniform judicial procedure was discussed, it was recognized that such a law would simplify procedure and help respond to the frustrations and complexity with federal procedure at the time. For example, ABA committee reports stressed that uniformity and simplicity in court procedure were desired in lieu of the confusing, complicated federal practice at the time.<sup>130</sup> An ABA committee report discussing the need for uniform federal practice explained that dynamic conformity in the federal courts, with its numerous exceptions, had made federal practice seem like "Sanskrit" to the average lawyer.<sup>131</sup> Similarly, a Senate report summarized some goals of uniform federal procedure as avoiding the technicality and confusion of then-existing federal practice:

First, [there is an inherent value in simply having uniformity of federal procedure throughout the nation.] Second, these general rules, if wisely made, would be a long step toward simplicity, a most desirable step in view of the chaotic and complicated condition which now exists. Third, it would tend toward the speedier and more intelligent disposition of the issues presented in law actions and toward a reduction in the expense of litigation. Fourth, it would make it more certain that if a plaintiff has a cause of action he would not be turned out of court upon a technicality and without a trial upon the very merits of the case; and, likewise, if the defendant had a just defense he would not be denied by any artifice of [sic] the opportunity to present it.<sup>132</sup>

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125. *Id.* at 1049-50.

126. *Id.*

127. Burbank, *supra* note 80, at 1050-98. There were variations among the bills. For example, the initial bills did not merge law and equity. *Id.* at 1051-52.

128. *Id.* at 1050-98.

129. *Id.*

130. For example, a 1922 report from the ABA's Committee for Uniform Judicial Procedure explained the need for the uniform bill as follows:

[The proposed bills would enable the development of] a simple, correlated, scientific system of rules of procedure and practice in lieu of the present complicated "federal practice." It is intended that this system of rules shall embrace all the merits and none of the vices of both the "common law" and "code" pleading.

45 ANN. REP. A.B.A 370, 375 (1922).

131. *Id.* at 376.

132. Burbank, *supra* note 80, at 1085 n.298 (citing S. REP. NO. 1174, 69th Cong., 1st Sess. 1-2 (1926)).

In discussing the need for uniform federal procedure, the Senate report explained that the “as near as may be” language found in the Conformity Act of 1872 had “introduced so many exceptions to the general rule of the statute that it is impossible to exaggerate the confused condition into which we have fallen.”<sup>133</sup>

There was opposition to the bills, and Congress did not enact a statute for uniform federal judicial procedure until 1934. Senator Thomas J. Walsh of Montana was a vocal opponent of the bills, and he believed that uniform federal procedure would be confusing to the majority of lawyers, whose practice was limited to only one state.<sup>134</sup> Senator Walsh was concerned that these lawyers would have to learn their own state’s procedure as well as a federal system of procedure.<sup>135</sup> He believed it was more important to protect “the one hundred [lawyers] who stay at home as against the one who goes abroad.”<sup>136</sup> Other concerns were raised as well, such as concerns about the delegation of rule-making power to the Supreme Court,<sup>137</sup> and concerns whether the Supreme Court was too busy or out of touch with trials to promulgate rules of procedure.<sup>138</sup>

In 1933, Senator Walsh, who was scheduled to become the next attorney general of the United States, died.<sup>139</sup> The new attorney general who took his place, Homer Cummings, supported the uniform federal procedure bill and helped revive the campaign for its enactment.<sup>140</sup> In a few months, Congress passed the legislation, and it was signed into law in June 1934.<sup>141</sup> The enacted statute read as follows:

Be it enacted . . . [t]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, that in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have

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133. S. REP. NO. 1174, 69th Cong., 1st Sess., 2 (1926).

134. Burbank, *supra* note 80, at 1063-64.

135. *Id.*

136. *Id.*

137. *Id.* at 1064, 1078.

138. *Id.* at 1063.

139. *Id.* at 1095-96.

140. Burbank, *supra* note 80, at 1095-97.

141. *Id.* at 1097.

been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.<sup>142</sup>

The Supreme Court at first took little action in formulating rules pursuant to the authority granted by the Rules Enabling Act.<sup>143</sup> In June 1935, the Supreme Court appointed an advisory committee of lawyers and law professors to prepare and submit a draft of rules merging equity and law.<sup>144</sup> Charles E. Clark, then dean of the Yale Law School, was the reporter for the committee, and the committee prepared and distributed draft rules to the bar and bench.<sup>145</sup>

These drafts were studied by bar committees, debated in the law reviews, and commented upon in letters from many individual lawyers, judges, and teachers. All of the comments on the [c]ommittee's proposals were distributed to each member of the [c]ommittee, and carefully analyzed by the Reporter and his staff. Time and again the [c]ommittee altered its recommendations in the light of these comments.<sup>146</sup>

The Supreme Court made some changes to the final draft submitted by the advisory committee and adopted the rules in December 1937.<sup>147</sup> The Attorney General then presented to Congress the rules adopted by the Supreme Court.<sup>148</sup> There were some congressional hearings, but no action was taken, and the Rules of Civil Procedure for the federal court system became effective in September 1938.<sup>149</sup>

The ultimate adoption of the Federal Rules of Civil Procedure was years in the making, and the influence of these rules has been widespread and is still felt today. These rules, in amended form, still generally govern federal court civil litigation, and these rules heavily influenced the development of procedure in state court systems.<sup>150</sup>

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142. *Id.* at 1097-98 (citing Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934)).

143. WRIGHT & MILLER, *supra* note 82, § 1004.

144. *Id.*

145. *Id.*

146. *Id.* § 1005.

147. *Id.* § 1004.

148. *Id.*

149. WRIGHT & MILLER, *supra* note 82, § 1004. Some features of the Federal Rules of Civil Procedure included simplified, relaxed pleading requirements, liberal amendment of pleadings, liberal joinder provisions, broad discovery, and summary judgment. See generally Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261 (1939).

150. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989) (stating that the Federal Rules are a "major triumph of law reform," and because of their wide influence on state procedure, the principles of the Federal Rules apply "to virtually every type of contested civil case involving interests of substantial financial or social significance"); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 37 U. PA. L. REV. 1969, 1969 (1989). "The Federal Rules have not just survived; they have influenced procedural thinking in every court in this land (and in some other lands, and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure." *Id.*; WRIGHT & KANE, *supra* note 85, § 62 ("[I]n more than half the states the [Federal Rules of Civil Procedure] have been adapted for state use virtually unchanged, and there is not a jurisdiction that has not revised its procedure in some way that reflects the influence of the federal rules.")).

*C. The Enactment of Modern Arbitration Statutes*

The enactment of modern arbitration statutes<sup>151</sup> is related to the movement for court reform during the early 1900s. As explored below, the enactment of the FAA and the Rules Enabling Act were procedural reforms that grew out of the dissatisfaction with the then-existing court system.

Before turning to the FAA, it is important to examine a New York arbitration statute enacted in 1920, the first modern arbitration statute making agreements to arbitrate future disputes enforceable.<sup>152</sup> As mentioned above, a significant procedural reform occurred in New York in 1848 when New York adopted the Field Code.<sup>153</sup> However, “[b]y the time of Pound’s address [in 1906], the 1848 Field Code had been transmogrified by the New York legislature into the Throop Code, one of the most elaborate and least workable schemes ever devised for the resolution of disputes.”<sup>154</sup> The New York legislature amended the Field Code so that by 1897, the initial 392 provisions of the Field Code grew to over 3,000 provisions, and this amended code, called the Throop Code, was in effect until 1921.<sup>155</sup> “It was attacked by bar committees for intermingling substantive and procedural provisions, and for being too long, too complicated, ‘too minute and technical, and lack[ing] elasticity and adaptability.’”<sup>156</sup> The Throop Code has been described as a “legal text of truly Byzantine complexity, a stellar trap for the unwary, and a source of mischief to hapless litigants.”<sup>157</sup>

One New York judge observed that the business community was frustrated with the complexity and inefficiency of court procedure, and this frustration helped fuel a desire for using arbitration to resolve disputes. He explained that business people “were willing to do almost anything” to avoid submitting a controversy to court:

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151. Professor Macneil explains the use of the term “modern” to describe arbitration statutes as follows:

The word “modern” is a term of art respecting arbitration statutes. The key characteristic distinguishing nonmodern from modern is that the latter make simple executory agreements to arbitrate disputes - particularly future disputes - irrevocable and fully enforceable and the former do not. Enacting this characteristic into legislation was the prime goal of [arbitration reformers].

MACNEIL, *supra* note 17, at 15.

152. Arbitration Law of 1920, ch. 275, N.Y. Laws §§ 1-10 (1920).

153. *See supra* notes 91-96 and accompanying text.

154. Paul D. Carrington, *Teaching Civil Procedure: A Retrospective View*, 49 J. LEGAL EDUC. 311, 322 (1999).

155. Subrin, *supra* note 97, at 940.

156. *Id.* A lawyer made the following remarks at a meeting of the New York State Bar Association:

Why, when I began to practice law I could carry the code in my vest pocket. It contained less than 500 sections, and less than 100 rules. You know what Mr. Throop did to that code because you use the present one. We think that our practice in this State is as complicated and as complex and as technical and as promotive of injustice, instead of justice, as that of any civilized land of which we know anything, and we think that the Bar Association of this State ought to do something, that will justify all this long discussion and consideration and study of the subject.

N.Y. State Bar Ass’n, *Proceedings of the Forty-Fourth Annual Meeting*, 348 (1921); *see also* HAROLD R. MEDINA, IMPORTANT FEATURES OF PLEADING AND PRACTICE UNDER THE NEW YORK CIVIL PRACTICE ACT 2 (1922) (describing how the Throop Code, with its “detailed provisions” became a “source of continual controversy”).

157. Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 163 (1991).

In the past fifty years we have revolutionized our methods of the conduct of private business, and largely also the conduct of public business; our methods are more direct, exact, and to the point; they minimize the possibility of error, eliminate "lost motion" and cut "red tape." Yet to all this improvement in methods our judicial procedure has paid substantially no heed. The mechanics of a courtroom trial are still substantially the same as they were in the days when our ancestors rode in stage-coaches, used tallow dips or pine knots for lighting. . . . [T]he court has failed to keep pace with the life of the community which surges outside its walls. . . . [T]he average court is the most indirect, inexact, inefficient, uneconomical and unintegrated instrumentality in the modern state. . . . Business men go to arbitration to avoid legal procedure. . . .<sup>158</sup>

As mentioned above, Pound's famous 1906 speech is often credited with having ignited a movement for reform.<sup>159</sup> His speech captured a growing dissatisfaction with court procedure and prompted the ABA to appoint the Committee to Prevent Delay and Unnecessary Cost in Litigation.<sup>160</sup> Similarly, concerns raised by Pound in his famous speech likely helped influence the campaign for modern arbitration laws, and in 1914, the New York State Bar Association created the Committee on the Prevention of Unnecessary Litigation.<sup>161</sup> There appears to be little recorded discussion involved with the creation of the committee.<sup>162</sup> The committee's first report cited dissatisfaction with then-existing court procedure, and the report echoed concerns similar to those concerns raised by Pound in his 1906 speech about the sporting theory of justice.<sup>163</sup> The report also mentioned that procedure in courts should be simplified, and the committee cited a report written by Pound and others.<sup>164</sup> The New York committee described the report by Pound as "very carefully prepared" and "deserv[ing] the attention of all persons interested in the subject,"<sup>165</sup> and this report by Pound reiterated his concerns regarding the need to reform court procedure.<sup>166</sup> The Pound report, cited very favorably by the New York committee, discussed how procedure in many jurisdictions was too hyper-technical and needed to be simplified, and the report suggested that legislatures should adopt a simple practice act setting forth general themes and delegate to courts the creation and refinement of particular rules.<sup>167</sup>

158. William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L. Q. 186, 199-201 (1917); see also William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L. Q. 261, 265 (1917) (explaining that a business person had a strong dislike for court procedure, which was "too complicated, technical, indirect, dilatory, wasteful of his time and everyone else's, to warrant him in taking any avoidable chances with the judicial mill").

159. See *supra* notes 112-122 and accompanying text.

160. *Id.*; see also Tidmarsh, *supra* note 46, at 513-14.

161. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L. J. 147, 147 (1921); N.Y. State Bar Ass'n, *Proceedings of the Thirty-Seventh Annual Meeting*, 382-83 (1914).

162. N.Y. State Bar Ass'n, *supra* note 161, at 382-83.

163. N.Y. State Bar Ass'n, *Proceedings of the Thirty-Eighth Annual Meeting*, 377, 386-87 (1915).

164. *Id.* at 386.

165. *Id.*

166. Pound et al., *Preliminary Report on Efficiency in the Administration of Justice*, 13-30 (1914).

167. *Id.*

Pound's concerns about reforming court procedure thus helped influence this New York State Bar Association committee.

In 1916, New York's Committee on Prevention of Unnecessary Litigation partnered together with the Chamber of Commerce of the State of New York,<sup>168</sup> a significant organization in the movement for arbitration reform,<sup>169</sup> to create proposed rules for the prevention of unnecessary litigation. These rules, which were written in the form of suggestions, covered several topics, one of which was arbitration.<sup>170</sup> The committee explained that "[t]he experience of many businessmen and lawyers testifies to the advantage of these [arbitration] methods of adjusting differences wherever possible. They are inexpensive, speedy and peaceful."<sup>171</sup> The committee prepared a set of rules for arbitration which lawyers could recommend their clients to use, and in introducing these rules, the committee acknowledged the frustration with then-existing court procedure: "In the preparation of this plan of arbitration your committee has had in mind the delay incident to court proceedings and the growing demand for arbitration evidenced by numerous commercial bodies maintaining systems of arbitration."<sup>172</sup>

During the New York State Bar Association's annual meeting in January 1917, the Committee on Prevention of Unnecessary Litigation presented its report about developing suggestions to avoid unnecessary litigation and developing arbitration rules that could be used in a dispute.<sup>173</sup> At this meeting, a lawyer asked the committee to consider the "advisability of legislation for the recognition and enforcement of agreements for future arbitration of controversies between the parties and if they deem such legislation advisable to prepare a bill for that purpose and present it to the legislature."<sup>174</sup> This resolution was subsequently adopted.<sup>175</sup>

The committee then prepared a draft bill to make valid agreements to arbitrate future disputes. In January 1918, at the New York Bar Association's annual meeting, the committee (whose name had been formally changed to the Committee on Arbitration) presented a draft of the bill to the bar association, and the committee planned to present the bill at the next session of the legislature.<sup>176</sup> However, the

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168. Cohen, *supra* note 161, at 147; Am. Arbitration Ass'n, *Report of the ABA's Standing Committee on Commerce, Trade and Commercial Law*, 48 ANN. REP. A.B.A. 353, 357 (1925).

169. The Chamber of Commerce of the State of New York was an important organization in the history of commercial arbitration in the United States. See Szalai, *supra* note 27, at 360-62. The Chamber of Commerce had an active arbitration committee, and the head of this committee for many years was Charles Bernheimer, a cotton merchant whom the *New York Times* called "the father of commercial arbitration." *Id.* at 360. During a congressional hearing in the 1920s involving the bills that would become the FAA, Bernheimer testified he became interested in commercial arbitration in 1908, following a financial panic of 1907, which threatened the American financial system. *Id.* Bernheimer, concerned about the cancellation of contracts following the panic, became interested in "finding methods that are more modern, more in keeping with business methods, in the handling of disputes," and Bernheimer began studying the arbitration facilities of the United States and other countries. *Id.* Bernheimer's dissatisfaction with outdated procedures during 1908 is consistent with the dissatisfaction expressed by Pound and Taft during this same time period.

170. N.Y. State Bar Ass'n, *Proceedings of the Fortieth Annual Meeting* 364-366, 372 (1917).

171. *Id.* at 390.

172. *Id.* at 366.

173. *Id.* at 365-67.

174. *Id.* at 401-03, 410.

175. *Id.*

176. N.Y. State Bar Ass'n, *Proceedings of the Forty-First Annual Meeting*, 150-56 (1918).



New York legislature did not enact the bill during its 1918 session “due largely to war conditions.”<sup>177</sup>

In January 1920, at the annual meeting of the New York bar, the Committee on Arbitration reported that it would lobby for a different version of an arbitration bill containing new provisions regarding a right to a jury for the issue of whether an agreement to arbitrate exists.<sup>178</sup> The Chamber of Commerce of the State of New York, the Committee on Arbitration, along with two other committees from the New York State Bar Association, helped draft the new version of the bill, which ultimately became the first modern arbitration statute.<sup>179</sup>

In April 1920, New York enacted the first modern arbitration statute making arbitration agreements irrevocable and enforceable.<sup>180</sup> Professor Macneil has explained that there was “immense significance” in the enactment of the 1920 New York statute:

[O]ne cannot overstate the significance of the single salutary reform which made possible the extension of arbitration beyond the trade associations which were its main breeding ground and led to its wholesale employment in standardized agreements of all kinds. This, in turn, raised a whole host of new questions regarding public policy limitations and one-sidedness which were not a problem when arbitration was about two textile merchants arguing over the quality of the merchandi[s]e.<sup>181</sup>

The enactment of the New York statute led to the creation of the Arbitration Society of America, which engaged in an educational campaign regarding arbitration and administered arbitration proceedings, and this society eventually merged with another organization to help create the American Arbitration Association, which still operates today and plays an important role in administering arbitration proceedings.<sup>182</sup> The success of the adoption of the New York statute in 1920 helped lead to the enactment of the FAA and similar arbitration statutes in other states.<sup>183</sup>

The ABA, which played an important role in the efforts to enact the Rules Enabling Act, also played a similar role in the enactment of the FAA.<sup>184</sup> In August 1920, at the annual meeting of the American Bar Association, a resolution was adopted asking the ABA’s Committee on Commerce, Trade, and Commercial Law to study and issue a report regarding “the extension of the principle of commercial arbitration.”<sup>185</sup> During the 1921 ABA annual meeting, the committee presented a report containing a draft uniform state statute and federal statute, both

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177. N.Y. State Bar Ass’n, *Proceedings of the Forty-Second Annual Meeting*, 92 (1919).

178. N.Y. State Bar Ass’n, *Proceedings of the Forty-Third Annual Meeting*, 96-102 (1920).

179. *Id.* at 112-13, 127-28; Cohen, *supra* note 161, at 148.

180. Arbitration Law of 1920, ch. 275, N.Y. Laws §§ 1-10 (1920).

181. MACNEIL, *supra* note 17, at 36-37 (alteration to original).

182. *Id.* at 38-41.

183. *Id.* at 41.

184. For a more detailed discussion of the ABA’s involvement, including how the ABA helped draft the bills that would become the FAA, see generally MACNEIL, *supra* note 17.

185. 43 ANN. REP. A.B.A. 75 (1920).

of which were patterned after the recently-enacted New York statute.<sup>186</sup> The committee's report presented at the 1922 ABA annual meeting stated:

In the opinion of your committee, the adoption of . . . the federal statute and the uniform state statute will put the United States in the forefront in this procedural reform. It will raise the standards of commercial ethics. It will reduce litigation. It will enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the federal and state courts. In pressing forward this improvement in the law, the Association will align itself with the best economic and commercial thought of the country and will do much to overcome the criticism of the "law's delays."<sup>187</sup>

In 1923 and 1924, there were congressional hearings regarding the bills that would become the FAA,<sup>188</sup> and these hearings help demonstrate the connection between the FAA and the broader procedural reforms of the time. For example, W.H.H. Piatt, who was the chairman of an ABA committee involved in drafting the FAA, testified at a hearing how the campaign for arbitration originated, and he expressly linked the push for modern arbitration laws to broader procedural reforms. He testified that modern arbitration laws were an "outgrowth" of the

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186. 44 ANN. REP. A.B.A 355-61 (1921); 45 ANN. REP. A.B.A 288, 295 (1922) (recognizing that the draft uniform act and draft federal act were patterned after the 1920 New York statute).

187. 45 ANN. REP. A.B.A 288, 295 (1922).

188. *A Bill Relating Sales and Contracts to Sell in Interstate and Foreign Commerce and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) [hereinafter 1923 Hearings]; 1924 Hearings, *supra* note 73. It is important to emphasize that during this same time period of the early 1920s when the ABA was actively lobbying for what would become the FAA, the ABA was also heavily involved in other procedural reforms to improve the administration of justice. These reforms grew out of dissatisfaction with the then-existing court system and the "law's delays" and can be understood as part of the same overall push for improving the administration of justice. For example, during the 1922 ABA annual meeting, one sees the ABA's campaign efforts for the FAA and the Rules Enabling Act. 45 ANN. REP. A.B.A 288, 293-95 (1922); *Id.* at 370-81. Also, during this same 1922 ABA annual meeting, Taft, who at this time was the Chief Justice of the United States Supreme Court, delivered an address regarding procedural reform for the federal court system, including proposals for the Judiciary Act of 1925 and uniform federal procedure, as already discussed above. *See supra* notes 57-65 and accompanying text.

In August 1918, there was a conference of delegates from state and local bar associations from all over the country in Cleveland, Ohio, and at this conference, there were speeches that further serve as a reminder that the efforts to secure uniform federal procedure and arbitration reform occurred contemporaneously in response to dissatisfaction with the complexity of existing court procedure. N.Y. State Bar Ass'n, *Proceedings of the Forty-Second Annual Meeting*, 146-47 (1919). At this conference, Thomas Shelton, the chairman of the ABA's Committee on Uniform Federal Procedure; Charles Bernheimer, the head of the arbitration committee of the Chamber of Commerce of the State of New York; and Daniel S. Remsen, the head of the New York Bar's Committee on Arbitration, all gave presentations explaining their responses to existing court procedure. *Id.* Shelton spoke about "eradicating unnecessary technicality" in litigation and the lobbying efforts in Congress for a uniform federal procedure. *Id.* at 155. Remsen discussed his work with the New York Committee on Arbitration, including the joint development of rules with the Chamber of Commerce, *id.* at 156, and Bernheimer explained his arbitration work with the Chamber of Commerce and that arbitration can help save clients "the expense and annoyance of litigation." *Id.* at 157-58.

“movement” to reduce and avoid litigation,<sup>189</sup> which, as explained above, included the creation of an ABA committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation<sup>190</sup> and a similar New York committee regarding the prevention of unnecessary litigation.<sup>191</sup> Pound’s critique of our judicial system influenced both of these committees, and both committees acknowledged the technicality of then-existing court procedure and called for simplified procedure.<sup>192</sup>

During the Congressional hearings regarding the bills that would become the FAA, arbitration was repeatedly described as helping to reduce the hyper-technicality of then-existing legal procedure and the delay of litigation.<sup>193</sup> There was testimony describing arbitration as occurring “without any formality and without interference from the court. All technicalities of legal procedure and requirements are removed.”<sup>194</sup> As explained above, such dissatisfaction with court procedure helped stimulate the movement for its reformation,<sup>195</sup> as well as modernization of our arbitration laws.

Julius Cohen was a New York lawyer who played an important role in connection with the enactment of modern arbitration laws. He assisted the Chamber of Commerce of the State of New York in its campaign for arbitration; he is regarded as a principal drafter of the 1920 New York arbitration statute and of the FAA; he wrote a book about the history of pre-modern arbitration law and the need for modern laws, which was described as influential in obtaining passage of the 1920 New York arbitration statute; and he provided substantial written and oral testimony about the need for modern arbitration laws during congressional hearings about the proposed bills that would become the FAA.<sup>196</sup>

While testifying during these congressional hearings, Cohen portrayed the campaign for reforming our arbitration laws as part of a larger movement for procedural reform. There had been some concern previously expressed that lawyers would not be in favor of the FAA because they would lose business.<sup>197</sup> At the beginning of his testimony, Cohen first tried to briefly address this concern about

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189. 1923 Hearings, *supra* note 188, at 9.

190. See *supra* notes 122-123 and accompanying text.

191. See *supra* notes 161-179 and accompanying text.

192. See *supra* notes 122-123, 161-179 and accompanying text.

193. See, e.g., 1923 Hearings, *supra* note 188, at 2 (arbitration “will enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the federal and state courts” and “will do much to overcome the criticism of the ‘law’s delays’”); 1924 Hearings, *supra* note 73, at 7 (litigation is the “worst method of them all” for resolving disputes); *id.* at 21 (arbitration will help relieve “congestion of courts” and the delays which cause a “virtual denial of justice”); *id.* at 22 (“economical adjustment [of] trade disputes and elimination of expensive litigation”); *id.* at 24 (arbitration is “expeditious, economical, and equitable, conserving business friendships and energy”); *id.* at 34 (the proceedings under the FAA would be “prompt, speedy and nontechnical”); *id.* at 35 (“reduces technicality and formality to a minimum”); *id.* at 34 (arbitration will help avoid the delay caused “frequently from preliminary motions and other steps taken by litigants, appeals therefrom, which delay consideration of the merits, and appeals from decisions upon the merits”); *id.* at 36 (“no material expense or delay and no opportunity for technical procedure”); *id.* at 40 (arbitration helps avoid “technicalities and details” of litigation).

194. 1924 Hearings, *supra* note 73, at 36.

195. See *supra* notes 102-110 and accompanying text.

196. Szalai, *supra* note 27, at 361-62; 1924 Hearings, *supra* note 73, at 33-41.

197. 1923 Hearings, *supra* note 188, at 8. One concern about the proposed bill is that it would take “jobs away from lawyers”. *Id.*

lawyers losing business to arbitration. He introduced himself as the vice chairman of the conference of delegates of the ABA, and he stressed this conference represented every bar association in the country.<sup>198</sup> He then explained the bar associations of the country were aligned with business interests in support of the FAA, and that lawyers would not lose money by handling a client's case in arbitration instead of litigation.<sup>199</sup> Cohen then explicitly linked the push for modern arbitration laws to the larger movement for procedural reform:

[Discussing the legal profession's financial interests in connection with arbitration] would put this matter on a narrow plane. The other plane is the one that has been expressed by the Chief Justice and others, and that is that it is the business of the bar so to improve the processes of justice as to make it an instrument of justice indeed.<sup>200</sup>

As mentioned above, Chief Justice Taft was known for advocating strongly for procedural reforms, such as the Judiciary Act of 1925 and the need for uniform federal rules of procedure, and he had experience with arbitration and called for more use of and laws regarding arbitration.<sup>201</sup> Cohen's congressional testimony regarding the FAA, with his reference to Taft and procedural reforms, helps show how the movement for modern arbitration laws was viewed as part of a broader movement for procedural reforms to improve the administration of justice.

Other Congressional testimony recognized the same connection between the FAA and the broader movement for procedural reform. Alexander Rose of the Arbitration Society of America, an organization that came into existence following the enactment of the 1920 New York arbitration statute in order to promote the use of arbitration,<sup>202</sup> testified during the 1924 Hearings about the frustration and delay with having disputes resolved in court:

[T]he need of the hour is what? It is to simplify legal matters. They have become too burdensome in many respects. People are dissatisfied with the courts. I mean no disrespect to the courts, because what I may say has been very much more forcibly expressed by Chief Justice Taft, who expressed much more vigorously the same sentiment.<sup>203</sup>

Rose then explained how the enactment of a law for arbitration would help disputes be heard "free from technicalities" by an arbitrator who could be an expert in the subject matter of the dispute.<sup>204</sup> Rose's testimony helps emphasize that the enactment of modern arbitration laws is related to other procedural reforms of the period. The FAA and Rules Enabling Act grew out of a period of frustration with court procedures viewed as outdated and hyper-technical.

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198. 1924 Hearings, *supra* note 73, at 13.

199. *Id.*

200. *Id.*

201. See *supra* notes 43-65 and accompanying text.

202. 1924 Hearings *supra* note 73, at 25.

203. *Id.* at 26-27.

204. *Id.* at 27.

Congressional reports help confirm Congress' understanding of the FAA as responding to the frustration with complex court procedures. One House report explained that the FAA was needed to help with the problems and frustrations associated with litigation:

It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.<sup>205</sup>

At the time of the congressional hearings and reports regarding the FAA, there would have been several years of lobbying already in Congress for the uniform federal procedure bill,<sup>206</sup> and so Congress would have been well aware of the "agitation" expressed with the court system. A Senate report similarly recognized the need for the FAA as a response to the frustration with the court system.<sup>207</sup>

In 1925, the multi-year campaign efforts of the ABA and commercial interests came to fruition. In this year, Congress passed, and the President signed into law, the FAA, a national, modern arbitration law making arbitration agreements enforceable and supporting a private system of dispute resolution.<sup>208</sup>

To summarize, the Rules Enabling Act and the FAA have an intertwined background, and there are many parallels or similarities in their enactment. Both statutes were intended, at least in part, to respond to dissatisfaction with the confusing, technical procedural landscape during the early 1900s, and both statutes, at their core, deal with dispute resolution.<sup>209</sup> Also, both statutes are similar in the sense that they involve rather minimal legislative pronouncements, and the actual creation of procedure is delegated. Another parallel is that the Rules Enabling Act and the related adoption of simplified court procedure were viewed as helping with the overcrowded federal dockets following the First World War,<sup>210</sup> and the FAA was similarly viewed as helping to alleviate the problems of an overburdened judiciary.<sup>211</sup> Furthermore, the ABA played a significant role in enacting these reforms. A national association of lawyers was involved in developing and campaigning for these nationwide reforms, which would be utilized by the legal

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205. H.R. REP. NO. 68-96, at 2 (1924).

206. See *supra* notes 125-129 and accompanying text.

207. S. REP. NO. 68-536, at 3 (1924) (recognizing that complex, large commercial disputes that would take "years of costly litigation" to resolve could be resolved in a short period of time in an arbitration proceeding "whose only rule of procedure is the rule of common sense").

208. See *supra* notes 74-76 and accompanying text.

209. See *supra* notes 102-133 and 193-205 and accompanying text. Professor Robert G. Bone has summarized some of the core beliefs animating the reformers who drafted the Federal Rules of Civil Procedure. Bone, *supra* note 112, at 290-91. According to Professor Bone, they saw the problems of the litigation system as stemming from the hyper-technicality of then-existing procedure. *Id.* at 290. Also, the reformers were pragmatists and moderate legal realists who cared about how the law worked in practice, and they were concerned about cost and delay resulting from the technicalities. *Id.* at 290-91. Also, the reformers believed that substance and procedure were distinct, with their own values, and the values of simplicity, efficiency, and flexibility were important for a procedural system. *Id.* at 291. These beliefs informed the adoption of the Federal Rules of Civil Procedure, and these same beliefs helped inform the enactment of the FAA.

210. 45 ANN. REP. A.B.A 379-80 (1922) (discussing how simplified court procedure would help with "post-bellum court burdens"); see also *supra* notes 58-62 and accompanying text.

211. See *supra* note 78 and accompanying text.

profession itself. Reformers also viewed these laws as related and part of a larger movement to improve the administration of justice.<sup>212</sup>

Another parallel is that during the campaigns for both federal statutes, reformers cited and relied on similar state reform efforts in New York, a state where significant commercial and financial activities occur. Reforms and proposals developed in New York would help serve as a model for their national counterparts, the FAA and Rules Enabling Act, and these federal statutes, in turn, eventually helped influence reforms in states across the country.<sup>213</sup> In effect, reform efforts in New York, a commercial center, helped influence procedural developments across the country. New York legislators were working on a plan of reform to simplify the “Byzantine complexity” of the New York court system under the Throop Code, and the national campaign for the Rules Enabling Act relied on these reform efforts from New York.<sup>214</sup> Also, New York’s 1920 arbitration statute, the nation’s first modern arbitration statute, was in part a response to the frustrations of the Throop Code, and this New York statute became the model for the FAA and other state statutes.<sup>215</sup>

The desire for procedural reform in New York is understandable considering the “Byzantine complexity” of the New York court system under the Throop Code, as described above, and especially considering New York’s status as a commercial and financial center:

[P]rocedural reform was most needed, or at least most desirable, in commercial states. Business like[d] its legal process to be rational and predictable. Business like[d] swift, nontechnical, decisions, based on facts, not writs and forms of action. . . . [Efficient resolution of business disputes] was fuel for the engine of a market economy.<sup>216</sup>

Reforms and proposals that were developed to help serve the commercial needs of New York helped influence related reforms at the national level and throughout the states. As explored in the next section, our country’s growing national economy and business needs in general have often served as a justification for procedural reform.

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212. See *supra* notes 197-207 and 47-50 and accompanying text.

213. MACNEIL, *supra* note 17, at 54-55 (during the 1920s, about a dozen states adopted modern arbitration statutes); *id.* at 56-57 (modern arbitration statutes have been adopted in almost every state); S. REP. NO. 1174, 69th Cong., 1st Sess. 12-13 (1926) (recognizing that a benefit of uniform federal procedure is that such uniform procedure can serve as a model for improving state procedure and possibly creating nationwide uniformity); Hazard, *supra* note 150, at 2237 (the Federal Rules of Civil Procedure are a “major triumph and have had a wide influence on the development of state procedure”); Shapiro, *supra* note 150, and accompanying text.

214. Burbank, *supra* note 80, at 1056 (explaining that a board of statutory consolidation, appointed by a committee of the New York State Bar Association, developed a plan for a short practice act and rules of court to help replace the Throop Code, and reformers pushing for a uniform federal practice and the House Judiciary Committee borrowed from the New York plan when discussing the limits of court rulemaking at the federal level).

215. 1924 Hearings, *supra* note 73, at 40 (New York statute served as model for FAA); MACNEIL ET AL., *supra* note 13, § 9.2.3.3.

216. FRIEDMAN, *supra* note 95, at 296-97.

### III. THE FAA'S RELATIONSHIP WITH INTERNATIONAL SHOE

The relationships discussed in the prior two sections, involving the FAA, the Judiciary Act of 1925, the Rules Enabling Act, and the Federal Rules of Civil Procedure, are somewhat different than the relationship between the FAA and the Supreme Court's decision in *International Shoe Co. v. Washington*<sup>217</sup> discussed in this section. The developments in the prior sections were primarily legislative or the delegation of a rulemaking function. *International Shoe* was, of course, a court decision as opposed to a legislative action or rulemaking. Also, the statutes and rules discussed in the prior sections had a relatively closer temporal connection than the relationship discussed in this section. Furthermore, the relationships discussed in the prior sections had a common theme: the reforms were, at least in part, responses to concerns about a confusing procedural landscape or overcrowded dockets. However, such concerns are not in the forefront when discussing the relationship between the FAA and *International Shoe*. Also, participants in the campaigns discussed in the prior sections sometimes expressly recognized the connections involving the statutes and identified their work with a larger movement for procedural reform. On the other hand, the drafters of the FAA probably could not foresee the changes that would occur with *International Shoe*, and the authors of *International Shoe* probably did not see a connection with the FAA. In sum, the relationship between the FAA and *International Shoe* is a little less direct and of a different nature than the relationships discussed in the prior sections. Nevertheless, as discussed in more detail below and in the final section of this article, the relationship between the FAA and *International Shoe* helps show an interesting aspect regarding the development of civil procedure.

In *International Shoe*, a landmark civil procedure decision from 1945, the Supreme Court created a new framework to analyze the important procedural doctrine of personal jurisdiction. Congress' enactment of the FAA and the *International Shoe* decision share an interesting relationship: Congress' enactment of the FAA was motivated, at least in part, by a growing national economy and advances in communications and transportation. These same factors have been viewed as helping shape the development of personal jurisdiction in *International Shoe* and the Supreme Court's subsequent personal jurisdiction cases. In 1925, Congress took one step to help respond to a growing national economy, and in 1945, the Supreme Court took another step with the *International Shoe* decision. Both are examples of our government engaging in procedural reforms to help deal with and foster a growing national economy.

*International Shoe*, a Delaware corporation with its principal place of business in Missouri, distributed its shoes in several states, including Washington.<sup>218</sup> The State of Washington required contributions from employers to fund a state unemployment compensation plan, and *International Shoe* refused to contribute to the fund.<sup>219</sup> The company argued, *inter alia*, that its activities did not make it

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217. 326 U.S. 310 (1945).

218. *Id.* at 313.

219. *Id.* at 311-12.

amenable to suit in Washington to recover unpaid contributions to the plan, and it was a denial of due process for the state to subject it to suit in Washington.<sup>220</sup>

Courts need to have jurisdiction or power over a defendant in order to bind a defendant to a judgment, and “[h]istorically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant’s person. Hence, his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him.”<sup>221</sup> In *International Shoe*, the Supreme Court shifted its jurisdictional analysis away from physical presence to a framework involving minimum contacts with the forum state:

But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.<sup>222</sup>

Examining the quality and nature of *International Shoe*’s contacts with Washington, including having about a dozen salespersons residing in Washington whose primary activities focused on Washington, the Supreme Court held that the company’s operations established sufficient minimum contacts with Washington such that it would be fair and reasonable to permit the state to enforce the obligations to contribute to the unemployment compensation plan.<sup>223</sup>

*International Shoe* is significant because the Supreme Court shifted the framework for analyzing personal jurisdiction from a test based on physical presence within the state to a test based on minimum contacts with a state.<sup>224</sup> In other words, traditionally, presence or voluntary appearance served as a basis for a court’s power to bind a defendant to a judgment. However, *International Shoe* opened the door such that activities directed towards a state could replace physical presence within a state as the basis for personal jurisdiction, and the scope of personal jurisdiction or the court’s power over a defendant expanded as a result of *International Shoe*.<sup>225</sup>

The Supreme Court has recognized that the expansion of the scope of personal jurisdiction was due, at least in part, to the growing national economy:

As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v.*

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220. *Id.* at 312-13.

221. *Id.* at 316 (citations omitted).

222. *Int’l Shoe*, 326 U.S. at 316 (citations and quotations omitted).

223. *Id.* at 320.

224. *Burnham v. Superior Court*, 495 U.S. 604, 616-18 (1990).

225. *See Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 149-50 (6th Cir. 1997).



*Neff*, to the flexible standard of *International Shoe Co. v. State of Washington*.<sup>226</sup>

Other Supreme Court cases have similarly recognized that the expansion of personal jurisdiction was “largely attributable to a fundamental transformation in the American economy.”<sup>227</sup>

The period of economic growth from the end of the Civil War to the 1920s has been described as “chang[ing] the character of life more dramatically and decisively than anything Americans had witnessed up to that point,”<sup>228</sup> and this transformation and growth of our economy helped influence the campaign for the FAA.

A striking feature of the FAA’s legislative history is the well-organized lobbying campaign of business interests. Numerous trade associations, chambers of commerce, and other business organizations formally endorsed the bills that would become the FAA and lobbied Congress to enact the FAA, and virtually all of the written and oral testimony during the congressional hearings regarding the FAA came from businesses or those representing business interests.<sup>229</sup> During

226. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958).

227. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980); see also *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957). “Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years.” *Id.*; *Burnham*, 495 U.S. at 617 (growth of national economy has “led to an inevitable relaxation of the strict limits on state jurisdiction over nonresident individuals and corporations”) (citation omitted).

228. ROBERT L. HEILBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA: 1600 TO THE PRESENT* 151 (4th ed. 1998); see also Tony A. Freyer, *Business Law and American Economic History*, in 2 *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES: THE LONG NINETEENTH CENTURY* 435, 462 (Stanley L. Engerman & Robert E. Gallman eds., 2000) (observing that after the Civil War, the “diffuse and predominantly agrarian market of the antebellum period gave way to a new, more integrated urban industrial order. . . .”); see generally LOUIS GALAMBOS & JOSEPH PRATT, *THE RISE OF THE CORPORATE COMMONWEALTH* (1988) (describing the history of economic growth and industrialization in America).

229. Szalai, *supra* note 27, at 380-81; see also 1924 Hearings, *supra* note 73, at 2 (testimony of Representative Charles I. Stengle, New York) (“I am here this afternoon by request of the Brooklyn Chamber of Commerce.”); *id.* at 5 (testimony of Senator John B. Kendrick, Wyo.) (observing that “business men of my section of the West” were strongly in favor of the proposed legislation and were “wiring and writing and asking me to indorse the proposed legislation, and even to appear before your subcommittee here and indicate to you their approval of the bill”); *id.* at 5-6 (statement of Charles L. Bernheimer) (explaining that he represented over seventy business organizations in support of the FAA); *id.* at 10 (statement of W.H.H. Piatt) (appearing on behalf of the ABA and as chairman of its Committee on Commerce, Trade, and Commercial Law); *id.* at 11 (statement of Gray Silver) (appearing on behalf of the Am. Farm Bureau Fed’n); *id.* at 12 (statement of R.S. French, representative of the Nat’l League of Marine Merchs. of the U.S. States, the Western Fruit Jobbers’ Ass’n of Am., and the Int’l Apple Shippers’ Ass’n of Am.) (explaining that the organizations he represented “are in sympathy with and lend their approval to this measure which is before this committee today”); *id.* at 13 (statement of C.G. Woodbury, representative of the Cannery League of Cal.); *id.* at 20 (letter of Herbert Hoover, Sec’y of Commerce) (urging Congress to enact the FAA in light of the fact that numerous “commercial organizations . . . have by formal vote expressed their support of the [pending legislation]”); *id.* at 21-22 (list of almost seventy commercial organizations supporting the proposed legislation); *id.* at 22-23 (letters from Nat’l Wholesale Grocers’ Ass’n); *id.* (letter from Am. Fruit and Vegetable Shippers’ Ass’n); *id.* at 23 (letter from Phila. Chamber of Commerce); *id.* at 23 (letter from Am. Bankers Ass’n); *id.* at 23-24 (letter from Converters’ Ass’n); *id.* at 24 (letter from N.Y. Bd. of Trade and Transp.); *id.* at 24 (letter from Brooklyn Chamber of Commerce); *id.* at 25-26 (statement of Alex-

congressional hearings regarding the FAA, Julius Cohen, one of the drafters of the New York arbitration statute and the FAA,<sup>230</sup> observed the business community's overwhelming support for the FAA.<sup>231</sup> Cohen then asked rhetorically why did such strong support among merchants exist? He replied:

Because of interstate business. And you know that commerce is mostly interstate now. So that this is a great tonic that is needed to strengthen this patient in the field of commercial activity. . .<sup>232</sup>

Cohen explained that by making arbitration agreements enforceable, Congress would encourage people to engage in more interstate business.<sup>233</sup>

The need for a federal law making arbitration agreements in interstate commerce enforceable seems rational in the context of a growing, national economy. If business transactions occur between two local merchants in a tightly-knit, small town, and a dispute arises, there are several forces that may encourage informal dispute resolution and compliance with an agreement to arbitrate. These forces may include community pressure, the fear of a damaged reputation within the small community, and perhaps a need to maintain good relationships because of the possibility of future transactions. However, if the business transaction occurs in interstate commerce across the continent between, for example, a New York merchant and California merchant, such forces perhaps may be less successful in encouraging informal dispute resolution and voluntary compliance with an agreement to arbitrate.<sup>234</sup>

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ander Rose of the Arbitration Soc'y of Am.) (explaining that "some 60 trade organizations" utilize the services of the Arbitration Soc'y of Am. and that in "New York society alone almost 1,000 of the leading merchants and citizens of New York" are supporting this society, and that at one meeting of "250 merchants" arbitration was "unanimously indorsed"); *id.* at 28 (statement of Henry Morse, representative of Mass. State Chamber of Commerce"); *id.* at 28-29 (statement of Henry Eaton, representative of Am. Fruit Growers, Inc.); *id.* at 30 (statement of Frank Carnahan, representative of the Nat'l Retail Lumber Dealers' Ass'n); *id.* at 30-31 (statement of Wilson J. Vance, representative of the N.J. State Chamber of Commerce); *id.* at 31 (statement of Thomas B. Paton, representative of the Am. Bankers' Ass'n); *id.* at 32 (statement of Bruce K. Wimer, representative of the Phila. Chamber of Commerce); *id.* at 32-33 (statement of W.W. Nichols, representative of the Am. Mfrs.' Export Ass'n).

230. Szalai, *supra* note 27, at 361-62; 1924 Hearings, *supra* note 73, at 33-41.

231. 1924 Hearings, *supra* note 73, at 16.

232. *Id.*

233. *Id.* (business people will "do more business" if the FAA is enacted since the FAA could help them avoid court proceedings in a distant state, and "[t]hat is why the business men are behind this thing"); *id.* at 7 (testimony of Charles Bernheimer) (observing that a representative transaction that could be covered by an arbitration clause pursuant to the FAA would be the sale of a carload of goods from a Wyoming seller to a New Jersey, dealer in New Jersey); *id.* at 35 (written brief of Julius Cohen) (recognizing that someone who lived in a state with a modern state arbitration statute would be able to resort to the statute in connection with an intrastate transaction, but for interstate commerce, a federal statute like the FAA was necessary). *Cf.* Cohen, *supra* note 161, at 148-49 (citing report of committee of N.Y. State Bar Ass'n recognizing that if New York wishes to be a "commercial center" it must not only "simplify its judicial procedure" but also "make available to business men the easy methods of commercial arbitration").

234. *Cf.* MACNEIL, *supra* note 17, at 36-37 ("[O]ne cannot overstate the significance of the single salutary reform which made possible the extension of arbitration beyond the trade associations which were its main breeding ground and led to its wholesale employment in standardized agreements of all kinds.").

In conclusion, both the expansion of personal jurisdiction and the enactment of the FAA are important procedural developments that have been viewed as attributable to a growing national economy.

#### IV. THE FAA'S RELATIONSHIP TO IMPORTANT PROCEDURAL DEVELOPMENTS HELPS HIGHLIGHT THE INTERCONNECTIVITY BETWEEN ARBITRATION AND LITIGATION AND THE VALUE OF THE FAA

Prior to the FAA's enactment in 1925, agreements to arbitrate future disputes were generally not enforceable in the United States.<sup>235</sup> The FAA is a remarkable, ground-breaking procedural statute for making such agreements enforceable and supporting a private system of dispute resolution. The FAA can have practical significance to two parties in a transaction simply because it can facilitate the resolution of a dispute between them. However, viewing the FAA as part of a larger landscape of procedural reform can help emphasize the value of the FAA to our legal system beyond merely resolving a dispute between two parties. The FAA's relationship to important procedural developments helps underscore the fact that there is an interconnectivity between arbitration and litigation, and through this examination, one sees how the FAA can serve our legal system and society in different ways.<sup>236</sup>

The movement for procedural reform in the early twentieth century was concerned in part with an overburdened judiciary. For example, the simplified procedure resulting from the Rules Enabling Act was viewed in part as helping with the problem of overcrowded dockets.<sup>237</sup> Also, as explored above, when Congress passed the Judiciary Act of 1925, Congress simultaneously enacted the FAA.<sup>238</sup> The Judiciary Act was enacted in part to address concerns about congestion at the Supreme Court level, and congressional hearings and reports stressed that the simultaneously-enacted FAA would help alleviate the overcrowded dockets in the lower courts.<sup>239</sup> Historically, reformers at the time of the FAA's enactment viewed the FAA as linked to our court system by helping relieve concerns about a docket crisis in the courts. Focusing on this aspect of procedural reform helps emphasize that our court system and system of dispute resolution supported by the FAA are interrelated to some degree. The system of dispute resolution supported by the FAA can in effect operate as a safety valve and help reduce the number of cases heard by the judiciary. If there is excessive delay in the court system, parties desiring a more expeditious and binding method of dispute resolution can choose to bring their disputes to arbitration.

The movement for procedural reform in the early twentieth century was also concerned in part with addressing the dissatisfaction with hyper-technical, confusing procedure of the time. Both the Rules Enabling Act, which led to the creation of uniform, simplified procedure, and the FAA, by allowing parties to create their

235. MACNEIL ET AL., *supra* note 13, § 4.1.2.

236. Cf. EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 26 (Cambridge Univ. Press 2006) (observing there is a public interest in fostering arbitration, particularly in the context of fostering industry self-governance).

237. See *supra* notes 58-62 and 210 and accompanying text.

238. See *supra* notes 63-78 and accompanying text.

239. *Id.*

own simplified procedure, were intended to help alleviate such dissatisfaction.<sup>240</sup> These statutes, by allowing for the creation of simplified, flexible rules, helped liberate parties from the frustration and confines of then-existing court procedure. Also, during this movement, it was recognized that dissatisfaction with the hyper-technical, confusing procedure of the time caused parties to opt for the simplicity of arbitration instead of courts.<sup>241</sup> Focusing on this particular aspect of procedural reform, one sees that the FAA can operate like a safety valve when there is dissatisfaction with court procedures. The system of arbitration supported by the FAA can similarly act like a safety valve today if parties are dissatisfied with more formal court procedures. For example, if parties are not satisfied with how courts are applying pleading standards and interpreting Rule 8 of the Federal Rules of Civil Procedure under *Twombly* and *Iqbal*,<sup>242</sup> parties can use arbitration to take their disputes out of the court system and choose their own pleading standard, which can be quite minimal or liberal. If parties desire a binding dispute resolution system and are unhappy with the one-size-fits-all approach of the Federal Rules of Civil Procedure, they are generally free to create their own procedures they believe are better suited for their particular type of dispute.

Litigation and the system of arbitration supported by the FAA are, to some extent, interrelated systems, and there are potential benefits in having these systems coexist. Professor Stephen Yeazell has observed that law students studying procedure may view the Federal Rules of Civil Procedure as an “eternal given” or “more or less inevitable.”<sup>243</sup> An attorney who is in the midst of federal litigation will probably also view or accept the Federal Rules as unchangeable for the particular case at hand. However, the very existence of a flexible arbitration system supported by the FAA can help serve as a constant and positive reminder that our Federal Rules are not set in stone, and other systems of procedure are possible and workable.

In a civil procedure course in law school, in order to stress to students that policy choices are made when creating procedural rules, it may be helpful to compare the discovery provisions or pleading provisions or any aspect of the Federal Rules of Civil Procedure with their counterparts, or lack thereof, in the arbitration rules used by different arbitration providers. Arbitration, which is a flexible system, can in effect serve as a laboratory for procedure. Arbitration can help show what is possible and give ideas for future changes in court procedure.<sup>244</sup> For example, if a court system wanted to consider different rules for certain types of disputes, there would be many different sets of arbitration rules to look at devel-

240. See *supra* notes 108-110, 130-133, and 193-205 and accompanying text.

241. See *supra* notes 49, 158, and 189-205 and accompanying text.

242. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

243. STEPHEN C. YEAZELL, *TEACHER'S MANUAL FOR CIVIL PROCEDURE* 110 (2009); see also Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311 (1988) (“[P]rocedure is usually discussed as if rules simply arrived, impelled by neither people nor ideology. Such disembodiment of law from its surroundings is unfortunate, because it obscures the real sociopolitical agendas that inevitably provoke and shape procedural reform.”).

244. Sternlight, *supra* note 33, at 720-21 (explaining that an “important benefit of merging our analysis of litigation and other dispute resolution processes is that it encourages us to consider the use of new dispute resolution techniques that may lie somewhere in between litigation and traditional forms of ADR” and describing how a local court adopted special “short trial” rules).

oped by different arbitration providers for different categories of disputes.<sup>245</sup> Also, features of the Federal Rules of Civil Procedure or other court rules can serve as a model, if desired, when parties are designing procedures for arbitration proceedings. For example, when the American Arbitration Association began administering class action arbitrations, the American Arbitration Association generally patterned its arbitration procedures regarding class certification after Rule 23 of the Federal Rules of Civil Procedure.<sup>246</sup> By borrowing from each other, the existence of two robust systems of arbitration and litigation can help with the assessment and improvement of procedures in both systems.

As mentioned above, examining the FAA as part of a larger landscape of procedural reform helps emphasize that arbitration and litigation are interrelated to some degree. When considering future reforms, it may be helpful to remember the systems are interrelated, and one should examine the impact a future reform in one system may have on the other. For example, the Dodd-Frank Act authorizes the Bureau of Consumer Financial Protection and the Securities & Exchange Commission to restrict the use of pre-dispute arbitration agreements.<sup>247</sup> To the extent that Congress or an administrative agency in the future may ban arbitration in certain areas, like employment or consumer transactions, there may be an increase in cases heard by the judiciary, and the potential impact of such an increase should be evaluated.

Examining the FAA within a broader context of procedural reform helps highlight another aspect of procedural developments: the growing nationalization of our economy has had an impact on the development of civil procedure. For example, the expansion of personal jurisdiction was viewed as attributable to a growing national economy.<sup>248</sup> Also, the Federal Rules of Civil Procedure, with their goal of national uniformity, were intended in part to help foster a national economy,<sup>249</sup> and similarly, the FAA was viewed as helping to promote increased trade.<sup>250</sup> Focusing on this particular aspect of procedural development helps show that there can be a potential benefit of procedure beyond facilitating a particular dispute between two parties: procedural rules can potentially foster commerce.<sup>251</sup>

245. For example, the American Arbitration Association has developed different arbitration rules for different categories of disputes. These rules are available on the website of the American Arbitration Association, <http://www.adr.org/sp.asp?id=38323> (last visited September 15, 2010).

246. Am. Arbitration Ass'n, *Supplementary Rules for Class Arbitrations* (Oct. 8, 2003), available at <http://www.adr.org/sp.asp?id=28763> (last visited September 15, 2010).

247. See *supra* notes 22-25 and accompanying text.

248. See *supra* notes 226-227 and accompanying text.

249. S. REP. NO. 1174, 69th Cong., 1st Sess. 12-13 (1926) (observing that uniform federal procedure could provide benefit to commercial relations because business interests could rely on fixed, predictable, uniform procedures that would apply nationwide); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2003-04 (1989) (recognizing the importance to our economy in having national uniformity in the administration of laws) (citations omitted).

250. See *supra* notes 229-233 and accompanying text.

251. Another example of this concept that procedure can foster commerce was mentioned by Taft, in his 1922 speech at the ABA's annual convention. Taft, *supra* note 57, at 258-59. He explained that the existence of diversity jurisdiction helped encourage investors from the East Coast to make investments to build up the South and West:

The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial

Of course, our country no longer has the same economic conditions that existed when the FAA and other procedural reforms occurred:

[There has been a] long-term shift in the basic structure of economic activity, as the manufacturing-based economy of the early post-war era became, by the late twentieth century, something else - a so-called postindustrial economy. . . . The managerial and organizational regimes of what came to be known as "big business" already embraced what [several people have] identified as the broad spectrum of industries engaged in "the production and distribution of knowledge" - communications media, education, research and development, computing machines, and financial and real estate services. . . . Just as the railroad and the telegraph knit local agrarian economies into regional ones and then a national economy in the late nineteenth century, we are witnessing today the emergence of a more global economy.<sup>252</sup>

What general role can the FAA play in connection with a more modern economy? In light of changes in economic conditions since the 1920s, should the promotion of commerce remain as a goal of our arbitration laws? In a post-industrial economy, where business transactions can occur across our continent (or globe) in the blink of an eye with the click of a mouse, it seems like litigation in a traditional court has the potential for being too slow to meet business needs in a fast-paced economy.<sup>253</sup> In our modern economy, arbitration, with its potential for quick resolution of disputes, will likely be an attractive choice to satisfy the commercial needs of those who desire a quick, binding method of dispute resolution, and it seems that promoting commerce may still be a valid justification for our arbitration laws.<sup>254</sup>

Looking at the FAA in the context of a larger reform movement helps emphasize a particular feature of the FAA and Rules Enabling Act: both statutes

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and commercial progress. No single element - and I want to emphasize this because I don't think it is always thought of - no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.

*Id.*

252. George David Smith & Davis Dyer, *The Rise and Transformation of the American Corporation*, in *THE AM. CORP. TODAY* 28, 31 (Carl Kaysen ed., 1996).

253. Especially in the context of international commerce, parties may be wary of having to litigate a dispute in a foreign court system, and so international arbitration should remain an attractive choice for dispute resolution for parties engaged in international commerce. The focus of this article has been on domestic arbitration and its relationship to other domestic procedural developments, and international arbitration is beyond the scope of this article.

254. To help assess this objective of our arbitration laws, perhaps further study should be undertaken to examine to what extent changing our arbitration laws would impact commerce. For example, would certain transactions be less likely if arbitration agreements were not enforceable or restricted in some manner? Would banning or restricting the use of arbitration agreements lead to higher costs and prices in commercial transactions? Anecdotally, I saw some evidence that if arbitration agreements were not enforceable, parties may be hesitant to engage in certain transactions. I once had a client located in one state who engaged in a lot of commerce with parties in a distant state. The client expressed that if arbitration agreements could not be enforced, the client would be hesitant to engage in these transactions in the future because the client perceived the burdens and costs of arbitration as less than the burdens and costs of litigating in the distant state.

involve a broad delegation of power to create procedure, and such power was delegated directly to those who would be involved in applying the procedure or be directly impacted by such procedure. The Rules Enabling Act delegates the power to create procedure to the judiciary, and the FAA in effect delegates such power to the parties, who in turn may delegate this power to the arbitrator. Looking at this procedural history and relationship between the FAA and Rules Enabling Act helps emphasize a fundamental value behind the FAA. The FAA helps respect party autonomy by giving parties the freedom to design and create their own procedure, and there is an inherent value to the FAA simply because the FAA can help respect party autonomy and the power to create procedure.<sup>255</sup> “[P]arty autonomy is directly related to the freedom essential in a democratic society,” and in such a society which respects individual liberty, courts should enforce the parties’ choice of arbitration procedures, which can help contribute to private ordering and self-governance.<sup>256</sup>

When I examined the FAA as part of a broader push for procedural reforms, the examination helped me see some strengths of the FAA as it relates to modern civil procedure. As discussed above, arbitration and litigation are interrelated, and a court system and our modern society can potentially benefit by having a strong system of arbitration. Hopefully, our laws will continue to be supportive of a vibrant system of arbitration. However, Congress has been chipping away at the FAA, and the scope of the FAA’s application is already beginning to change, as evidenced by the Dodd-Frank Act and the proposed Arbitration Fairness Act of 2009.<sup>257</sup> It appears we may be entering a period of transition with respect to our arbitration laws, and I expect there may be other amendments to the FAA in the future.<sup>258</sup>

As mentioned above, I am concluding this article with the following draft obituary for the FAA. Of course, the FAA is not without its faults, but like most obituaries, this one will not focus on the negative and instead will focus on how the FAA was an important breakthrough in an age of procedural reform. I believe this aspect of the FAA has been lost in the current debate, and I hope some of these benefits or values of the FAA can be preserved in future incarnations of a federal arbitration statute.

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255. BRUNET ET AL., *supra* note 236, at 4 (“party autonomy should be the fundamental value that shapes arbitration”).

256. *Id.* at 5.

257. *See supra* notes 21-25 and accompanying text.

258. Supreme Court cases interpreting the FAA over the last thirty years have tended to be pro-arbitration. *See supra* notes 16-19 and accompanying text; *see also* Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010) (arbitrator may be delegated the authority to resolve the enforceability of an arbitration agreement, unless a party challenges specifically the enforceability of the delegation provision); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (statutory claims are subject to arbitration); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1982) (“The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .”). The Arbitration Fairness Act of 2009 set forth several findings that were critical of the use of arbitration and the expansive interpretations of the FAA given by the Supreme Court. *See* H.R. 1020, 111th Cong. § 2 (2009). Eventually, if there is enough support for legislative action, Congress may amend the FAA and perhaps overrule or limit Supreme Court cases involving the FAA.

*Died (or Significantly Amended):  
the Federal Arbitration Act,  
an Older Cousin to Modern Civil Procedure*

Born in 1925, the Federal Arbitration Act represented an early victory at the national level in a larger push for procedural reform. The Federal Arbitration Act was an older cousin to other landmark procedural developments such as the Rules Enabling Act and the Federal Rules of Civil Procedure, all of which were motivated, at least in part, by frustrations with hyper-technical and confusing systems of court procedures, by concerns regarding a growing national economy, and by concerns of a docket crisis in the courts. The Federal Arbitration Act was a ground-breaking statute at the time for reversing a long-standing judicial hostility towards the enforcement of arbitration agreements and for liberating parties by respecting their freedom to create their own procedure.



