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Concluding Remarks

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Adjudication is vital to society and its operations. The law and legal proceedings, along with international acrimony, demonstrate that there is no end to human discord. In the United States, fundamental political values are inextricably linked to law. The Bill of Rights protects citizens from the State encroachments to their person and property. Freedom is the principal attribute of American citizenship. Public law requires the State to comply with an exacting level of due process when it seeks to restrict citizen freedoms.

American citizenship also sports a more private and mundane face. The daily life of the American citizen can lead to conflicts that engender private civil disputes. Public law guarantees still apply to legal proceedings involving private claims between individual citizens. There are evident differences between criminal and civil proceedings, the most evident of which is the standard for reaching a liability determination (beyond a reasonable doubt as opposed to a preponderance of the evidence). Fairness, in the form of the impartiality of decision-makers and parity between the parties, however, applies to both processes—only the depth of the imprint differs.

The costs and risks generally associated to litigation push both processes to avoid trials and adjudicated outcomes. Plea-bargains are prevalent in criminal trials and civil trials often result in settlements. Justice, in effect, is done through the avoidance of trial determinations. The uncertainty of pursuing rights guarantees is so great that parties prefer to avoid the established machinery of justice. Ironically, the promise of justice is most achievable when the mechanisms of justice are ignored.

The failure of justice processes to function as designed testifies both to the rigor of the public law analysis and the virtual impossibility of achieving its ends. In most cases, the required expenditure of resources exceeds both individual and societal capabilities. The legal procedure demanded by the Constitution, even in civil matters, becomes an unworkable burden. Nonetheless, American jurists would find it untenable to adjust the foundational principles of the judicial trial and adapted them to the exigencies of a more populous and complex society. In fact, these jurists would contend that society, no matter its current status or stage of evolution, should conform to the immutable verities of the law.

Arbitration intermediated the seismic rift between society's need to resolve conflict and the law's unbending regime of adjudicatory governance by proffering a remedy that was at once fair and functional. While a majority of the modern U.S. Supreme Court has been favorably disposed to arbitration, other groups have advanced more critical assessments of arbitral adjudication. The most controversial aspect of the contemporary social usage and standing of arbitration centers upon adhesive arbitration in employment and consumer matters. Criticism also flared regarding arbitration in the state-investor context, relating to the business leanings and partiality of NAFTA arbitrators, but the misgivings were quelled once hearings were open to the public. Although the U.S. Supreme Court's evaluation of arbitration bears the greatest practical

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weight, the critique made by various interest groups is based on a set of common values that endorse the supremacy of the public law guarantees.

For some groups, arbitral adjudication is a profound wrong. Its simpleminded vision of the trial should be relegated to the darkest recesses of specialized commercial activities. Public justice tolerates no substitute—even when parties freely and willingly consent to alternative processes. Justice is as singular as the Constitution that commands it. Adjudication cannot take place without party-driven trials, extensive discovery and record-building, unrelenting cross-examination, and the exhaustion of all possible remedies, including appeal. For other groups, arbitration is the perfect private remedy—an oasis of rationality in the turbulent lunacy of procedural justice. The obsession with winning is replaced with a sensible protocol that posits that loss occasioned by a fair hearing at the hands of a knowledgeable adjudicator is both acceptable and civilized. Incessant lawyer advocacy is a false offering that services primarily the advocate's interest—not the client's. Arbitration fulfills the promise of American citizenship and does not impose a crushing surcharge on the operations of American society. It puts an end to conflict in a traditionalist manner, yet avoids perpetual retakes and reconsiderations.

The presence of arbitration at the center of the adjudicatory arena mandates that society choose how it will behave. When citizens are in conflict, should society trust the decision-makers or obligate them to assume the neutral status of a referee and thereby endorse resolution through procedural protections implemented by advocates? Society's choice for civil adjudication is between two forms of trial—one that is disciplined, but functional and effective and another that is dedicated to the protection of legal rights through absolute procedural rectitude—a form of protection so resolute that it undermines its own operation. To a substantial degree, the choice represents a struggle between endorsing the pragmatic and workable or what is painstakingly difficult and inefficient—the myths surrounding the belief in the exclusive righteousness of adjudication done pursuant to public law strictures. Will a mentality of achievement or a belief in immutable truths prevail and become the backbone of adjudication in American society? It is difficult to resist admiring what works, especially when the competing choice is a rhetorical, often sanctimonious set of beliefs that frequently fail to provide protection to anything or anyone.

The symposium participants have ably engaged in a discussion about the protection of rights and considered in their assessment of remedies the allocation of resources for competing social endeavors. There can be little doubt that arbitration represents a nearly miraculous solution to the due process and affordability dilemma. Because it is private, arbitration eliminates the demands on public resources and monies. The general professionalism and self-interest of arbitrators and the presence of lawyers in the proceedings validate arbitration as a rights protection mechanism. *Southland*[1]and the latest *per curiam* opinion from the U.S. Supreme Court[2] indicate that the federal right to arbitrate is firmly rooted in U.S. law.[3] For all intents and purposes, it is a right with

[1] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[2] Nitro-Lift Techs., L.L.C, v. Howard, 133 S. Ct. 500 (2012).

[3] "But the Oklahoma Supreme Court must abide by the FAA, which is [']the supreme Law of the Land,[']U.S. Const., art. VI, cl. 2, and by the opinions of this court interpreting that law." *Howard*, 133 S. Ct. at 503.

constitutional dimensions that rivals the right to political expression and to be free of invidious discrimination based on race. The Ninth Circuit,[4] and increasingly the Second Circuit,[5] have dissented from the U.S. Supreme Court's unfailing support of arbitration, but the opposition—especially adamant in the matter of adhesion—has been ineffective and is seemingly destined to remain so. Members of the Court disagree in different sets of circumstances and, periodically, there are anti-arbitration decisions, but the support for arbitration on the Court seems to be wide and deep.[6]

The only inkling of imperfect consensus resides in an apparently emerging power struggle between the various players in the process as to which of them will set the ultimate direction for the regulation of arbitration.[7] Four players have the potential to decide: the parties, the courts, the arbitrators, and arbitral institutions. A fifth player is society at large acting through the legislative process, an institution which—since 1925—has been remarkably and mercifully silent on the subject of arbitration. Freedom of contract may be vital to the development of arbitration. The transborder and domestic history of arbitration, however, indicates, without equivocation, that judicial approval and support are crucial to its effectiveness. Courts can convert the most favorable statutory regime into a jungle of deadly opposition.[8] The California decisional law on arbitration is a perfect illustration.[9] It is evident at both the state and federal judicial levels that current judges have been persuaded to support arbitration; they believe that they have a duty to uphold arbitration agreements and awards given the U.S. Supreme Court's construction of the Federal Arbitration Act and the vibrant application of the federal preemption doctrine.[10] Accordingly, arbitrators 'take the baton' from the parties and, with minimal supervision from arbitral institutions, conduct the proceedings and resolve the merits, unless the agreement or the law places special restrains on their exercise of power.

In the context of class action litigation, the U.S. Supreme Court has, on the one hand, heralded the superiority of arbitration and contract choice and, on the other hand, completely undermined the autonomous operation of arbitration by vacating the arbitrators' interpretation of the arbitration agreement as an 'excess of authority.' The description of the contrastive approaches is reflected in the contradistinctive holdings in *AT&T Mobility v. Concepcion*[11] and *Stolt-Nielsen v. AnimalFeeds, Inc.*[12] The result in *AT&T Mobility* establishes that class action waivers are a legitimate part of the bargain for arbitration and dismisses adhesion as a flaw in the formation of an arbitration

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[4] *See* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION, ch. 4 (4th ed. 2012).

[5] *See*, *e.g.*, *In re* Am Express Merchs. Litig., 554 F.3d 300 (2d Cir. 2009), *cert. granted sub nom* Am. Express Co. v. Italian Colors Rest.,130 S.Ct. 2401 (2010); *see also In re* Am. Express Merchs. Litig., 634 F.3d 187 (2d Cir. 2011); *In re* Am. Express Merchs. Litig., 667 F.3d 204 (2d Cir. 2012).

[6] *See* CARBONNEAU, *supra* note 4, at xiii-xxii.

[7] *See* Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002).

[8] *See* Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343 (2009).

[9] *See* CARBONNEAU, *supra* note 4.

[10] *See id.* at ch. 5.

[11] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[12] Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

agreement.[13] In a completely contrary vein, *Stolt-Nielsen* places significant and decisive restraints on the ability of arbitrators to rule on matters that are instrumental to the independence of the arbitral process.[14] The difference in approach and result places a cloud of indeterminacy over the future direction of arbitration law.

Stolt-Nielsen, like *Hall Street Associates*,[15] *Volt Information Sciences*,[16] *Alexander v. Gardner-Denver*,[17] *Wilko v. Swan*,[18] may indicate a turning point in the U.S. law of arbitration. There are clear problems with the privatizing of adjudication in Western democratic societies. Despite *14 Penn Plaza v. Pyett*,[19] the arbitrability of civil rights claims remains a debatable addition to arbitrable subject matters. How arbitrators are qualified and to whom or what they owe allegiance are concerns that remain unaddressed despite the strength of the federal policy favoring arbitration and contract freedom. Whether greater regulation or supervision of the arbitral process is a good idea is another festering matter. Current practice has given the impartiality of arbitrators a renewed significance in the litigious regulation of the arbitral process.[20] It is unclear whether the latter has 'improved' the process or simply made it vulnerable to a new form of attack from disgruntled parties. As the U.S. Supreme Court itself has made evident on a number of occasions,[21] greater litigation about arbitration, and its enhanced adversarialization, will have alternative adjudication return, full circle, to the *status quo ante*.

The definition and discussion of issues and procedural law are an important part of justice in a democracy. It is clear that arbitration has become instrumental to the 'life of the law'[22] and that the decisional work of the courts regulates the operation of the arbitral process. Academic discussion like the one that has taken place are most valuable when they assess the content of actual judicial holdings and contribute to maintaining a functional and fair process of adjudication. I applaud both the student editors who so ably organized this event and the distinguished academic lawyers who contributed to the quality of the discussion—from a warning about oligarchs to the merger of alternative remedies and including an evaluation of the impact of arbitration on administrative processes and ending with a brief for the stakeholders of investment arbitration processes.

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[13] *See* CARBONNEAU, *supra* note 4, at ch. 5.

[14] *See Concepcion*, 131 S. Ct. 1740.

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

[16] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989).

[17] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[18] Wilko v. Swan, 346 U.S. 427 (1953).

[19] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

[20] *See* CARBONNEAU, *supra* note 4, at 527.

[21] *See*, *e.g.*, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[22] A reference to Justice Oliver Wendell Holmes, Jr.'s famous observation that: "The life of the law has not been logic; it has been experience." *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).