

---

ARTICLE

---

---

REFLECTIONS ON THE NEXUS OF PROCEDURE AND  
HISTORY: THE EXAMPLE OF MODERN AMERICAN  
ARBITRATION

---

AMALIA D. KESSLER†

INTRODUCTION ..... 2401

I. CONTEXTUALIZING THE RISE OF MODERN AMERICAN  
ARBITRATION ..... 2405

II. CORPORATIST MODELS ..... 2409

III. THE MATERNALIST MODEL ..... 2415

IV. THE COURT-BASED MODEL ..... 2419

CONCLUSION ..... 2422

INTRODUCTION

There is surely no more appropriate context in which to discuss interdisciplinary approaches to civil procedure than in a festschrift honoring Stephen Burbank. In a diverse and expansive set of writings spanning several decades, Burbank has drawn on a wide range of disciplines and methods in approaching key questions of procedure. Masterful at delivering rigorous and precise legal analysis, he has also acquired deep knowledge and sophistication in a range of allied fields, including history and political science. This has enabled him to utilize various qualitative and quantitative methods in pursuit of the deeper social meaning and purposes of the law. As he has insisted, “the technical reasoning required to be a master of doctrine is a necessary

---

† Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies and Professor (by courtesy) of History, Stanford University. Many thanks to Bob Bone, Bernie Meyler, Ed Purcell, Judith Resnik and Diego Zambrano for their helpful questions and comments and to the editors of the *University of Pennsylvania Law Review* and the *University of Pennsylvania Journal of Constitutional Law* for their editorial assistance.

condition for . . . good scholarship about procedure,” but “it is not a sufficient condition.”<sup>1</sup> For those who “seek to understand law’s significance,” it is vital to gain “perspectives in addition to the internal logic of technical reasoning”<sup>2</sup>—and these can be supplied only by turning to disciplines beyond the law, “including history, empiricism, and . . . political science.”<sup>3</sup>

Among Burbank’s interdisciplinary pursuits, and dear to my own heart, is the study of procedure from a historical perspective. But what precisely does history contribute? Unlike the quantitative methods employed by empiricists and widely embraced as the leading edge of both social science and legal studies today, the historian’s toolkit is more amorphous and the ensuing contribution harder to identify. As Burbank’s own work powerfully suggests, what history affords, above all else, is much-needed context. As he has often observed, procedure is power, providing the terms and structuring the processes through which decisions of vast individual and social consequence are made.<sup>4</sup> But it is all too easy, “[p]articularly when the law in question is labeled ‘procedure’ . . . to accept a doctrinal question at face value (that is, to regard doctrine as an end in itself).”<sup>5</sup> The unfortunate end result of this tendency, he has cautioned, is “to view such a question apart from the litigation dynamics that it engenders, and otherwise to ignore issues of power that may be at stake in its resolution.”<sup>6</sup> It is here that history can be of particular use, revealing the social context that elucidates these vital power dynamics, and thus making clear the stakes of our procedural choices.

As evidenced by Burbank’s scholarship, as well as that of others participating in this symposium, historical approaches to procedure are of interest to procedure scholars. But as is true across the legal academy and broader university, enthusiasm for the historical method pales in comparison to that for empirical social science. Among legal scholars, the most obvious exception to that generalization is the relatively small but thriving field of legal history, many of whose participants are not only trained as lawyers, but also hold doctorates in history. But if we look at the work produced by those who identify as legal historians, remarkably little concerns questions of civil procedure and practice. Although legal historical work abounds in such fields as administrative law, labor and employment, and criminal law and procedure,

---

<sup>1</sup> Stephen B. Burbank, *Procedure, Politics, and Power*, 52 J. LEGAL EDUC. 342, 343 (2002).

<sup>2</sup> Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1440-41 (2008).

<sup>3</sup> Burbank, *Procedure, Politics, and Power*, *supra* note 1, at 344.

<sup>4</sup> See generally Burbank, *Procedure, Politics, and Power*, *supra* note 1; see Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513 (1996); Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 116-20 (2009); Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471-76 (1987).

<sup>5</sup> Burbank, *The Class Action Fairness Act*, *supra* note 2, at 1441.

<sup>6</sup> *Id.*

the same cannot be said of civil procedure.<sup>7</sup> Shaped by the realist turn in American approaches to law and legal education, as well as by their training in history, U.S.-based legal historians—unlike their counterparts in much of the rest of the globe—are largely externalist in orientation, eager to focus on the lived experience of the law, rather than its formal trappings. From this perspective, procedure and its technicalities seem far removed from the social and political dynamics believed to matter. But if we take seriously Burbank's repeated insistence that procedure is power, we are left with no small irony. Just as procedure scholars can be tempted to ignore history in their rush to analyze doctrine in its own terms, ignoring the social context that reveals the underlying reality of power, so too many historians—in their pursuit of the social context that proceduralists sometimes ignore—are inclined to ignore procedure. The nexus of procedure and history, where power dynamics play out through the law, is thus all too often neglected, to the ultimate detriment of scholarship in both fields.

As this suggests, we need more histories of procedure. In so arguing, I mean to make not only a quantitative, but also a qualitative point. Our need, in other words, is not only for more books and articles examining the history of procedure, but also for more of the historian's distinctive sensibility in the work that is produced. What precisely is that sensibility? Emerging out of the intersection of critical legal studies and cultural history, the legal historical scholarship produced in the United States over the last several decades has focused on context and contingency. By setting historical events in context, the legal historian reveals the myriad contingencies undergirding past developments, thus shedding light on the often complicated and unpredictable nature of legal and social change—including, not least, the role played by complex dynamics of power.<sup>8</sup> Of late, a number of scholars have grown frustrated with the reigning paradigm, arguing, in the words of Christopher Tomlins, that the embrace of "totalized contingency" has proven a dead end, giving rise to a growing sense of "indeterminacy" and replacing "explanation" with "an aesthetic of 'complexity.'"<sup>9</sup> But despite the rise of such critiques and the call for a new paradigm, one has yet to emerge. Legal historians as a whole remain committed to pursuing context and contingency.

---

<sup>7</sup> There are, of course, exceptions. See, e.g., KELLEN FUNK, *THE LAWYERS' CODE* (forthcoming 2021); AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877* (2017) (presenting historical accounts of the development of American procedural law).

<sup>8</sup> See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984) (describing the various approaches to historical analysis within the field of critical legal studies).

<sup>9</sup> Christopher Tomlins, *Revolutionary Justice in Brecht, Conrad, and Blake*, 21 *LAW & LIT.* 185, 204 (2009).

There are, no doubt, many reasons for this persistence—including perhaps, as Tomlins has put it, the fact that the field is “obdurately atheoretical.”<sup>10</sup> In addition, however, I suspect that many legal historians doubt that attending to contexts and contingencies necessarily leads to “totalized contingency.” Even while tracing particular contingent pathways of development, the legal historian can identify deeper, structural and institutional forces that also shaped past events and that were less subject to possible change. Deployed in this way, the historical focus on context and contingency can have great explanatory force. It is true, to some extent, that a focus on a different set of contexts might shine light on a different set of causes, thus leading us back to the problem of indeterminacy. But the value-added of history is not that it is a social science that purports to present us with definitive, falsifiable accounts of legal and social development. It is instead an interpretive discipline that opens up new and important lines of inquiry that we might not otherwise even have known to consider.

To call for more of the historian’s sensibility in the writing of legal histories of procedure and practice is thus, ultimately, to call for more and broader contextualization. But what exactly does this mean? As I see it, there are three deeply interrelated components to the pursuit of historical contextualization: identifying a broad range of relevant contexts, reading widely in the primary sources (beyond the immediate legislative history of a particular rule or statute of interest), and perhaps most importantly, retaining an imaginative openness to the strangeness of the past. These are not sequential moves that provide a formulaic method or recipe to be systematically applied, but are instead better understood as the constitutive components of an overarching frame of mind. Thus, insight that a particular context ought to be explored might lead the legal historian to examine a broader range of sources than initially contemplated. But so too, reading widely in the sources might bring to light a relevant context that had not previously been considered. And throughout this iterative process of identifying contexts and reading sources, the legal historian must retain a degree of imaginative openness, since without that, potentially relevant contexts and sources might not even be recognized as such.

But this is all far too abstract. To try to make more concrete the ways in which the historian’s sensibility might contribute to legal historical scholarship on procedure, I will focus the remainder of my remarks on an example drawn from my current work on the history of modern American arbitration law and practice.

---

<sup>10</sup> Christopher Tomlins, *What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon’s “Critical Legal Histories”*, 37 *LAW & SOC. INQUIRY* 155, 155 (2012).

## I. CONTEXTUALIZING THE RISE OF MODERN AMERICAN ARBITRATION

Given the highly contested and ever-expanding practice of binding, mandatory arbitration, arbitration law is one of those subjects in the broader field of civil procedure and practice to which some historical work has in fact been devoted. The work produced to date has taken two main forms. One line of inquiry explores the legislative history of the Federal Arbitration Act of 1925 (FAA). Highlighting the role of commercial interests in lobbying for the statute, this research suggests that these interests envisioned arbitration as a device for resolving commercial disputes between parties of roughly equal bargaining power and never contemplated that it would be deployed, as today, through contracts of adhesion drafted by large corporations and imposed on millions of consumers and employees.<sup>11</sup> A second line of inquiry examines the U.S. Supreme Court's caselaw interpreting the FAA over the decades since the statute was first enacted, emphasizing, in particular, the extent to which the court has refashioned core underpinnings of the legal framework first put into place (including through its own decisions), even while continuing to insist on purported interpretive continuity.<sup>12</sup>

While this work has been valuable, it only begins to scratch the surface of what a deeply contextualized, historical approach might bring to bear. How then might we expand our vision? One initial possibility is to offer a more deeply contextualized account of the FAA itself, extending beyond its immediate legislative history and subsequent interpretation. Although relatively rare, some of the most promising work in the field has been in this direction. Consider, for example, Katherine Van Wezel Stone's argument that the enactment of various state arbitration statutes and the FAA in the 1920s should be understood in relation to the associationalist vision of the state

---

<sup>11</sup> See generally IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013). This reading of history has also been cited as a justification for legislation that would prevent the enforcement of pre-dispute agreements to arbitrate consumer and employment disputes. See also Arbitration Fairness Act, H.R. 1873, 112th Cong. § 402(a) (2011) (The FAA "was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power."); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1642-43 (Ginsburg, J., dissenting) ("The legislative hearings and debate leading up to the FAA's passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes . . . . The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts.").

<sup>12</sup> See, e.g., Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 619-26 (2020); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in the Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2855-73 (2015); see generally THOMAS E. CARBONNEAU, *TOWARD A NEW FEDERAL LAW OF ARBITRATION* (2014); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052 (2015).

advanced by Herbert Hoover in his capacity as Secretary of Commerce, as typified by his effort to promote trade associations. As she notes, Hoover urged the development of what historian Ellis Hawley has described as an “associative state”—one in which government would facilitate the development of trade associations, professional organizations and other group forms and encourage these to share research and expertise, develop common standards, and otherwise work together to promote a more efficient and humane mode of capitalism.<sup>13</sup> By situating the emergence of the FAA (whose enactment Hoover supported) against the backdrop of this associationalist project of governance, Van Wezel Stone suggests that the statute was designed to facilitate the ability of groups—envisioned as “normative communities” sharing core values and interests—to resolve their own internal disputes and thereby engage in self-governance. The FAA was thus never intended to apply, as it does now, to relations between those who do not inhabit the same normative community—as is the case, for example, of large corporations and their consumers.<sup>14</sup>

Hiro Aragaki and Imre Szalai have also done important work contextualizing the FAA—in their case by identifying the parallels between arguments for the reform of statutory arbitration and the broader Progressive-era campaign for procedural reform. As they note, the campaign for procedural reform emerged from lawyers’ widespread perception that a crisis had arisen in access to justice, as courts, inherited from an earlier era, proved unable to handle the vast influx of cases generated by rapid industrialization and urbanization.<sup>15</sup> From this perspective, Aragaki explains, the FAA was not intended, as assumed today, to advance contractual values of “autonomy, consent, and self-determination,” such that arbitral agreements must be strictly enforced.<sup>16</sup> Instead, he argues, the statute aimed to facilitate access to justice by promoting such core procedural values as “simplicity, flexibility, and intolerance of technicalities.”<sup>17</sup>

These efforts to contextualize the FAA are significant contributions to our understanding of the social meaning and purposes of the statute—ones that serve to complicate and unsettle now dominant views. But if we step back even further and examine them together, rather than in isolation, another possibility emerges for contextualizing the rise of modern arbitration law and practice—namely, decentering the FAA itself. Our focus today is on

---

<sup>13</sup> See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 987-991 (1999).

<sup>14</sup> See *id.* at 992-94.

<sup>15</sup> See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1964-90 (2014); SZALAI, *supra* note 11, at 26-27, 168-73.

<sup>16</sup> Aragaki, *supra* note 15, at 1941.

<sup>17</sup> *Id.* at 1943.

the FAA because, especially after the U.S. Supreme Court held that it preempted state law,<sup>18</sup> the statute has become central to shaping our current arbitration landscape. But ironically, to take the FAA as both the starting and focal point of the history of modern arbitration law and practice serves to naturalize the expansive vision of the statute that the court itself has imposed through its relatively recent jurisprudence. If we pull back the lens sufficiently far, the FAA suddenly appears as one among many contemporary efforts, not only to promote arbitration, but also to remake the state and its institutions in the early twentieth century—all with an eye toward addressing the myriad new challenges of modern, urban, industrial life. And key among these was, of course, the burgeoning administrative state. Might the growing power of the administrative state, a familiar set piece of U.S. legal history, be a relevant context for examining the rise of modern arbitration law and practice, including—but also extending well beyond—the FAA itself?

As it turns out, in the early decades of the twentieth century, a wide range of contemporary commentators regularly drew parallels between the spread of arbitration and the growth of administrative agencies. Consider, as just one example, the highly influential Roscoe Pound, longtime dean of the Harvard Law School and an early, leading advocate of procedural and judicial reform. A longstanding proponent of arbitration, Pound joined the advisory council of the newly established American Arbitration Association (AAA) in 1926. In letters that he exchanged that fall with then president of the AAA Lucius Eastman, Pound observed that there were many advocates of arbitration who viewed it as a solution to the ills of modern industrial society, hoping to see it “replace the law of the land” or “become our everyday resource for social control.”<sup>19</sup> On this view, arbitration was emerging alongside administrative agencies as part of a broader series of efforts to substitute for the many inadequacies of the formal court system. As Pound commented, the present moment was characterized by a proliferation of “minute legislation, multiplication of administrative powers and standards, and an increased resort to arbitration.”<sup>20</sup> Among their commonalities, in his view, was that such responses sought to infuse substantial discretion into decision-making processes, and were thus all “in the direction of an individualized treatment of particular cases[,] dealing with each case as if it were unique and of no relation to any other.”<sup>21</sup>

---

<sup>18</sup> See *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA preempted a California law invalidating certain FAA-protected arbitration agreements).

<sup>19</sup> Letter from Roscoe Pound to Lucius R. Eastman (November 11, 1926), in *CIVIL WAR: AMERICAN LEGAL MANUSCRIPTS FROM THE HARVARD LAW SCHOOL LIBRARY* (Proquest database).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

As Pound and other observers noted, both arbitration tribunals and administrative agencies were institutions that, while deeply rooted in history, were then experiencing a remarkable resurgence as responses to the challenges of modern industrial society. More particularly, both arbitration and administrative adjudication provided much-needed alternatives to the formal court system and its adversarial procedures. Traditional court procedure was criticized as exceedingly slow and inaccessible, placing the entire weight of factual investigation on the parties and their lawyers and thus exacerbating the injustices that stemmed from rampant socio-economic inequality. What was needed, many believed, was more streamlined procedures that would enable decision-makers to attend more to substantive justice and less to procedural technicalities. Such procedures would endow decision-makers with significant discretion, including to pursue factual investigation. And these decision-makers, in turn, would have relevant non-legal expertise, enabling them to exercise their discretion in ways that ensured more accurate and efficient dispute resolution. Both arbitration and administrative adjudication were widely thought to be forms of procedure that shared these key characteristics. Indeed, the parallels between the two were such that agency adjudication—and, in particular, what the Administrative Procedure Act of 1946 would later classify as “informal adjudication”—might itself be described as a form of arbitration.<sup>22</sup>

From this perspective, arbitration was not, as is now commonly supposed, a mode of private ordering, enabling parties to resolve their dispute in private and in accordance with their own contractualized preferences. Rather than an effort to retreat from the state, arbitration was instead viewed by many as a tool for remaking and thereby strengthening state institutions. But while there was widespread agreement that arbitration was intimately connected to a broader project of state-building, views as to how exactly such arbitration was to be conducted—by whom and toward what ends—varied widely. It is only by looking well beyond the FAA, reading across multiple sources, produced in multiple institutional contexts, that we can begin to capture the extent of the contemporary enthusiasm for arbitration as a mode of public governance. A complete account of these contexts and sources lies well beyond the scope of these pages. But a brief overview should suffice to demonstrate the nature and depth of the contemporary commitment to deploying arbitration in service of a broader program of improved governance.

---

<sup>22</sup> The various ways in which contemporaries drew parallels between arbitration and agency adjudication are detailed below. See text accompanying *infra* notes 26–30, 38–41, 45–50, 59–64. See also WILLIAM F. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 8, 21, 40–42, 53 (1929) (describing the turn to both administrative adjudication and arbitration and conciliation as efforts to develop alternatives to the formal court system); EWING COCKRELL, SUCCESSFUL JUSTICE 1–16, 610, 618 (1939) (same).

## II. CORPORATIST MODELS

An important set of arguments for arbitration as a mode of public governance, akin to (and intertwined with) administrative agency adjudication, stemmed from the early twentieth-century enthusiasm for corporatism, or state-coordinated, group self-governance. Across the political spectrum, a broad range of business leaders, economists, and policymakers argued that the new challenges posed by modern industrial society required a rejection of classical liberalism's individualist model of social and political organization and an embrace instead of a more group-based or corporatist model. Corporatist thought and experimentation never took as deep root or departed as much from core liberal principles as was the case in contemporary Europe, where fascist regimes came into power and more left-leaning models (like guild socialism in Britain) also made some inroads.<sup>23</sup> But corporatist discourse was, nonetheless, commonplace in the contemporary United States and had some meaningful purchase in practice. Such arguments were advanced by right-leaning business interests eager to thwart burgeoning regulatory efforts, as well as by more left-leaning thinkers and policymakers searching for ways to attend more fully to the needs of labor (even while eschewing radical redistribution). And central to all these corporatist projects was arbitration—envisioned as a tool that was vital for helping to establish and maintain forms of state-coordinated, group self-governance.

The corporatist conception of arbitration advanced by business interests was articulated most forcefully by Clarence F. Birdseye in a book entitled *Arbitration and Business Ethics: A Study of the History and Philosophy of Various Types of Arbitration and Their Relations to Business Ethics*. Published in 1926, the book was widely reviewed and came to be regularly cited in contemporary publications, becoming a standard point of reference in discussions of (especially commercial) arbitration.<sup>24</sup> As a "corporation lawyer with a large practice," Birdseye was particularly interested in the use of arbitration to

---

<sup>23</sup> See, e.g., HOWARD J. WIARDA, CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT "ISM" 18-19, 34-43, 134-39 (1996); CHARLES S. MAIER, RECASTING BOURGEOIS EUROPE: STABILIZATION IN FRANCE, GERMANY, AND ITALY IN THE DECADE AFTER WORLD WAR I 3-15, 353-54, 579-94 (1975); James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 749-51 (1991).

<sup>24</sup> See, e.g., Martin Gang, 15 CAL. L. REV. 76, 76-77 (1926) (reviewing CLARENCE F. BIRSDSEYE, ARBITRATION AND BUSINESS ETHICS (1926)); J. Kent Greene, 13 A.B.A. J. 35 (1927) (reviewing CLARENCE F. BIRSDSEYE, ARBITRATION AND BUSINESS ETHICS (1926)); Paul L. Sayre, 2 IND. L. J. 352, 352-55 (1927) (reviewing CLARENCE F. BIRSDSEYE, ARBITRATION AND BUSINESS ETHICS (1926)); JOHN HENRY WIGMORE, SUPPLEMENT TO SECOND EDITION OF THE TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE 18 n.1 (1934) (citing CLARENCE F. BIRSDSEYE, ARBITRATION AND BUSINESS ETHICS (1926)).

resolve business-related disputes.<sup>25</sup> That said, as suggested by its subtitle, his book ranged widely, considering “Various Types of Arbitration.” Two of the book’s key premises were that arbitration and administrative agency adjudication were functionally akin and that both were experiencing a renaissance as tools thought to facilitate the remaking of the state along corporatist lines.

According to Birdseye, administrative agency adjudication was a subset of the broader category of arbitration. As he put it, such adjudication was “Official Administrative Arbitration by Nonjudicial Functionaries.”<sup>26</sup> Like arbitration, administrative agency adjudication was a means of resolving disputes by relying on non-legally trained individuals with relevant expertise in the matter at hand, rather than on generalist lawyer-judges. In his words, “well-qualified citizens, who are not members of the judiciary, but who are presumed to be well acquainted with local customs and rules—experts therein—are designated by the statutes to act in a judicial capacity, and often as judge, jury and sheriff.”<sup>27</sup> While noting that administrative agency adjudication dated back many centuries, Birdseye suggested that the conditions of mass industrial society were serving greatly to expand the need for such “arbitration by official nonjudicial arbitrators.”<sup>28</sup> As he explained, there was a new “tendency” that could be “seen in this country”—namely, the conferral of “quasi judicial powers . . . on our insurance, banking and other departments.”<sup>29</sup> But properly understood, the development of new bureaus and commissions with adjudicatory authority was “only an extension to bureaucracy of the fundamental principle of commercial arbitration—that a permanent tribunal of fair minded experts is the natural and necessary forum to decide technical questions with which they are thoroughly familiar.”<sup>30</sup>

As this suggests, Birdseye believed that the model of “commercial arbitration . . . [as] a permanent tribunal of fair minded experts” was applicable well beyond commercial disputes as such. It was best understood as an ideal type, designating a mode of arbitration practice that might be applied in any and all intra-group disputes. Surveying the contemporary landscape, Birdseye insisted that the era was defined by a pervasive tendency to organize into groups—one that was “not peculiar to business, but is a part of a great

---

<sup>25</sup> Otis Notman, *More Lawyers Who Write Books: Mr. Birdseye of 'Revised Statutes' Fame*, N.Y. TIMES, April 6, 1907, at BR224.

<sup>26</sup> CLARENCE F. BIRDSEYE, *ARBITRATION AND BUSINESS ETHICS: A STUDY OF THE HISTORY AND PHILOSOPHY OF VARIOUS TYPES OF ARBITRATION AND THEIR RELATIONS TO BUSINESS ETHICS* 151 (1926).

<sup>27</sup> *Id.* at 152.

<sup>28</sup> *Id.* at 151.

<sup>29</sup> *Id.* at 153.

<sup>30</sup> *Id.*

national movement to organize and suborganize, which characterizes the age and is plainly discernible in the religious and club life of the country.”<sup>31</sup> In his telling, such groups arose as an attempt to temper the excesses of liberal individualist competition, which had worked to the detriment of all. More particularly, groups required their members to abide by common standards, thus reasserting group norms as against forms of individual self-interest that might threaten intra-communal and social peace. And crucially, these standards were enforced internally—within the group itself—through arbitration. On this view, the corporatist restructuring of society, which ensured that “the better conditions of the new collectivism” would replace “the evils of the older individualism,” hinged on practices of arbitration.<sup>32</sup>

With an eye toward quelling pervasive labor unrest, Birdseye argued that the medieval guild epitomized the ideal type of commercial arbitration. The guild-based model presumed that the interests of capital and labor were fundamentally the same and called on industrialists, as leaders of the community of industry, to guide workers through arbitration to recognize that their own interests were in fact those of their employers. More particularly, industrialists would encourage workers to view themselves as (subsidiary) participants in a common industrial community, thereby ensuring not only labor’s well-being, but also its quietude: “Some degree of self-government sobers and satisfies the employees and makes them more conservative in their views and demands, and more reasonableness is engendered on both sides.”<sup>33</sup> As for where this left the state, Birdseye made clear that the state’s administrative apparatus would continue to expand so as to provide much-needed guidance in addressing the challenges of industrial modernity. But this apparatus would be firmly in the hands of business interests—a logical entailment, he implied, of the fact that administrative agency adjudication was itself just a form of “commercial arbitration.”

Business interests, moreover, were not the only ones who pointed to the parallels between arbitration and administrative agency adjudication and who did so in service of a corporatist project of state building. More left-leaning institutional economists—including especially University of Wisconsin professor John Commons and his students—also propounded a corporatist model of arbitration, but with different goals in mind. On their view, such a model would simultaneously promote the interests of labor and ensure the continued survival of capitalism. In no way radical, these men argued that an arbitration-backed model of “constitutional government in industry” would

---

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.* at 129.

offer a third way between relatively unmediated capitalism (of the sort appealing to Birdseye and his ilk) and more radical socialist alternatives.<sup>34</sup>

Commons and his acolytes shared Birdseye's view that the early twentieth-century was characterized by the rapid emergence of new forms of group-based organization—particularly in the sphere of capital-labor relations. So too, and again like Birdseye, they insisted that such group-based organizations were arising in response to the challenges of modern industrial capitalism and that they were characterized by the embrace of arbitration as a tool of self-governance—one that would help to address the growing number of industrial conflicts pitting capital against labor. But while Birdseye framed these developments as a return backward in time to the model of the medieval guild, Commons conceived of the directionality of history in very different terms. In Commons's telling, the contemporary enthusiasm for arbitration-backed, group self-governance was forward-looking in nature—the end point of enlightened social and political modernity. More particularly, he described these trends—including especially the development of arbitration-backed collective bargaining agreements—as an offshoot of the modern emergence of ideals of democratic, constitutional government or, as he put it, the rise of “constitutional government in industry.”<sup>35</sup>

Within this emerging model of industrial self-governance, arbitrators served the vital role of the judiciary. As detailed by Commons's student, William Leiserson, himself a prominent economist, collective bargaining agreements functioned as the constitutions of industrial communities and “the vast majority of [these] . . . now provide for arbitrators to be called in” to resolve disputes arising over the agreements' interpretation.<sup>36</sup> Serving as a neutral outsider or “third party,” the arbitrator—like a judge in the political state—was able to provide a trusted, objective resolution to the dispute.<sup>37</sup> But though a neutral outsider, the arbitrator was chosen by group insiders and bound to adhere to the group's constitution and laws, thus ensuring that such arbitration constituted a form of internal self-governance.

In line with the contemporary tendency to equate arbitration and administrative agency adjudication, Leiserson—again like Birdseye—drew important parallels between his ideal of arbitration and the burgeoning administrative state. More particularly, Leiserson specified that effective industrial arbitration was a form of judicial machinery that was more akin to administrative agency adjudication than to traditional court-based, judicial

---

<sup>34</sup> See *supra* notes 35–37 and accompanying text.

<sup>35</sup> JOHN R. COMMONS, *TRADE UNIONISM AND LABOR PROBLEMS* 1 (1905).

<sup>36</sup> William M. Leiserson, *Constitutional Government in American Industries*, 12 *AM. ECON. REV.* 56, 64 (1922, Supplement).

<sup>37</sup> *Id.* at 63.

processes. Industrial arbitrators, he asserted, “saw the[ir] duties . . . as much the same as those of a Workmen’s Compensation Board or a Public Utilities Commission.”<sup>38</sup> Pointing to John E. Williams, who had served as an arbitrator in the much-discussed New York cloak and suit industry strike that erupted in 1914, Leiserson argued that Williams conceived of his role as “quasi-judicial, partaking both of a court and an administrative officer.”<sup>39</sup> Like someone conducting administrative agency adjudication, Williams understood himself to be endowed with the discretion to disregard procedural and evidentiary technicalities and to pursue substantive justice instead. In Leiserson’s words, he sought “to get the real truth in industrial cases, which as in ordinary law cases are [sic] often hidden by the trial.”<sup>40</sup>

In thus emphasizing the similarities between industrial arbitration and administrative agency adjudication, Leiserson drew in part on his own experience working in the Wisconsin Industrial Commission that Commons had helped to establish in 1911. As Commons and his students understood the role of the commission (and more generally, that of the rapidly expanding administrative state), it was to assist in the efforts of business and labor to engage in industrial self-governance, providing vital guidance and coordination, including not least through fact-finding, investigatory support.<sup>41</sup> From this perspective, industrial arbitration conducted by private business and labor entities, on the one hand, and administrative agency adjudication pursued by government officials, on the other, operated in much the same fashion and with many of the same goals—through expert oversight aimed at facilitating industrial self-governance.<sup>42</sup> Accordingly, much like Birdseye—though with different goals in mind—Commons and his students advanced a broader agenda of arbitration-backed group self-governance

---

<sup>38</sup> *Id.* at 65 n.8.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See DONALD W. ROGERS, MAKING CAPITALISM SAFE: WORK SAFETY AND HEALTH REGULATION IN AMERICA, 1880–1940, at 48–49 (2009); WILLIAM J. BREEN, LABOR MARKET POLITICS AND THE GREAT WAR: THE DEPARTMENT OF LABOR, THE STATES, AND THE FIRST U.S. EMPLOYMENT SERVICE, 1907–1933, at 122 (1997).

<sup>42</sup> It bears emphasis that even while focusing on labor relations, Commons and Leiserson viewed arbitration as a kind of umbrella procedure, such that much could also be learned from developments pertaining to the arbitration of commercial disputes. As they saw it, business’s embrace of commercial arbitration provided a model for labor arbitration. In an article co-authored with fellow economist Edward W. Morehouse in 1927, Commons bemoaned the fact that courts were thus far unwilling to enforce “arbitration awards under ‘contracts’ between unions and employers’ associations.” John R. Commons and E. W. Morehouse, *Legal and Economic Job Analysis*, 37 YALE L. J. 139, 178 n.67 (1927). Such awards, the authors suggested, ought to be treated with the same judicial solicitude as that being increasingly shown to those rendered in commercial disputes: “Should not the courts allow to extra-judicial adjustment of labor relations at least the same freedom from legal consequences that is increasingly allowed in the arbitration of commercial relations?” *Id.* at 178.

pursuant to which private ordering would ultimately serve to remake social organization and public authority.

It bears emphasis, moreover, that the embrace of arbitration as the foundation of a new corporatist form of governance was not confined to the writings of theorists. Herbert Hoover's project of advancing an "associative state," astutely identified by Van Wezel Stone as an important context for the enactment of the FAA, was itself a significant outgrowth of this corporatist discourse. So too, the brief-lived establishment of the National Industrial Recovery Administration during the First New Deal borrowed in key respects from this broader, corporatist vision, and in so doing, gave pride of place to arbitration.<sup>43</sup>

Enacted in 1933, the National Industrial Recovery Act (NIRA) sought to establish a new cooperative regime in which business and labor worked with one another to develop a stable, less competitive environment. More particularly, the statute directed business and labor interests to create codes of fair competition, thus delegating major self-regulatory power to private industry. Negotiated within and tailored to particular industries, the codes set minimum wages and maximum hours and encouraged various forms of price stabilization. Each code, moreover, was directly administered by a code authority that was supposed to consist of representatives of business, labor, and the public.<sup>44</sup> At the same time, the system as a whole was overseen by a newly established federal administrative agency: the National Recovery Administration (NRA).<sup>45</sup> Informed by a corporatist logic of industrial self-governance, the NIRA experiment assumed that business and labor would voluntarily cooperate in designing and complying with the new codes. Such cooperation was, however, to be fostered and sustained through practices of arbitration, as well as by modes of administrative agency adjudication (or "adjustment") that were all but indistinguishable from arbitration.

The NRA and code authorities were charged with pursuing the "adjustment" of disputes over whether a code violation had occurred. More particularly, the *NRA Manual for the Adjustment of Complaints* specified that, when conflicts over alleged code violations arose, the first step toward

---

<sup>43</sup> See generally DONALD R. BRAND, *CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION* (1988); Whitman, *supra* note 23.

<sup>44</sup> See BRAND, *supra* note 43, at 99-116. In practice, as the codes were actually drafted, the code authorities came to be dominated almost entirely by business interests, thus giving little, if any voice to labor. See CHARLES L. DEARING ET AL., *THE ABC OF THE NRA* 94 (1934) ("The code authority is usually composed of members of the industry . . ."); Theda Skocpol, *Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 *POL. & SOC'Y* 155, 178-79 (1980) (explaining that labor lacked meaningful representation on code authorities).

<sup>45</sup> See BRAND, *supra* note 43, at 81-95.

resolution was to assist with fact-finding.<sup>46</sup> Since many conflicts were assumed to arise from misunderstandings, such findings of fact—ideally issued through the auspices of the code authority and thus harnessing “the pressure of opinion within the Industry”—were thought often to be sufficient to secure adjustment.<sup>47</sup> But when more was needed, the manual recommended “adjustment . . . by conciliation, mediation, and arbitration,” without distinguishing in any way between these procedures.<sup>48</sup> Thereafter, it indicated simply that “at any stage in the adjustment of any complaint,” the code authority or NRA officials “may seek to induce the parties to arbitrate.”<sup>49</sup>

The nascent American Arbitration Association (AAA) took heed of this guidance. Established in 1926, the AAA was still struggling to survive well into the 1930s. Recognizing in the NIRA regime a potentially valuable opportunity to reimagine its functions and fortunes, the association successfully negotiated with NRA officials for the insertion of arbitration provisions into the codes—including, not surprisingly, provisions that required the use of AAA rules and/or staff. The end result was to promulgate AAA-based arbitration in ways that proved to be a significant boon to the association at a time when its existence remained precarious, thus contributing to its ultimately successful efforts to position itself as the country’s preeminent general purpose arbitration provider.<sup>50</sup> In all these respects, the NIRA regime was the apotheosis of contemporary corporatist aspirations: Seeking seamlessly to blend the administrative state and industrial self-governance, it called on an inchoate mix of informal agency adjudication and arbitration.

### III. THE MATERNALIST MODEL

Alongside these various corporatist models for deploying arbitration as a tool of public governance, there emerged another model that, while also premised on the parallels between arbitration and administrative agency

---

<sup>46</sup> See NATIONAL RECOVERY ADMINISTRATION, MANUAL FOR THE ADJUSTMENT OF COMPLAINTS BY STATE DIRECTORS AND CODE AUTHORITIES 28-29 (1934) (describing the procedure of handling complaints by an “Industrial Adjustment Agency”).

<sup>47</sup> *Id.* at 8.

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

<sup>49</sup> *Id.* at 29. In practice, the details of adjustment and arbitration were sometimes further specified in individual codes, and there was substantial variability among these. See FRANCES KELLOR, ARBITRATION IN THE NEW INDUSTRIAL SOCIETY 181-94 (1934) (describing variations among code authorities).

<sup>50</sup> See Report from Lucius R. Eastman, President, Am. Arb. Ass’n 2 (1933) (on file with author); Report of the Arbitration Committee 1 (detailing the AAA’s successful efforts to include arbitration provisions within the codes and the opportunities thereby afforded the association further to develop and expand).

adjudication, pursued different ends. This was what we might call a “maternalist” model of arbitration.

During the Progressive Era, white upper- and middle-class women reformers advanced what scholars have described as a project of maternalist state-building, aimed at assisting poor (often immigrant) working women and their children. These reformers managed to secure the enactment of a great deal of protective legislation. But in addition, relying on the remarkable porousness of the American state, they succeeded in funding and establishing a number of administrative agencies—including, most famously, the federal Children’s Bureau.<sup>51</sup> Within this broader project of maternalist state-building, there emerged a maternalist model of agency-based arbitration.

In pursuing this policy-making agenda, as well as their own empowerment, women reformers justified their demands and their own claimed expertise by virtue of their identity as women and thus as (actual or potential) mothers. More particularly, reformers drew on the then dominant ideology of separate spheres, which depicted women as innately suited to the private, domestic sphere of home and family, to argue that women possessed a distinctively moral and nurturing, maternal nature. On this view, women were endowed with a unique capacity and responsibility to pursue legal and social reforms in the interests of the many poor women and children struggling under the conditions of modern, urban industrial life.<sup>52</sup> This maternalist program of state-building was rooted in the urban settlement houses that were established by elite white women in the late nineteenth and early twentieth centuries to assist the many thousands of new immigrants then flooding into the country. Reformers utilized the settlement house as a home base from which to pursue a program of socially oriented research and reform, and in so doing, laid claim to a domain of feminine expertise in household management that justified their efforts to teach immigrant women how to manage their own homes and families.<sup>53</sup> But as they researched the social structures sustaining urban poverty and crime, reformers came to believe that attending properly to the needs of immigrant

---

<sup>51</sup> See, e.g., THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 312-524 (1992) (explaining the origins of child welfare policy); ROBYN MUNCY, *CREATING A FEMALE DOMINION IN AMERICAN REFORM 1890-1935*, at 38-65 (1991) (describing the creation of the Children’s Bureau). Although there is widespread agreement that a significant subset of the policy-making efforts pursued by elite white women in this period can and should be described as “maternalist,” there has been much debate about the precise parameters of this term. For an overview of this literature, including persistent debates, see Felicia A. Kornbluh, *The New Literature on Gender and the Welfare State: The U.S. Case*, 22 *FEMINIST STUD.* 171 (1996); Molly Ladd Taylor, *Toward Defining Maternalism in U.S. History*, 5 *J. WOMEN’S HIST.* 110 (1993).

<sup>52</sup> See SKOCPOL, *supra* note 51, at 321-72; MUNCY, *supra* note 51, at 36-37, 48.

<sup>53</sup> See SKOCPOL, *supra* note 51, at 343-50; MUNCY, *supra* note 51, at 3-37.

women and their children would require them to address causal factors extending well beyond the sphere of the home, narrowly defined. They thus turned their attention to the broader municipality (and, in short order, to the state and nation as a whole), framing this more expansive reach as a form of “municipal housekeeping.”<sup>54</sup>

One such reformer was Frances Kellor, a stalwart of the settlement house movement, who would later go on to become a founding member and the longtime acting head of the AAA.<sup>55</sup> Having long devoted herself to exposing and preventing the exploitation of the poor (often immigrant) women serving as domestic workers, Kellor established the New York State Bureau of Industries and Immigration (BII) in 1910.<sup>56</sup> The BII’s mission was to identify and root out the myriad injustices suffered by immigrants as a whole—a mission that, in line with the general thrust of maternalist state-building, she identified as a key “problem of municipal house-keeping.”<sup>57</sup> As part of this same maternalist vision, Kellor designed the agency such that it was able to call on a broad network of women’s groups to provide much-needed lobbying and investigative support.<sup>58</sup> So too, in assisting individual immigrant complainants, the BII adopted a model of dispute resolution that followed from its broader, maternalist orientation. This model focused on promoting informal arbitration or conciliation—two procedures that were long viewed by many as all but interchangeable, especially before later-enacted statutory reforms made arbitration agreements more readily enforceable.<sup>59</sup>

Kellor and her supporters viewed the BII as implementing a distinctively maternalist approach to these procedures—one initially cultivated in the women’s protective associations that, as detailed by Felice Batlan, emerged in

---

<sup>54</sup> SKOCPOL, *supra* note 51, at 333, 337, 529.

<sup>55</sup> See Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L. J. 2940, 2973-83 (2015) (describing Kellor’s contributions).

<sup>56</sup> See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925*, at 239-41 (2d ed. 1988) (describing Kellor’s work in New York as a public servant); William Joseph Maxwell, *Frances Kellor in the Progressive Era: A Case Study in the Professionalization of Reform 181-201* (Apr. 22, 1968) (Ph.D. dissertation, Columbia University) (on file with author) (describing Kellor’s work in New York and New Jersey); John Press, *France Kellor, Americanization, and the Quest for Participatory Democracy 69-90* (2009) (Ph.D. dissertation, New York University) (on file with author) (describing Kellor’s contributions to “Americanization”).

<sup>57</sup> *The Immigrant Woman*, AM. HEBREW & JEWISH MESSENGER, June 16, 1916, at 184 (quoting Kellor).

<sup>58</sup> In December 1909, Kellor created a local New York Committee of the North American Civic League for Immigrants (NACL), which was extended to New Jersey in 1911. Kellor worked to intertwine this committee with the BII, using the private organization to provide extensive staffing and funding to the state agency. See HIGHAM, *supra* note 56, at 240; Press, *supra* note 56, at 70-80. The New York-New Jersey Committee, in turn, developed extensive networks of support through its connections with women’s groups, which were thus made available to the BII. See Amalia D. Kessler, *A Maternalist Model of Arbitration* (unpublished book chapter) (on file with author).

<sup>59</sup> See Kessler, *Arbitration and Americanization*, *supra* note 55, at 2956-61.

the late nineteenth century as the earliest legal aid societies.<sup>60</sup> From the perspective of Kellor and her allies, this maternalist model was defined in antithesis to the informal arbitration or conciliation that was becoming increasingly popular within newer, male-dominated legal aid societies and local municipal courts. As argued by the author and social reformer Kate Halladay Claghorn, these male-dominated entities pursued a highly legalistic mode of dispute resolution, focused only on claims cognizable in law. But this legalistic approach negated the very possibility of achieving a lasting and meaningful settlement, since such a settlement was possible only where those overseeing the proceedings had gained a complete, fully contextualized understanding of the parties and their dispute. As Claghorn observed:

The legal-aid society follows the modern court in laying emphasis on conciliation and arbitration. But how can these be effected if the personal peculiarities of clients and their opponents are not taken into account? Conciliation and arbitration depend upon persuasion, upon the voluntary co-operation of the parties in interest, not upon the sanctions of the law. The parties must be approached on the basis of their own feelings and prejudices about the matter in hand. How can this be done if the differences are not thought important and are not seen?<sup>61</sup>

On this view, it was women reformers like Kellor, who excelled qua women in the arts of listening and care—as demonstrated by, among other things, their contemporary development of the burgeoning new field of social work. As such, it was they who were best able to design effective modes of arbitration and conciliation.

The BII's maternalist approach to informal arbitration or conciliation therefore began with an effort to gather the claimant's entire story. Having done so, the agency would then order "a hearing . . . in the hope of bringing the parties together, clearing their minds and getting them to adjust the matter."<sup>62</sup> In true maternalist fashion, the ultimate goal of such adjustment was not only to resolve the dispute, but also to attend to the immigrant's full range of social and material needs. Toward this end, the BII connected immigrants with various individuals and entities able to provide such assistance. As reported by the *New York Tribune* in May 1912, Kellor explained in her capacity as BII chief that "[t]he Bureau of Industries and Immigration not only does what it can . . . to right wrongs and secure justice, but often directs aliens to such charitable persons as will enable them to

---

<sup>60</sup> See generally FELICE BATLAN, *WOMEN AND JUSTICE FOR THE POOR: A HISTORY OF LEGAL AID, 1863-1945* (2015); Kessler, *A Maternalist Model*, *supra* note 58.

<sup>61</sup> KATE HOLLADAY CLAGHORN, *THE IMMIGRANT'S DAY IN COURT* 473 (1923).

<sup>62</sup> N.Y. DEP'T OF LABOR, *FIRST ANNUAL REPORT OF THE BUREAU OF INDUSTRIES AND IMMIGRATION FOR THE TWELVE MONTHS ENDED SEPTEMBER 30, 1911*, at 124 (1912).

continue on their journey after they have parted with their last funds.”<sup>63</sup> In its eagerness thus to do justice, the article suggested, the BII had taken on the character of its leader. It was, in short, all but an extension of Kellor herself—someone who epitomized “the burning, courageous enthusiasm of a modern woman in action.”<sup>64</sup>

#### IV. THE COURT-BASED MODEL

Legal elites in the early twentieth century also embraced arbitration as a tool of public governance. In so doing, they shared the widely expressed view that there were important parallels between arbitration and administrative agency adjudication. But as was true of Roscoe Pound, among others, they tended to be far less enthusiastic about this development.<sup>65</sup> Unlike their contemporaries who adopted models of arbitration that were intimately connected to the burgeoning administrative state, lawyers as a whole preferred to look to the profession’s traditional bastion of state-based authority—namely, the courts. It was within the (lawyer-controlled) courts that many lawyers sought to develop an approach to arbitration that would address the myriad new challenges of modern industrial society.

Anxious to ensure their own continued preeminence, legal elites urged the cabining of both administrative agency adjudication and arbitration through lawyer-wielded rules and procedures. Yet, even while working to contain these arenas of discretion, they sought to expand the discretion that they themselves enjoyed within the courtroom—and in so doing, to position themselves so as better to compete in responding to the challenges of modernity. Toward this end, reform-minded lawyers argued that rigid, legislatively enacted codes of procedure, adopted on the model of New York’s Field Code, ought to be replaced by new procedural rules crafted in a more flexible, ongoing fashion by judges themselves. This program of reform was initially implemented in local municipal courts, several decades before the enactment of the Rules Enabling Act of 1934. Indeed, though largely forgotten today, many of the procedural innovations that eventually made their way into the Federal Rules of Civil Procedure were first attempted

---

<sup>63</sup> *A Good Samaritan for Hapless Alien Hosts is Miss Frances A. Kellor*, N.Y. TRIBUNE, May 12, 1912, at A4.

<sup>64</sup> *Id.*

<sup>65</sup> As is well known, Pound’s views of the administrative state were mixed—but over time, his animosity toward it grew. See, e.g., JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 211-78 (2007). Similarly, as concerns arbitration, he expressed doubts. Even while observing that “I have . . . a great deal of faith in commercial arbitration” and “have advocated it vigorously and consistently,” he made a point of cautioning that arbitration could not “do the whole work of administering justice,” as many contemporaries seemed to hope. Pound, *supra* note 19.

through municipal-court reform in such cities as Boston, Chicago, Cleveland, and New York.<sup>66</sup> As explained in the definitive treatise on the newly enacted New York Municipal Court Code, which went into effect in 1915, these procedural reforms included “[s]implifying the rules and methods of pleading,” “[e]liminating all technical rules as to joinder of parties and of causes of action,” and “[a]bolishing technical and useless restrictions upon judicial power in matters of procedure.”<sup>67</sup>

Accompanying these now familiar efforts to eliminate procedural technicalities and empower judges to promote substantive justice were various attempts to develop systems of arbitration and/or conciliation that would operate in connection with the municipal court. These arbitration- and conciliation-based experiments aimed at serving the needs of the urban, immigrant poor, while also endowing those lawyers serving as judges with extensive discretionary authority—of the sort increasingly enjoyed by the non-lawyers who staffed administrative agencies and arbitral tribunals. As this suggests, Aragaki and Szalai are correct to insist on the important parallels between arguments for procedural and arbitral reform. However, the two movements were linked not only conceptually (in the sense that they pursued many of the same goals), but also institutionally—through the contemporary campaign for municipal-court reform.

As developed by legal elites in conjunction with, most especially, Jewish communal leaders eager to assist (and Americanize) recent Jewish immigrants from Eastern Europe, various such arbitration- and conciliation-based experiments—linked in different ways to the local municipal courts—were attempted. Key among these was the Jewish Court of Arbitration, which was founded in New York City in 1919.<sup>68</sup> Continuing in operation until the mid-1980s, the court resolved (without charge) many thousands of disputes, thus having a significant impact on the lives of many.<sup>69</sup> Although its immediate

---

<sup>66</sup> See, e.g., Robert Wyness Millar, *Notabilia of American Civil Procedure, 1887-1937*, 50 HARV. L. REV. 1017, 1035 n.92, 1063-64 (1937) (observing that notice pleading originated in the Municipal Court of Chicago and referencing Massachusetts reforms); Rasmus S. Saby, *Simplified Procedure in Municipal Court*, 18 AM. POL. SCI. REV. 760, 766-68 (1924) (describing reforms in Chicago and Cleveland); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1055-62 (1982) (mentioning the New York reforms).

<sup>67</sup> EDGAR J. LAUER, *THE NEW PRACTICE AND PROCEDURE IN THE MUNICIPAL COURT OF THE CITY OF NEW YORK UNDER THE MUNICIPAL COURT CODE 59-60* (1922).

<sup>68</sup> The court was renamed the Jewish Conciliation Court of America in 1930 as part of an effort to distance itself from a competitor, rather than because of any change in its practice. See Amalia D. Kessler, *The Jewish Conciliation Court as the “Official Arbitrating Organ” of the State-Run Courts* (unpublished book chapter) (on file with author).

<sup>69</sup> See Joseph Kary, *Judgments of Peace: Montreal’s Jewish Arbitration Courts, 1914-1976*, 56 AM. J. LEG. HIST. 436, 443-49 (2016) (describing the history of the court); Tehila Sagy, *What’s So Private About Private Ordering?*, 45 LAW & SOC’Y REV. 923, 933-34 (2011) (explaining the origins and practice of the court); JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 83-88 (1983) (“[The court]

aim was to aid and Americanize recently immigrated Lower East Side Jews, it participated in a broader campaign for arbitration that extended well beyond the Jewish community alone. The court engaged actively with (and obtained recognition from) the leaders of the AAA and successfully deployed arbitration (and conciliation) in service of the contemporary movement to remake the local courts.

It was the Jewish Court's executive secretary, Louis Richman, who took the lead in working to connect the institution to then widespread efforts to promote arbitration. He regularly communicated with others who were actively involved in promoting arbitration and conciliation, including some who played a leading role in the development of modern commercial arbitration. Among these were Frances Kellor and Moses H. Grossman, a former municipal-court judge who went on to help establish the AAA, alongside Kellor.<sup>70</sup> Richman's efforts to position the Jewish Court as participating in a broader arbitration movement gained some traction, as suggested by the fact that *The Arbitration Journal*—a periodical issued by the AAA and edited by Kellor—published a number of pieces on the court as part of its effort to track developments in the field as a whole.<sup>71</sup> Indeed, in line with this vision of itself as a participant in the broader arbitration movement, the Jewish Court in the mid- to late-1930s went so far as seriously to contemplate becoming a general purpose arbitration provider, akin to the AAA—including, not least, by shedding its sectarian, Jewish identity.<sup>72</sup>

In thus positioning itself within a broader campaign to promote arbitration (and conciliation), the Jewish Court actively sought to enmesh itself with and thereby remake the state-run court system. As this suggests, it embraced a profoundly public-oriented, governmental conception of arbitration. Although the court was founded by a private act of incorporation and obtained its funds from private charitable donations contributed by local Jewish local elites, it engaged in highly public proceedings that were linked in various ways to those of the local, state-run courts. It relied extensively on sitting state-court judges, who served as arbitrators and conciliators (in ways that would violate today's rules of judicial ethics).<sup>73</sup> And for decades, it held

---

resolved thousands of disputes, and was sufficiently active to justify establishment of branch offices in scattered Jewish neighborhoods throughout the city.”).

<sup>70</sup> Grossman also served as chair of the New York County Lawyers Association's Committee on Arbitration and Conciliation. See *N.Y. County Lawyers Committees*, 5 N.Y. ST. B. ASS'N BULL. 369, 370 (1933).

<sup>71</sup> Louis Richman, *Justice Amongst Themselves*, 1 ARB. J. 357, 357-59 (1937); *Work of Jewish Conciliation Court Grows*, 2 ARB. J. 130, 130 (1938).

<sup>72</sup> See Kessler, *The Jewish Conciliation Court*, *supra* note 68.

<sup>73</sup> See *id.*; CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 73 (2009) (“Rule 3.9: Service as Arbitrator or Mediator. A judge

its proceedings in public courthouses—in the view of a great many spectators. So too, the leading lawyers and state-court judges who served on the Jewish Court and otherwise helped to run the organization were deeply involved in the ongoing project of local court reform, aiming to develop new procedural and institutional mechanisms that would provide more meaningful access to justice to the urban immigrant poor. These reformers worked within both the Jewish Court and the state-run courts, drawing little, if any distinction between the two and using the one as a laboratory in which to develop approaches that might then be transplanted to the other. As just one example, the Jewish Court and its personnel played a key role in the emergence in 1933 of the New York Domestic Relations Court, which was widely heralded as the embodiment of the modern ideal of the socialized court.<sup>74</sup> The Jewish Court, in fact, developed a relationship with the state-run courts that was so close and interconnected that it became possible, at least for a time, to envision it as an official state entity in its own right—or what its leaders described as “the official arbitrating organ of the [state-run] Courts.”<sup>75</sup> In all these respects, the court afforded a type of arbitration that was far removed from the now dominant model of private ordering.

#### CONCLUSION

As these examples suggest, the early decades of the twentieth century witnessed a flourishing of models of arbitration that were not directly connected to the enactment of the FAA and that bear little, if any resemblance to the now reigning paradigm of arbitration as a mode of private ordering. Pursuant to these models, arbitration was a tool of public governance—one widely viewed as parallel in nature and function to the adjudicatory apparatus of the then flourishing administrative state. Indeed, some models of arbitration took the form of efforts to advance new types of administrative agency adjudication. And while legal elites preferred a model of arbitration that was rooted in the courts, rather than administrative agencies, they too developed the procedure in ways that aimed to serve key public functions—akin to, and interconnected with, those of public court proceedings.

---

shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge’s official duties unless expressly authorized by law.”).

<sup>74</sup> See Kessler, *The Jewish Conciliation Court*, *supra* note 68. On the New York Domestic Relations Court of 1933, see Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1280-83 (2019) (summarizing the court’s origins and function). On the ideal of the socialized court, see generally MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

<sup>75</sup> Report of Louis Richman, Executive Secretary of the Jewish Conciliation Court of America, Inc., *Rendered at Its Annual Meeting* (Jan. 10, 1934) (on file with the Israel Goldstein Papers (Collection A364), Central Zionist Archives, File 271b).

The precise nature of the relationship between these different models of arbitration and the enactment of the FAA remains to be detailed, though it bears emphasis that there is evidence of interconnections between the various individuals and interests pressing for each.<sup>76</sup> So too, we are left with the question of how these different models developed and changed over time, giving rise by mid-century to the now dominant view of arbitration as a form of private ordering. But however important, these matters extend well beyond the scope of these pages. My goal here has been more limited—namely, to highlight the new lines of inquiry made possible by bringing a historical sensibility to bear as we approach issues of procedure and practice. By reading widely across multiple sources, produced in multiple institutional contexts—and by remaining imaginatively open to the strangeness of a not-so-distant past—we can begin to discern foundations of modern American arbitration that are far removed from our now settled understandings.

---

<sup>76</sup> Consider, for example, the role played by Charles L. Bernheimer—the chair of the New York Chamber of Commerce’s Committee on Arbitration and the man widely credited with leading the chamber’s campaign for the enactment of the FAA—in promoting municipal-court reform, including not least municipal-court-based arbitration. Bernheimer and his committee actively lobbied for the inclusion of arbitration provisions within (and the subsequent enactment of) the 1915 New York Municipal Court Code. *See* Address and Report of William Liebermann in Relation to the Establishment of a Court of Arbitration by the Kehillah of the City of New York (Apr. 25 & 26, 1914) (on file in the Collection of Judah L. Magnes Papers (P3-1848), Central Archives for the History of the Jewish People Jerusalem, Hebrew University of Jerusalem) (noting that “[t]he New York Chamber of Commerce urged the passage of the [code’s] arbitration provisions”). And once the code was enacted, the chamber and its arbitration committee assisted in developing the rules required to implement the new arbitration system. These efforts are discussed in the Annual Report of Committee on Arbitration, *in* SIXTIETH ANNUAL REPORT OF THE CORPORATION OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK FOR THE YEAR 1917–1918, at 6 (1918).

\* \* \* \* \*