

# INTRODUCTION: DREAMING ABOUT ARBITRATION REFORM

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Some peoples' dreams are really great, or at least really exotic. Reverend Martin Luther King had a history-changing dream, of the end of discrimination.<sup>1</sup> Me, I had a dream about a really great conference on arbitration, and how it might ultimately help lead to legal reform of arbitration. While the dream may not have been the most exotic, thanks to the participants in this Symposium, and many others,<sup>2</sup> at least the first part of my dream has come true. We did host a very good conference. Perhaps this Symposium issue will even impact the nature of the law on arbitration in this country.

The Federal Arbitration Act ("FAA") is now eighty-two years old.<sup>3</sup> Thus, its age, alone, raises the question as to whether the statute is in need of reform. Beyond such ageism, the Act of late has become quite controversial. Originally adopted to allow businesses to knowingly choose a potentially quicker, cheaper, more expert arbitration process over litigation,<sup>4</sup> for many years the Act initially received little criticism or even attention. However, a series of Supreme Court decisions commencing in the mid-1980s made clear that the Act could be used not only in business-to-business settings, but also in contexts involving disputes between a business and a "little guy" consumer, employee, or franchisee.<sup>5</sup> When companies began to rely on these Supreme Court decisions to mandate that "little guys" resolve future disputes through private arbi-

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<sup>1</sup> Martin Luther King, Jr., I Have a Dream, Speech Delivered at the Lincoln Memorial (Aug. 28, 1963) (transcript and audio recording available at <http://www.americanrhetoric.com/speeches/mlkihavedream.htm>).

<sup>2</sup> I owe special thanks to the following for helping make my dream a reality: Michael and Sonja Saltman, the inspirational founders and funders of the Saltman Center for Conflict Resolution; Dick Morgan and Joan Howarth, former dean and associate dean of the Boyd School of Law, who supported this event; Ray Patterson, Associate Director of the Saltman Center, who provided seemingly endless logistical direction and support; Mary Guidera, staff to the Center, who made sure people got registered and/or paid; and Paula Gregory, who pitched in at the last moment to make sure that people got where they needed to go. I am also very grateful to members of the *Nevada Law Journal* for their hard work in supporting the publication of these articles.

<sup>3</sup> The Federal Arbitration Act, originally known as the U.S. Arbitration Act, was enacted in 1925. Act of Feb. 12, 1925, ch. 213, §§ 1-15, 43 Stat. 883-86 (current version at 9 U.S.C. §§ 1-16 (2000)).

<sup>4</sup> For the early history of the Act see, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

<sup>5</sup> For a tracing of this history, see Sternlight, *supra* note 4, at 644-74.

tration rather than litigation, many commentators and even some courts condemned the practice and, at least indirectly, the FAA for permitting the practice.<sup>6</sup> Of course, the Court's decisions permitting mandatory arbitration also have their defenders,<sup>7</sup> which is what makes for a controversy.

Apart from the disputes over mandatory arbitration, other aspects of the Federal Arbitration Act have recently engendered increased controversy as well. Whereas it once was assumed that disputants who chose arbitration would prefer a quick, inexpensive, informal, and private process, today some disputants and some commentators are seeking to create more complex hybrids between traditional arbitration and litigation.<sup>8</sup> For example, some disputants have written clauses seeking to replace the very limited review mechanisms, described in the FAA, with a far more extensive appellate process.<sup>9</sup> Also, the seemingly arcane question of whether arbitrators or courts should make certain arbitration-related decisions has recently received a great deal of attention from both courts and commentators.<sup>10</sup> The existence of mandatory arbitration has a substantial impact on discussion of these issues as well, in that the nature of appellate review and division of jurisdictional powers can affect both the extent and impact of mandatory arbitration.<sup>11</sup>

<sup>6</sup> For some of the best and certainly most colorful critiques of mandatory arbitration, see *Knepp v. Credit Acceptance Corp.* (*In re Knepp*), 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) ("The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic."); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996) ("[T]he arbitration law made by the Court is a shantytown."); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (stating, referring to arbitration jurisprudence, "[t]he Supreme Court has created a monster").

<sup>7</sup> See, e.g., Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements— with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 261 (2006).

<sup>8</sup> See generally Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39 (1999).

<sup>9</sup> For discussion of this issue, see Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007); Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234 (2007); Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, & Drahozal*, 8 NEV. L.J. 271 (2007); Richard E. Speidel, *Parties' Power to Vary Standards for Review of International Commercial Arbitration Awards*, 8 NEV. L.J. 314 (2007); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385 (2007).

<sup>10</sup> For discussion of this issue, see William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135 (2007); Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169 (2007); Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107 (2007).

<sup>11</sup> For example, opponents of mandatory arbitration would typically prefer that judges, rather than arbitrators, decide whether an arbitration clause is valid. Such opponents fear that arbitrators might, at least unconsciously, be influenced by their eagerness to hear an arbitration and thus refuse to find the clause invalid. See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L.

Although academics have spent a great deal of time and pages bashing the Supreme Court's recent interpretation of the Federal Arbitration Act, they have devoted far less energy to the more positive mission of trying to reform the statute, assuming reform is needed. In an attempt to take some positive steps towards reform, co-authors Edward Brunet, Richard Speidel, Stephen Ware, and I decided to write a book discussing what if any reforms of the FAA are needed.<sup>12</sup> While we did not agree amongst ourselves as to what reforms were needed,<sup>13</sup> we all found that the process of thinking through possible legislative reform, and debating it amongst ourselves, was very rewarding.

This Symposium is an outgrowth of the book project. As Director of the Saltman Center for Conflict Resolution, I have the luxury of being able to host conferences related to the topic of conflict resolution. I decided to invite some of the best-known and respected arbitration scholars in the country to come to Las Vegas and opine on how if at all the Federal Arbitration Act should be revised. To my delight (and a bit of shock), every single invitation I extended was accepted, and this terrific group of articles is the result.<sup>14</sup>

Those of us who participated in the Symposium know that it was a great deal of fun.<sup>15</sup> But, I believe I speak for the entire group of scholars when I say that we fervently hope that this Symposium will prove to be valuable not only to us, but to policy makers as well. The potential for reform of the Federal Arbitration Act is real. For example, on July 12, 2007, the Arbitration Fairness Act of 2007 was introduced before both the House and Senate.<sup>16</sup> This bill, if passed, would amend the FAA to prohibit the use of mandatory arbitration with respect to consumers, employees, or franchisees.<sup>17</sup> Similarly, on June 12, 2007, the Subcommittee on Commercial and Administrative Law for the House Judiciary Committee held a hearing on whether mandatory binding arbitration

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REV. 1, 24 (1997) (“[A]rbitrators are even less likely to void purported arbitration agreements than are courts.”). The question of whether arbitrators or instead courts should make these rulings has led to a split among federal courts of appeal. *Compare* *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003), *with* *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003).

<sup>12</sup> EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006).

<sup>13</sup> Indeed, Chapter 7 of the book contends a colloquy on some of our disagreements.

<sup>14</sup> Following the dream metaphor, I was reminded a bit of the famous line from the movie *Field of Dreams* (Gordon Co. 1989), albeit alluding to a baseball diamond: “If you build it, he will come.” Internet Movie Database, <http://www.imdb.com/title/tt0097351/quotes> (last visited Oct. 20, 2007). We created the conference and the experts came to Las Vegas.

<sup>15</sup> We are, after all, a bunch of arbitration nerds.

<sup>16</sup> Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

<sup>17</sup> See Arbitration Fairness Act of 2007, H.R. 3010, § 4. Note that Congress has already passed legislation proscribing the use of mandatory arbitration with respect to automobile franchisees and prohibited payday lenders from imposing arbitration on military personnel. The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001 was signed into law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1758, 1835-36 (2002). As part of a Department of Defense authorization bill, Pub. L. No. 109-364, it is “unlawful for any creditor to extend consumer credit to a covered member or a dependent of such member with respect to which . . . the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute.” 10 U.S.C. § 987(e)(3) (2000).

agreements are fair to consumers.<sup>18</sup> Thus, it is clear that there is interest, in Congress, in considering potential reform of the FAA.<sup>19</sup>

In organizing the Symposium, I basically asked each invitee to write about whatever aspect of FAA potential reform they found most compelling. Yet, notwithstanding this libertarian approach, the panelists' remarks divided themselves fairly neatly into five panels, as discussed below.

Participants in the first panel all examine the question of whether and when agreements to arbitrate ought to be enforceable. Professor Richard Bales and co-author Christopher Kippley present an argument regarding the type of consent that ought to be required before pre-dispute arbitration agreements would be enforceable with respect to consumers and employees.<sup>20</sup> They urge that just as workers are protected, by statute, from waiving their rights to benefits, so too should all consumers and employees be protected from agreeing, unwittingly, to resolve future disputes through binding arbitration rather than through litigation. Next, Professor Amy Schmitz also examines the dangers of enforcing small-print contracts of adhesion mandating arbitration.<sup>21</sup> However, rather than urging the outright ban of pre-dispute arbitration clauses in the consumer and employment settings, she instead suggests that Congress impose minimum standards of fairness with respect to such clauses. Then Professor Michael Green examines the question of what if any steps Congress might take to encourage *post*-dispute agreements to arbitrate.<sup>22</sup> Green asserts that if opponents to mandatory employment arbitration are successful in banning pre-dispute agreements to arbitrate employment disputes, it is critically important simultaneously to find means to encourage post-dispute agreements to arbitrate. Otherwise, urges Green, the many potential benefits of arbitration over litigation for both employees and employers will be lost.<sup>23</sup> Finally, as the last participant in the first panel, I seek to turn matters a bit on their head. As a longtime opponent of the imposition of mandatory arbitration on "little guys," I

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<sup>18</sup> *Hearing on the "Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?" Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007). Testimony was provided by F. Paul Bland, Jr., a Staff Attorney for Public Justice, who has litigated many cases seeking to invalidate mandatory arbitration provisions; David S. Schwartz, a professor at the University of Wisconsin Law School who has written multiple articles opposing mandatory arbitration; Mark J. Levin, an attorney at a large firm who regularly defends his lender clients' use of mandatory arbitration; and Jordan Fogal, a senior citizen who was required to bring her claims against her home builder in arbitration and believes she received highly unfair treatment.

<sup>19</sup> Because the Supreme Court has interpreted the preemptive scope of the Federal Arbitration Act very broadly, state legislatures have quite limited power to reform arbitration practices. For discussion of preemption issues, see Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326 (2007).

<sup>20</sup> Christopher J. Kippley & Richard A. Bales, *Extending OWBPA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers*, 8 NEV. L.J. 10 (2007).

<sup>21</sup> Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37 (2007).

<sup>22</sup> Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58 (2007).

<sup>23</sup> *Id.* at 60.

have frequently urged Congress, states, or courts to ban the practice.<sup>24</sup> In this presentation, for a change of pace, I decided to defend the practice of mandatory arbitration but only if imposed on the company, rather than on the little guy.<sup>25</sup> From both a policy and a constitutional perspective, I consider why it might be acceptable for Congress to impose arbitration on companies, even if it is not acceptable in my view for private companies to impose arbitration on little guys.

The second panel of the Symposium focuses on issues pertaining to how responsibilities and legal issues should be divided between arbitrators and courts. As the commentators recognize, these issues of “separability” and jurisdiction are often seen as the most complex in arbitration. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>26</sup> the Supreme Court explained that arbitration clauses and the contracts in which they are contained are “separable,” and that arbitrators rather than courts should typically determine the validity of the container contract. Professor Stephen Ware, first, focuses on the Supreme Court’s most recent foray into this morass: *Buckeye Check Cashing Inc. v. Cardegna*.<sup>27</sup> Considering how *Buckeye* might be reconciled with such prior Supreme Court decisions as *Prima Paint*,<sup>28</sup> *First Options of Chicago, Inc. v. Kaplan*,<sup>29</sup> and *Howsam v. Dean Witter Reynolds, Inc.*,<sup>30</sup> Ware boldly calls for a repeal of the separability doctrine in order to better honor parties’ contractual intentions.<sup>31</sup> Professor William Park, next, addresses doctrines of separability and jurisdiction from the perspective of one deeply versed in international as well as domestic arbitration. Showing that the Supreme Court’s approach is closely analogous to the way other countries have approached these jurisdictional issues, Park concludes: “While not entirely free from doubt, the American cases are probably getting things more right than wrong.”<sup>32</sup> Finally Professor Alan Rau provides his rationale for why the Federal Arbitration Act

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<sup>24</sup> See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1674-75 (2005) (asserting privately imposed mandatory arbitration is “unjust”); Sternlight, *supra* note 11, at 99-100 (calling upon courts to recognize that mandatory arbitration is often unconstitutional); Sternlight, *supra* note 4, at 712 (urging that if the Supreme Court does not revise its arbitration jurisprudence, Congress should either bar mandatory arbitration or allow state legislatures to pass protective legislation). I therefore enthusiastically support the recently introduced Arbitration Fairness Act of 2007.

<sup>25</sup> Jean R. Sternlight, *In Defense of Mandatory Arbitration (if Imposed on the Company)*, 8 NEV. L.J. 82 (2007).

<sup>26</sup> *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967).

<sup>27</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (holding that challenge asserting contract as a whole is void as a matter of public policy must be heard by arbitrator rather than by court, while recognizing that challenges to arbitration clause in particular shall be heard by courts).

<sup>28</sup> *Prima Paint*, 388 U.S. 395.

<sup>29</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding that court, rather than arbitrator, must rule on question of whether container agreement was ever formed).

<sup>30</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002) (reiterating that courts rather than arbitrators should decide “gateway” disputes as to whether arbitration clause applies to a particular dispute, while holding that arbitrator should decide timeliness of claim brought in arbitration).

<sup>31</sup> Ware, *supra* note 10.

<sup>32</sup> Park, *supra* note 10, at 168.

should not be revised with respect to separability (or any other matter).<sup>33</sup> As to separability, Rau has previously explained that while the doctrine is often misunderstood, he for one finds it “unproblematical.”<sup>34</sup> Defending that notion as well as courts’ generally superior abilities as compared to legislators, Rau colorfully proclaims: “The power of Congress over the practice of arbitration should, I think, be precisely equivalent to that of the Czar over the far-flung peasant villages of Russia—absolute, but exercised at an inconceivably remote distance.”<sup>35</sup>

The third panel focuses on the terms under which courts should be able to vacate arbitral awards. Several of the panelists favor amending the FAA to allow for more expansive review than currently permitted by section 10 of the Act, although they differ substantially on the specifics. For example Professor Sarah Cole, espousing the virtues of freedom of contract, urges that the FAA be amended to “permit parties to agree to expanded judicial review, so long as the court’s review of the award does not compromise the institutional integrity of the courts.”<sup>36</sup> Professor Christopher Drahozal focuses on “manifest disregard” as a basis for vacating arbitral awards, rather than on contractual expansions of section 10.<sup>37</sup> As Drahozal notes, although courts generally allow arbitral awards to be vacated due to their manifest disregard of the law, this doctrine lacks good support as a matter of either doctrine or case law.<sup>38</sup> He advocates that the doctrine ought to be codified to support the integrity of the court system.<sup>39</sup> Professor Jeffrey Stempel focuses on the implications of mandatory or “mass” arbitration for determination of an appropriate vacatur standard.<sup>40</sup> As a prudential matter, Stempel urges that opponents of mandatory arbitration are better off seeking an improved vacatur standard, which would help ensure that arbitrators apply the law, than opposing the enforcement of mandatory arbitration provisions altogether.<sup>41</sup>

However, not all the presenters favor the use of expanded review. Professor Richard Reuben instead states: “[T]he displacement of finality with substantive judicial review, if codified, will greatly undermine the arbitration process, its attractiveness as an alternative to public adjudication or negotiated settlement, and its utility as an aid to the judiciary as a forum for the expeditious resolution of disputes.”<sup>42</sup> Thus, Reuben urges that “[r]ather than requiring or permitting substantive judicial review . . . the FAA should maintain its

<sup>33</sup> Rau, *supra* note 10, at 169 (“[I]t would be far better if we were to leave the FAA completely alone.”).

<sup>34</sup> Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 3 (2003).

<sup>35</sup> Rau, *supra* note 10, at 169.

<sup>36</sup> Cole, *supra* note 9, at 214.

<sup>37</sup> Drahozal, *supra* note 9.

<sup>38</sup> No language in the FAA supports the use of “manifest disregard” review, and the Supreme Court has only supported the doctrine in dictum. *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

<sup>39</sup> Drahozal, *supra* note 9, at 235.

<sup>40</sup> Stempel, *supra* note 9, at 251.

<sup>41</sup> *Id.*

<sup>42</sup> Reuben, *supra* note 9, at 272.

current narrow grounds for substantive review and be amended to resolve a split in the lower courts, to make clear that parties cannot contract for substantive judicial review . . . .”<sup>43</sup>

Finally, switching gears to consider the international context, Professor Richard Speidel considers how contractually expanded review, such as that discussed by Professor Cole,<sup>44</sup> might be treated in an international contract.<sup>45</sup> Speidel is concerned with the potential for lack of parity between the treatment afforded to domestic and foreign arbitral awards. He urges that it ought not to be permissible, in the international setting, to expand the scope of review beyond that permitted by treaty, and that the relevant laws ought to be revised to ensure that result.<sup>46</sup>

The fourth panel focuses on multi-jurisdictional issues brought into play by the Federal Arbitration Act and its interpretation. Professor Edward Brunet discusses what he sees as the anomalous fact that “federal law has been permitted to run roughshod over the subtleties of state efforts to regulate aspects of arbitration.”<sup>47</sup> One might have expected that states rather than the federal government would play a major role in regulating arbitration, says Brunet, given that contractual and consumer matters are typically left to states’ police powers, given that states are typically allowed to provide their own procedural rules, and given the Supreme Court’s current supposed devotion to federalism values.<sup>48</sup> To correct this situation, Brunet urges that the FAA be amended to specify no intent to preempt the field of arbitration regulation.<sup>49</sup> Turning, then to the international setting, Professor Catherine Rogers considers how the arrival of “have-nots” into the world of international arbitration will and should affect the nature of arbitration that crosses international boundaries.<sup>50</sup> Specifically, whereas international arbitration has traditionally been premised on the supposition that two sophisticated parties with relatively equal bargaining power voluntarily agreed to arbitrate rather than litigate their disputes, Rogers explains that globalization and increased reliance on the Internet have now brought both consumers and employees into the world of international arbitration. Looking at the effect these new arrivals may have on the system of international arbitration, Rogers concludes that such arbitration has the potential to “operate as an instrument for . . . mediating conflicting national laws and policies, for securing effective transnational regulation, and for generating international public policy norms.”<sup>51</sup> She believes that other countries’ protection of consumers and employees from unfair processes may ensure that international arbitration involving “have-nots” will be fairer than its domestic counterpart.<sup>52</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> See Cole, *supra* note 9.

<sup>45</sup> Speidel, *supra* note 9.

<sup>46</sup> *Id.* at 323-25.

<sup>47</sup> Brunet, *supra* note 19, at 326.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 340.

<sup>50</sup> Catherine A. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L.J. 341 (2007).

<sup>51</sup> *Id.* at 384.

<sup>52</sup> *Id.* at 360.

The fifth panel of the Symposium looks at the FAA through a wide-angle lens, rather than focusing on particular narrow aspects that might be in need of reform. Professor Maureen Weston traces the history of the Act and argues that whereas the Act was “[o]stensibly designed to provide for the voluntary private adjudication of disputes, [it] generates thousands of lawsuits, is vociferously challenged by consumer protection groups, widely criticized in scholarly articles, and is judicially determined to preempt and thus substantially restrict states’ ability to enact legislation responsive to constituent concerns.”<sup>53</sup> Therefore, urges Weston, Congress ought to pass legislation that returns the FAA to its roots by limiting its preemptive scope and either exempting consumer and employment disputes altogether or, at minimum, providing extra protections for consumers or employees who are contractually mandated to take claims to arbitration.<sup>54</sup> Next Professor David Schwartz, a long-time critic of the Supreme Court’s arbitration jurisprudence,<sup>55</sup> sounds similar themes when he contends that “[w]e are nearing the quarter-century mark in the Supreme Court’s misguided reinterpretation of the Federal Arbitration Act.”<sup>56</sup> He targets the Court’s decisions permitting the growth of mandatory arbitration and urges that these decisions are bad not only because they support unfair policy,<sup>57</sup> but also because “the forcing of employment and consumer cases into the mandatory arbitration system has created inexorable pressures to judicialize arbitration.”<sup>58</sup> Thus, addressing himself to those who love arbitration as it was, Schwartz urges that the FAA be amended to exempt consumer and employment disputes from pre-dispute arbitration.<sup>59</sup> Finally, Professor Thomas Stipanowich ends the Symposium by examining how the law of binding arbitration is affecting the law of other dispute resolution processes.<sup>60</sup> Stipanowich explains that binding arbitration is no longer the main game in town, and that contracts are increasingly calling for the use of other informal processes such as non-binding arbitration and mediation. Also, contracts increasingly include step-dispute resolution clauses that anticipate the potential use of multiple processes.<sup>61</sup> Yet, courts are not quite sure how to handle these non-arbitration clauses and are inconsistent as to whether they apply the Federal Arbitration Act to processes other than binding arbitration.<sup>62</sup> Stipanowich urges that “the burden generally outweighs whatever benefits may be achieved by viewing ADR processes

<sup>53</sup> Weston, *supra* note 9, at 386 (footnote omitted).

<sup>54</sup> *Id.* at 398-99.

<sup>55</sup> See, e.g., Schwartz, *supra* note 6; David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004).

<sup>56</sup> David S. Schwartz, *If You Love Arbitration, Set It Free: How “Mandatory” Undermines “Arbitration,”* 8 NEV. L.J. 400, 400 (2007).

<sup>57</sup> Schwartz does not present fairness arguments here, but rather alludes to his own and others’ prior work. *Id.* at 401.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 422.

<sup>60</sup> Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427 (2007).

<sup>61</sup> Such clauses might for example state that disputants need to attempt good faith negotiation, but that if that fails they should then mediate, and that if mediation fails they should resolve the dispute through binding arbitration.

<sup>62</sup> Stipanowich, *supra* note 60, at 437.

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through the lens of arbitration law,” and instead suggests that courts needed to be provided with other guidance, perhaps through a *Restatement of Dispute Resolution*.<sup>63</sup>

Maybe it's just “Nevada Dreamin’”<sup>64</sup> but I truly hope that this conference, and this Symposium issue, can help influence debate in this country regarding arbitration. Having brought together some of the best arbitration scholars in the country, it would be a real shame if this conference was only a good time for us and had no impact in the real world.

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<sup>63</sup> *Id.* at 463, 473.

<sup>64</sup> “California Dreamin’” was first released by the Mamas and the Papas in 1965, and Wikipedia reports that the song is #89 on Rolling Stone’s list of top 500 songs ever. THE MAMAS AND THE PAPAS, *California Dreamin’*, on IF YOU CAN BELIEVE YOUR EYES AND EARS (Dunhill 1966); Wikipedia, [http://en.wikipedia.org/wiki/California\\_Dreamin'](http://en.wikipedia.org/wiki/California_Dreamin') (last visited Oct. 20, 2007). I hope it is not the impossible dream. “The Impossible Dream” was a song in the 1965 musical, *Man of La Mancha*. MITCH LEIGH, *The Impossible Dream*, in MAN OF LA MANCHA (1965). The lyrics are available at Reel Classics, <http://www.reelclassics.com/Actors/O'Toole/impossibledream-lyrics.htm> (last visited Oct. 20, 2007).